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# Federal Register

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# Presidential Documents

**Title 3—**

## The President

**Memorandum of March 10, 2010**

## Finding And Recapturing Improper Payments

**Memorandum for the Heads of Executive Departments and Agencies**

My Administration is committed to reducing payment errors and eliminating waste, fraud, and abuse in Federal programs—a commitment reflected in Executive Order 13520 of November 20, 2009, Reducing Improper Payments. Executive departments and agencies should use every tool available to identify and subsequently reclaim the funds associated with improper payments. Thorough identification of improper payments promotes accountability at executive departments and agencies; it also makes the integrity of Federal spending transparent to taxpayers. Reclaiming the funds associated with improper payments is a critical component of the proper stewardship and protection of taxpayer dollars, and it underscores that waste, fraud, and abuse by entities receiving Federal payments will not be tolerated.

Today, to further intensify efforts to reclaim improper payments, my Administration is expanding the use of "Payment Recapture Audits," which have proven to be effective mechanisms for detecting and recapturing payment errors. A Payment Recapture Audit is a process of identifying improper payments paid to contractors or other entities whereby highly skilled accounting specialists and fraud examiners use state-of-the-art tools and technology to examine payment records and uncover such problems as duplicate payments, payments for services not rendered, overpayments, and fictitious vendors. (A Payment Recapture Audit as used in this memorandum shall have the same meaning as the term "recovery audit" as defined in Appendix C to Office of Management and Budget Circular A-123.) One approach that has worked effectively is using professional and specialized auditors on a contingency basis, with their compensation tied to the identification of misspent funds.

Therefore, I hereby direct executive departments and agencies to expand their use of Payment Recapture Audits, to the extent permitted by law and where cost-effective. The Director of the Office of Management and Budget (OMB) shall develop guidance within 90 days of the date of this memorandum on actions executive departments and agencies must take to carry out the requirements of this memorandum. The guidance may require additional actions and strategies designed to improve the recapture of improper payments, including, as appropriate, agency-specific targets for increasing recoveries. The Director of the OMB shall further coordinate with the Council for Inspectors General on Integrity and Efficiency to identify an appropriate process for obtaining review by Inspectors General of the effectiveness of agency efforts under this memorandum. The agencies' expanded use of Payment Recapture Audits does not preclude Offices of Inspectors General from performing any activities to identify and prevent improper payments.

Nothing in this memorandum shall be construed to require the disclosure of classified information, law enforcement sensitive information, or other information that must be protected in the interests of national security.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
*WASHINGTON, March 10, 2010*

[FR Doc. 2010–5685
Filed 3–12–10; 8:45 am]
Billing code 3110–01–P

# Rules and Regulations

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 121

**[Docket No. FAA–2002–6717; Amendment No. 121–348]**

**RIN 2120–AI03**

## Extended Operations (ETOPS) of Multi-Engine Airplanes; Technical Amendment

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

**ACTION:** Final rule; Technical amendment.

**SUMMARY:** The Federal Aviation Administration is making a minor amendment to a previously published final rule. That final rule applied to air carrier, commuter, and on-demand turbine powered multi-engine airplanes used in passenger-carrying, and some all-cargo, extended-range operations. This technical amendment corrects an incorrect citation reference.

**DATES:** Effective March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Zara Willis, Office of Rulemaking, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 493–4405 facsimile (202) 267–5075; e-mail *Zara.Willis@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

### Background

The final rule, Extended Operations (ETOPS) of Multi-engine Airplanes, applied to air carrier (part 121), commuter, and on-demand (part 135) turbine powered multi-engine airplanes used in passenger-carrying, extended range operations (January 16, 2007; 72 FR 1808). All-cargo operations in airplanes with more than two engines of both part 121 and part 135 were exempted from the majority of this rule. The rule established regulations governing the design, operation and maintenance of certain airplanes operated on flights that fly long distances from an adequate airport. It codified current FAA policy, industry best practices and recommendations, as well as international standards designed to ensure long-range flights will continue to operate safely. To ease the transition for current operators, the rule included delayed compliance dates for certain ETOPS requirements.

In the final rule § 121.646(b)(1)(i)(B) incorrectly references § 121.133. The citation should read § 121.333.

### Technical Amendment

This technical amendment merely corrects an incorrect cross-reference in § 121.646. No other changes are made to the section.

### Justification for Immediate Adoption

Because this action corrects a cross-reference, the FAA finds that notice and public comment under 5 U.S.C. 553(b) is unnecessary. For the same reason, the FAA finds that good cause exists under 5 U.S.C. 553(d) for making this rule effective upon publication.

### List of Subjects in 14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Aviation safety, Charter flights, Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety, and Transportation.

### The Amendment

■ In consideration of the forgoing, the Federal Aviation Administration amends 14 CFR part 121 as follows:

## PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

**§ 121.646 [Amended]**

■ 1. Amend § 121.646 (b)(1)(i)(B) by removing the citation "§ 121.133" and adding in its place the citation "§ 121.333."

Issued in Washington, DC, on March 10, 2010.

**Pamela Hamilton-Powell,**

*Director, Office of Rulemaking.*

[FR Doc. 2010–5589 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## PENSION BENEFIT GUARANTY CORPORATION

### 29 CFR Parts 4022 and 4044

## Allocation of Assets in Single-Employer Plans; 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 regulations on Allocation of Assets in Single-Employer Plans and Benefits Payable in Terminated Single-Employer Plans prescribe interest assumptions for valuing and paying certain benefits under terminating single-employer plans. This final rule amends the asset allocation regulation to adopt interest assumptions for plans with valuation dates in the second quarter of 2010 and amends the benefit payments regulation to adopt interest assumptions for plans with valuation dates in April 2010. Interest assumptions are also published on PBGC's Web site (*http://www.pbgc.gov*).

**DATES:** Effective April 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 Allocation of Assets in Single-Employer Plans (29 CFR part 4044) and the regulation on Benefits Payable in Terminated Single-Employer Plans (29 CFR part 4022). Assumptions under the asset allocation regulation are updated quarterly; assumptions under the benefit

payments regulation are updated monthly. This final rule updates the assumptions under the asset allocation regulation for the second quarter (April through June) of 2010 and updates the assumptions under the benefit payments regulation for April 2010.

The interest assumptions prescribed under the asset allocation regulation (found in Appendix B to Part 4044) are used for the valuation of benefits for allocation purposes under ERISA section 4044. 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 4044 the interest assumptions for valuing benefits for allocation purposes in plans with valuation dates during the second quarter (April through June) of 2010, (2) 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 April 2010, and (3) 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 April 2010.

The interest assumptions that PBGC will use for valuing benefits for allocation purposes (set forth in Appendix B to part 4044) will be 4.63 percent for the first 20 years following the valuation date and 4.51 percent thereafter. In comparison with the interest assumptions in effect for the first quarter of 2010, these interest assumptions represent a decrease of 0.26 percent for the first 20 years following the valuation date and a decrease of 0.12 percent for all years thereafter.

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 March 2010, these interest assumptions are 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 April 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**

*29 CFR Part 4022*

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

*29 CFR Part 4044*

Employee benefit plans, Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR parts 4022 and 4044 are 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 198 is added to the table to read as follows:

**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 | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | | * |
| 198 | 4–1–10 | 5–1–10 | 2.75 | 4.00 | 4.00 | 4.00 | 7 | 8 |

■ 3. In appendix C to part 4022, Rate Set 198 is added to the table to read as follows:

**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 | | $i_1$ | $i_2$ | $i_3$ | $n_1$ | $n_2$ |
| * | * | | * | * | * | * | | * |
| 198 | 4–1–10 | 5–1–10 | 2.75 | 4.00 | 4.00 | 4.00 | 7 | 8 |

## PART 4044—ALLOCATION OF ASSETS IN SINGLE–EMPLOYER PLANS

■ 4. The authority citation for part 4044 continues to read as follows:

**Authority:** 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 5. In appendix B to part 4044, a new entry for April–June 2010 is added to the table to read as follows:

**Appendix B to Part 4044—Interest Rates Used to Value Benefits**

* * * * *

| For valuation dates occurring in the months— | The values of $i_t$ are: | | | | | |
|---|---|---|---|---|---|---|
| | $i_t$ | for $t$ = | $i_t$ | for $t$ = | $i_t$ | for $t$ = |
| * * * | * | | * | * | * | |
| April–June 2010 | 0.0463 | 1–20 | 0.0451 | >20 | N/A | N/A |

Issued in Washington, DC, on this March 9, 2010.

**Vincent K. Snowbarger,**

*Acting Director, Pension Benefit Guaranty Corporation.*

[FR Doc. 2010–5541 Filed 3–12–10; 8:45 am]

**BILLING CODE 7709–01–P**

## POSTAL SERVICE

### 39 CFR Parts 310 and 320

### Restrictions on Private Carriage of Letters

**AGENCY:** Postal Service™

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Postal Service regulations on the enforcement and suspension of the Private Express Statutes to correct obsolete addresses.

**DATES:** *Effective Date:* March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Garry Rodriguez, 202–268–7281.

**SUPPLEMENTARY INFORMATION:** Amendment of parts 310 and 320 is necessary to correct the addresses for inquiries and other correspondence regarding enforcement of the Private Express Statutes.

**List of Subjects in 39 CFR Parts 310 and 320**

Advertising; Computer technology.

■ For the reasons set forth above, the Postal Service amends 39 CFR Chapter I, Subchapter E as follows:

## PART 310—[AMENDED]

■ 1. The authority citation for 39 CFR part 310 continues to read as follows:

**Authority:** 39 U.S.C. 401, 404, 601–606; 18 U.S.C. 1693–1699.

■ 2. Revise § 310.5(b) to read as follows:

**§ 310.5 Payment of postage on violation.**

* * * * *

(b) The amount equal to postage will be due and payable not later than 15 days after receipt of formal demand from the Inspection Service or the Manager, Mailing Standards, USPS Headquarters, unless an appeal is taken to the Judicial Officer Department in accordance with rules of procedure set out in part 959 of this chapter.

* * * * *

■ 3. Revise § 310.6 to read as follows:

**§ 310.6 Advisory opinions.**

An advisory opinion on any question arising under this part and part 320 of this chapter may be obtained by writing the General Counsel, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–1100. A numbered series of advisory opinions is available for inspection by the public in the Library of the U.S. Postal Service, and copies of individual opinions may be obtained upon payment of charges for duplicating services.

## PART 320—[AMENDED]

■ 4. The authority citation for 39 CFR Part 320 continues to read as follows:

**Authority:** 39 U.S.C. 401, 404, 601–606; 18 U.S.C. 1693–1699.

■ 5. In § 320.3:

■ a. Revise paragraph (a) to read as set forth below; and

■ b. Amend paragraph (b) in the second sentence by removing the words "the RCSC" and adding the words "Mailing Standards" in their place.

**§ 320.3 Operations under suspension for certain data processing materials.**

(a) Carriers intending to establish or alter operations based on the suspension granted pursuant to § 320.2 shall, as a condition to the right to operate under the suspension, notify the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza SW, Rm. 3436, Washington, DC 20260–3436, of their intention to establish such operations not later than the beginning of such operations. Such notification, on a form available from the office of Mailing Standards, shall include information on the identity and authority of the carrier and the scope of its proposed operations.

* * * * *

**Stanley F. Mires,**

*Chief Counsel, Legislative.*

[FR Doc. 2010–5622 Filed 3–12–10; 8:45 am]

**BILLING CODE 7710–12–P**

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

### 49 CFR Part 571

**[Docket No. NHTSA–2010–0032]**

**RIN 2127–AK48**

### Federal Motor Vehicle Safety Standards; Side Impact Protection; Fuel System Integrity; Electric-Powered Vehicles: Electrolyte Spillage and Electrical Shock Protection

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** This document comprises the agency's second of two responses to petitions for reconsideration of a September 11, 2007, final rule that upgraded Federal Motor Vehicle Safety Standard (FMVSS) No. 214, "Side impact protection." The final rule incorporated a vehicle-to-pole test into the standard, adopted technically-advanced test dummies and enhanced injury criteria, and incorporated the advanced dummies into the standard's moving deformable barrier test. An earlier response was published on June 9, 2008, which addressed lead time, phase-in percentages, test speed, and other issues. Today's response addresses the remaining issues raised by the petitions.

**DATES:** *Effective Date:* The date on which this final rule amends the CFR is May 14, 2010.

If you wish to petition for reconsideration of this rule, your petition must be received by April 29, 2010.

**ADDRESSES:** If you wish to petition for reconsideration of this rule, you should refer in your petition to the docket number of this document and submit your petition to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

The petition will be placed in the docket. Anyone is able to search the electronic form of all documents 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).

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, you may call Christopher J. Wiacek, NHTSA Office of Crashworthiness Standards, telephone 202–366–4801. For legal issues, you may call Deirdre Fujita, NHTSA Office of Chief Counsel, telephone 202–366–2992. You may send mail to these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

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## I. Background

On September 11, 2007, NHTSA published a final rule that upgraded Federal Motor Vehicle Safety Standard (FMVSS) No. 214, "Side impact protection," (72 FR 51908, Docket No. NHTSA–29134).[1] Until the final rule, the only dynamic test in FMVSS No. 214 was a moving deformable barrier (MDB) test simulating an intersection collision with one vehicle being struck in the side by another vehicle. In the MBD test, vehicles are required to provide thoracic and pelvic protection to the driver and rear seat occupant on the struck side of the vehicle, as measured by a side impact dummy (SID) representing a 50th percentile adult male. NHTSA upgraded FMVSS No. 214 to require all light vehicles with a gross vehicle weight rating (GVWR) of 4,536 kilograms (kg) or less (10,000 pounds (lb) or less) to protect front seat occupants in a vehicle-to-pole test simulating a vehicle crashing sideways into narrow fixed objects, such as utility poles and trees. By doing so it required vehicle manufacturers to assure head and improved chest protection in side crashes for a wide range of occupant sizes and over a broad range of seating positions. It ensured the installation of new technologies, such as side curtain air bags [2] and torso side air bags, which are capable of improving head and thorax protection to occupants of vehicles that crash into poles and trees or of vehicles that are laterally struck by a higher-riding vehicle. In the final rule, NHTSA estimated that side impact air bags reduce fatality risk for nearside occupants by an estimated 24 percent; torso bags alone, by 14 percent.[3] The side air bag systems installed to meet the requirements of the final rule also reduce fatalities and injuries caused by partial ejections through side windows. The agency estimated that the final rule will prevent 311 fatalites and 361 serious injuries a year when fully implemented throughout the light vehicle fleet.[4]

Under the September 11, 2007, final rule, vehicles will be tested with two new, scientifically advanced test dummies representing a range of occupants from mid-size males to small females. A test dummy known as the ES–2re represents mid-size adult male occupants. The ES–2re has improved biofidelity and enhanced injury assessment capability compared to all other mid-size adult male dummies used today. A test dummy known as the SID–IIs, the size of a 5th percentile adult female, represents smaller stature occupants 5 feet 4 inches (163 cm), which crash data indicates comprise 34 percent of all serious and fatal injuries to near-side occupants in side impacts. The SID–IIs better represents small stature occupants than the SID (50th percentile adult male dummy) used today in FMVSS No. 214.[5]

The September 11, 2007, final rule also enhanced FMVSS No. 214's MDB test by specifying the use of the ES–2re dummy in the front seat and the SID–IIs dummy in the rear seating position. Through use of both test dummies, vehicles will have to provide head, enhanced thoracic and pelvic protection to occupants ranging from mid-size males to small occupants in vehicle-to-vehicle side crashes.

The September 11, 2007, final rule provided lead time for and phased in the pole test requirements, making allowance for use of advanced credits towards meeting the new requirements, and other adjustments to the schedule for heavier vehicles. The rule also

[1] The final rule fulfilled the mandate of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU)." Section 10302 of the Act directed the agency "to complete a rulemaking proceeding under chapter 301 of title 49, United States Code, to establish a standard designed to enhance passenger motor vehicle occupant protection, in all seating positions, in side impact crashes."

[2] These different side air bag systems are described in a glossary in Appendix A to the September 11, 2007 final rule (72 FR at 51954).

[3] Final Regulatory Impact Analysis, "FMVSS No. 214; Amending side impact dynamic test; Adding oblique pole test," Docket No. NHTSA–29134. *See also,* "An Evaluation of Side Impact Protection, FMVSS 214 TTI(d) Improvements and Side Air Bags," January 2007, NHTSA Technical Report DOT HS 810 748.

[4] The cost of the most likely potential countermeasure—a 2-sensor per vehicle window curtain and separate thorax side air bag system—compared to no side air bags was estimated to be $243 per vehicle. After analyzing the data voluntarily submitted by manufacturers on their planned installation of side air bag systems, NHTSA estimated the final rule will increase the average vehicle cost by $33 and increase total annual costs for the fleet by $560 million.

[5] Samaha R. S., Elliott D. S., "NHTSA Side Impact Research: Motivation for Upgraded Test Procedures," 18th International Technical Conference on the Enhanced Safety of Vehicles Conference (ESV), Paper No. 492, 2003.

adopted a phase-in for the MDB test and aligned the phase-in schedule with the oblique pole test requirements, providing also for the use of advance credits.

## II. Petitions for Reconsideration

The agency received petitions for reconsideration of the September 11, 2007 final rule from: the Alliance of Automobile Manufacturers (Alliance),[6] General Motors North America (GM), Toyota Motor North America, Inc. (Toyota), American Honda Motor Co., Inc. (Honda), Nissan North America, Inc. (Nissan), Porsche Cars North America, Inc. (Porsche), the National Truck Equipment Association (NTEA), and Robert Bosch LLC (Bosch). The issues raised by the petitioners are summarized below.

*Lead time.* The final rule specified that manufacturers must begin meeting the upgraded pole and MDB test requirements on a phased-in schedule beginning two years from the publication of the final rule. The Alliance, Toyota, Nissan, Porsche asked for more time to begin the start of the phase-in.

*Lower bound on speed range for the pole test.* The final rule specified that vehicles must meet the requirements of the pole test when tested "at any speed up to and including 32 kilometers per hour (km/h)(20 mph)." The Alliance, GM, Toyota, Porsche petitioned to bound the test speed at a lower speed of 26 km/h (16 mph) or 23 km/h (14.3 mph), or (GM) delay implementation of the "up to" aspect of the requirement until the end of the phase-in to allow for additional development of sensing technology.

*Convertibles.* The final rule applied the pole test requirements to convertible vehicles after the agency had made a determination that it was practicable for the vehicles to meet the requirements. The Alliance, Nissan, Porsche, and VW petitioned the agency to provide more lead time for convertibles or to exclude the vehicles from the pole test requirements.

*SID–IIs pelvic criterion.* The final rule adopted a pelvic force injury assessment reference value of 5,525 Newtons (N) for the SID–IIs small female dummy. The Alliance asked that this value be changed to 8,550 N.

*Multi-stage and altered vehicles, including vehicles with partitions.* The Alliance and the NTEA recommended that NHTSA "exempt" multi-stage/altered vehicles (including vehicles with partitions behind the front seats) from the oblique pole test requirements.

*Amending test procedures and correcting typographical errors.* The Alliance and Honda cited omissions or errors in the regulatory text in need of correction. Honda sought correction and clarification with respect to referenced materials and test procedures, such as making FMVSS No. 214 consistent with cross-references to the test dummy used in the FMVSS No. 301 and 305 crash tests, providing for adjustment of telescopic steering columns, and clarifying adjustment of seat belt shoulder anchorages. Bosch asked that NHTSA "modify the test set-up by optionally allowing information being made available from the Electronic Stability Control [ESC] on the vehicle CAN-bus."

## III. June 9, 2008, Response to Petitions for Reconsideration

To respond to petitioners' concerns about lead time as quickly as possible, the agency addressed the lead time issue first and separate from other substantive issues raised by the petitions. The lead time issue, and other matters that needed to be resolved or clarified concerning lead time and the phasing-in of the new requirements, were addressed in an initial response to petitions published June 9, 2008 (73 FR 32473). That final rule:

a. Extended the lead time period before manufacturers must begin phasing in vehicles to meet the upgraded FMVSS No. 214 requirements to September 1, 2010, and amended the percentages of manufacturers' vehicles that are required to meet the new requirements from 20/50/75/all to 20/40/60/80/all;[7]

b. Specified the test speed for the pole test as "26 km/h to 32 km/h" (16 mph to 20 mph) until the end of the phase-in, at which time vehicles must meet the requirements of the pole test when tested "at any speed up to and including 32 km/h (20 mph)";

c. Delayed the effective date for convertible vehicles until September 1, 2015;

d. Delayed the effective date for multi-stage vehicles and alterers until after completion of the phase-in for all other vehicle types, i.e., until September 1, 2016; and

e. Corrected the omissions and minor errors found in the regulatory text relating to: The earning of credits for early compliance, the SID–IIs dummy arm positioning, the definition of limited line manufacturer, and the reinstatement of the seat adjustment procedure for the SID dummy.

## IV. Overview of Today's Document

Today's document denies the requests to revise the SID–IIs pelvic criterion and to exclude vehicles manufactured in more than one stage from the pole test. This rule grants several suggestions to clarify or revise aspects of the test procedures relating to, among other matters: Vehicle set-up (adjusting the non-struck side seat; adjusting head restraints, shoulder belt anchorages, and adjustable steering wheels, clarifying the vehicle test attitude tolerance); test dummy set-up (positioning the SID–IIs; removing redundant foot positioning procedures); and corrections (*e.g.,* ES–2re filter class designation; exclusion of rear seats that cannot accommodate the SID in the MDB test during the phase-in period; FMVSS No. 301 and FMVSS No. 305 test dummy applications). In addition, in response to a July 23, 2008 petition for reconsideration from the Alliance, this document also makes clear that the upgraded MDB test does not apply to convertibles manufactured before September 1, 2015. For the reasons explained in this preamble, all other requests made in the petitions for reconsideration of the September 11, 2007 final rule to which we have not previously responded are denied.

## V. Response to Petitions

### *a. SID–IIs Pelvic Criterion*

The September 11, 2007 final rule adopted injury criteria for the ES–2re and the SID–IIs. For the ES–2re, the final rule adopted a 6,000 N pubic load criterion. The agency estimated that this criterion corresponded to a 25 percent risk of AIS 3+ pelvic fracture to a 45-year-old male occupant involved in a side crash. For the SID–IIs, the agency adopted a 5,525 N pelvic injury criterion limit for the sum of iliac and acetabular forces measured by the dummy. The agency estimated that the criterion corresponded to a 25 percent risk of AIS 2+ pelvic fracture to a 56-year-old small female occupant involved in a side crash.

In its petition, the Alliance asked that the SID–IIs pelvic injury criterion be changed from 5,525 N to 8,550 N. It stated that an 8,550 N criterion corresponds to a 25 percent risk of AIS 3+ pelvis injury and would align the pelvic injury risk with the AIS 3+ level set by NHTSA for the ES–2re. The petitioner further suggested that a 5,525 N criterion overemphasizes pelvic protection, which could result in designs that overload the thorax. The

[6] At the time of the petition, the Alliance was made up of BMW group, Chrysler LLC, Ford Motor Company, General Motors, Mazda, Mitsubishi Motors, Porsche, Toyota, and Volkswagen.

[7] All vehicles must meet the requirements without the use of advance credits.

petitioner suggested that manufacturers should be provided leeway to balance the loading to various parts of the body to prevent any single part from being overloaded.

In addition, the Alliance suggested rewording the pelvic injury criterion to state that the combined pelvis force in the SID–IIs must correspond to a pubic symphysis force of 4,280 N. According to the petitioner, since typically the external load is twice that measured at the pubic symphysis, a pubic symphysis load of 4,280 N is associated with a combined pelvis load of 8,550 N. Alternatively, the Alliance suggested that separate injury criteria for the iliac wing and the acetabulum be utilized for the SID–IIs pelvic injury criteria. The Alliance proposed a force limit of 5,000 N for both.

*Agency Response:* NHTSA is denying the Alliance petition to change the pelvic injury criterion to 8,550 N. Although the ES–2re criterion corresponds to a 25% risk of AIS 3+ injury, there are several reasons for having the SID–IIs injury risk level be set at AIS 2+ rather than AIS 3+.

First, we believe that the data estimating injury risk at the AIS 2+ level is more biomechanically reliable than at the AIS 3+ level. The agency established the SID–IIs criterion at a 25% risk level for AIS 2+ injuries [8] based on available biomechanical test data from Bouquet *et al.,*[9] Zhu *et al.,*[10] and Cavanaugh *et al.*[11] NHTSA found inconsistencies in the researchers' coding of AIS 2 and 3+ pelvic injuries using the 1990 Abbreviated Injury Scale. Because of these inconsistencies, the agency determined that it would be preferable to use AIS 2+ injury risk to establish criteria for the SID–IIs. The agency considered using the AIS 2+ injury risk for the ES–2re as well, but did not adopt the AIS 2+ risk level at the time because an AIS 2+ pelvic injury criterion for the ES–2re would have been 3,250 N. An ES–2re pelvic injury criterion of 6,000 N was used internationally for the ES–2 dummy and not enough was known about the practicability and other implications of requiring manufacturers to meet a criterion that was approximately twice as stringent as the criteria used internationally. It was thus decided that the ES–2re pelvic injury criterion should remain at the AIS 3+ level, but that the injury risk level for the SID–IIs pelvic injury criterion would be at the AIS 2+ level.

Further, in establishing the SID–IIs criteria, the agency normalized the pelvic force data from the Bouquet pelvic impact tests to that of a small female weighing 48 kg (105 lb). The agency also adjusted the risk curve to that for a 56-year-old, since that was the average age of seriously injured occupants of a height less than 163 cm (5 feet 4 inches) involved in side crashes. 72 FR at 51944, see also, "Injury Criteria for Side Impact Dummies," NHTSA Docket 17694. There was a significant amount of research indicating that pelvic injuries to older people were associated with increased mortality. O'Brien *et al.*[12] and Henry *et al.*[13] examined patients who sustained a pelvic fracture during a 5-year period and found that patients 55 years and older were more likely to sustain a lateral compression fracture pattern and had a higher frequency of mortality due to the injury than the younger patients (<55 years old). Thus, the 5,525 N sum of acetabular and iliac force corresponded to a 25% risk of AIS 2+ injury, reflecting the reduced bone strength in and a lower pelvic injury tolerance of older women.

With regard to the Alliance's request to specify the SID–IIs pelvic injury criterion with respect to the pubic force, we are denying that request. Specifying a criterion limit of 4,280 N on the SID–IIs pubic load measuring device was not proposed in the NPRM or explored in the final rule, so the public has not had an opportunity to comment on the suggested criterion and the agency has not had the benefit of those comments. Furthermore, the Alliance's assertion that the external load is twice that measured at the pubic symphysis of the SID–IIs is not supported by the SID–IIs test data it submitted to the agency ("Injury Criteria for Side Impact Dummies," NHTSA Docket 17694).[14] In the Alliance-submitted data, the external load was approximately 8.7 to 28.6 times the load measured at the public symphysis. Further, we believe that the pubic load cell for the SID–IIs is limited in its capacity to measure a load of 4,280 N because the attachment sites are too rigid. A design change to the dummy is likely needed to have a pubic load criterion for the SID–IIs, and the petitioner has not demonstrated justification to undertake this change.

We have also decided to deny the petitioner's request to create separate injury threshold levels of 5,000 N for the iliac and acetabular load cells. The test data used to develop the AIS 2+ injury risk curves for the pelvis measured the total force applied to the pelvis (Cavanaugh), as opposed to measuring separate loads on the iliac and acetabulum. The injuries resulting from the total applied pelvic force included a variety of pelvic injuries observed in real world crashes: Pubic rami fractures, sacro iliac joint fractures, iliac wing fractures, and ischio pubic branch fractures (Cavanaugh and Bouquet).[15] The AIS 2+ injury risk curves that were independently developed using the Cavanaugh and Bouquet test data were nearly identical, demonstrating that the total pelvic force is a good predictor of a variety of pelvic injuries. The sum of iliac force and acetabular force provides a better estimate of the total load on the pelvis than the Alliance's approach, and consequently, provides better injury prediction for different type of pelvic injuries. For this reason, the sum of iliac and acetabular loads was used for injury prediction, and adopted in the final rule. The Alliance provided no analysis to support its alternative.[16]

[8] Kuppa, S., Injury Criteria for Side Impact Dummies, 2007, Docket No. NHTSA–2007–29134–0001, *http://www.regulations.gov/fdmspublic/component/main.*

[9] Bouquet, R., Ramet, M., Bermond, F., Vyes, C. Pelvic Human Response to Lateral Impact, 16th International Technical Conference on the Enhanced Safety of Vehicles, Paper No. 98–S7–W–16, National Highway Traffic Safety Administration, Windsor, Canada, 1998.

[10] Zhu, J., Cavanaugh, J., King, A., Pelvic Biomechanical Response and Padding Benefits in Side Impact Based on a Cadaveric Test Series, SAE Paper No. 933128, 37th Stapp Car Crash Conference, 1993.

[11] Cavanaugh, J., Walilko, T., Malhotra, A., Zhu, Y., King, A., Biomechanical Response and Injury Tolerance of the Pelvis in Twelve Sled Side Impacts, Proc. of the Thirty-Fourth Stapp Car Crash Conference, SAE Paper No. 902305, Society of Automotive Engineers, Warrendale, PA, 1990.

[12] O'Brien, D., Luchette, F., Pereira, S., Lim, E., Seeskin, C., James, L., Miller, S., Davis, K., Hurst, J., Johannigman, J., Frame, S. (2002) Pelvic Frature in the Elderly is Associated with Increased Mortality, Surgery, Volume 132, pp. 710–715.

[13] Henry, S., Pollack, A., Jones, A., Boswell, S., Scalea, T. (2002) Pelvic Fracture in Geriatric Patients: A distinct Clinical Entity, Journal of Trauma, Volume 53, No. 1, pp. 15–20.

[14] The ratio of the sum of acetabular and iliac forces of the SID–IIs and the applied force on the cadaver (normalized to that of a 5th percentile female) from the paired Bouquet cadaver tests appears to be dependent on the impact velocity. Considering only the impacts at 10 to 12 m/s, the average ratio of SID–IIs measured total pelvic force to the cadaver applied force is 1.21.

[15] Fractures due to lateral loading can occur at several locations on the pelvic ring, including the pubic rami (pubic rami fractures are typically the first that occur, as the pubic rami is the weak link in the pelvis), pubic symphysis, iliac wing, sacro-iliac junction, and acetabulum. Moreover, the load paths through the pelvis in lateral impacts are complex: loading through the trochanteron can result in fractures at the sacro-iliac joint; loading through the iliac wing can cause pubic rami fractures.

[16] We also note that the 5,525 N injury criterion selected by the agency for the SID–IIs is consistent with that used by the Insurance Institute for Highway Safety (IIHS) in its side impact consumer information program, whereas the petitioner's suggested criterion of 8,550 N is not. IIHS ranks vehicles based on performance when impacted perpendicularly by a moving barrier at about 50 km/h. IIHS uses a maximum limit of 5,100 kN for

Data from recent pole tests we conducted in support of NHTSA's New Car Assessment Program (NCAP) illustrate the practicability of meeting the SID–IIs pelvic injury criterion. We tested six vehicles that were in conformance with the voluntary agreement made by auto manufacturers [17] that had been characterized as "good" performers in the IIHS rating program.[18] Of the six vehicles tested, the 2006 VW Passat and 2006 Subaru Impreza met the pelvic force requirements.[19] The results of the testing are set forth in Table 1, below.

TABLE 1—SID–IIS OBLIQUE POLE TESTS WITH VEHICLES RATED "GOOD" BY IIHS

| Vehicles | SAB type | 5th Female IARV | | | | |
|---|---|---|---|---|---|---|
| | | HIC36 | Thorax/rib defl. (mm) | Abdominal defl. (mm) | Lower spine (Gs) | Pelvis force (N) |
| | | 1000 | 38* | 45* | 82 | 5525 |
| 2007 Honda Pilot | Curtain + Torso | 3464 | 48 | 49 | 68 | 6649 |
| 2007 Nissan Quest | Curtain | 5694 | 50 | 56 | 79 | 5786 |
| 2007 Ford Escape | Curtain + Torso | 407 | 65 | 36 | 65 | 6515 |
| 2006 VW Passat | Curtain + Torso | 323 | 23 | 32 | 40 | 3778 |
| 2006 Subaru Impreza | Combo | 184 | 51 | 38 | 58 | 4377 |
| 2007 Toyota Avalon | Curtain + Torso | 642 | 28 | 38 | 62 | 6672 |

***Note:** Injury measurements for reference only; not required in FMVSS No. 214.

Not only did the 2006 VW Passat and the 2006 Subaru Impreza meet the pelvic force limit, but both vehicles met the lower spine and head requirements as well.[20] The VW Passat also had very low thoracic and abdominal deflection measurements. The performance of the VW Passat illustrates the feasibility of protecting all body regions at the FMVSS No. 214 levels without overloading the thorax or any other part of the occupant. With the additional lead time and longer phase-in of the upgraded FMVSS No. 214 requirements provided by the June 2008 final rule, manufacturers will have sufficient time to design the necessary countermeasures to meet the pelvic criteria established in the September 11, 2007 final rule.

*b. Multi-Stage Vehicles and Partitioned Vehicles*

In the September 2007 final rule, NHTSA decided not to exclude vehicles manufactured in two or more stages equipped with a cargo carrying, load bearing or work-performing body or equipment from the pole test requirements, as suggested by NTEA's comment on the NPRM. 72 FR at 51937. The agency decided that the exclusion was unwarranted; there was not sufficient reason to deny the occupants of the vehicles the life-saving benefits of head and enhanced thorax protection provided by side air bags. (The Final Regulatory Impact Analysis estimated those benefits to be a 24 percent reduction in fatality risk for nearside occupants by side air bags and an estimated 14 percent reduction in fatality risk by torso bags alone. *See* Docket No. NHTSA–29134.)

We believed that many incomplete vehicle manufacturers (which are typically large vehicle manufacturers, such as GM and Ford) will accommodate the needs of final-stage manufacturers, since the incomplete vehicles they provide would typically have a significant portion of the occupant compartment completed, with seat- or roof-mounted head/thorax air bag systems already installed and would be accompanied by a workable and reasonable incomplete vehicle document (IVD). NHTSA determined that, by using the IVD, final-stage manufacturers would be able to rely on the incomplete vehicle manufacturer's certification and pass it through to certify the completed vehicle. 72 FR at 51937.

Under NHTSA's regulations,[21] the incomplete vehicle manufacturer must provide an IVD with each incomplete vehicle it provides to the final-stage manufacturer. The IVD requirements were thoroughly explained in a February 14, 2005, final rule on certification responsibilities of manufacturers of vehicles built in two or more stages and altered vehicles [22] and in NHTSA's May 15, 2006, final rule responding to NTEA's petition for reconsideration of the rule.[23] As explained in those documents, an IVD details, with varying degrees of specificity, the types of future manufacturing contemplated by the incomplete vehicle manufacturer and must provide, for each applicable safety standard, one of three statements that a subsequent manufacturer can rely on when certifying compliance of the vehicle, as finally manufactured, to some or all of all applicable FMVSS.

"good" vehicles. Vehicles with a combined acetabulum and ilium force greater than 7,100 N receive a "poor" injury rating by IIHS. The Alliances' suggested criterion of 8,550 N would be in the poor category.

[17] On December 4, 2003, the Alliance, the Association of International Automobile Manufacturers (AIAM), and IIHS announced a new voluntary commitment to enhance occupant protection in front-to-side and front-to-front crashes. The industry initiative consisted of improvements and research made in several phases, focusing, among other things, on accelerating the installation of side impact air bags. See footnote 8 of the September 11, 2007 final rule (72 FR 51910), and Docket NHTSA–2003–14623–13.

[18] IIHS's side impact consumer information program ranks vehicles based on performance when impacted perpendicularly by a moving barrier at about 50 km/h. *http://www.iihs.org/ratings/side_test_info.html.*

[19] This series of tests with the 5th percentile female dummy were conducted with the iliac wing "material #2" specified in the December 2006 SID–IIs final rule. The SID–IIs final rule to address petitions for reconsideration specifies performance criteria that allow for use of a stiffer "material #3" for the iliac wing. Material #3 will not increase the total pelvic force appreciably from that of the SID–IIs iliac wings used for the 2004–2005 MY vehicle tests listed in the 2007 final rule. When comparing material #3 responses to material #2 responses, it is estimated the material #3 will result in a 12% increase in the iliac force in the qualification environment and correspond to a 5% increase in total pelvis force in these vehicle tests. The VW Passat and Subaru Impreza are still expected to meet the pelvic force IARV with the new material.

[20] We note that all six vehicles were well below the 8,550 N pelvic force limit proposed by the Alliance and consequently, no changes would need to be made to any of these vehicles to meet its suggested criterion.

[21] 49 CFR part 568, "Vehicles Manufactured in Two or More Stages—All Incomplete, Intermediate and Final-Stage Manufacturers of Vehicles Manufactured in Two or More Stages." Section § 568.4 requires the incomplete vehicle manufacture to furnish the IVD at or before the time of delivery.

[22] 70 FR 7414, Docket 99–5673.

[23] 71 FR 28168, May 15, 2008, Docket 2006–24664.

The final-stage manufacturer has to meet the conditions of the IVD in producing the final vehicle.

The first type of statement contained by an IVD is one referred to in 49 CFR 568.4(a)(7) as a "Type 1 statement." These statements indicate, with respect to a particular safety standard, that the vehicle, when completed, will conform to the standard if no alterations are made in identified components of the incomplete vehicle. This representation is most often made with respect to chassis-cabs, a type of incomplete vehicle that has a completed occupant compartment. 49 CFR 567.3.

The second type of statement is a "Type 2 statement" (§ 568.4(a)(7)). This is a statement of specific conditions of final manufacture under which the completed vehicle will conform to a particular standard or set of standards. This statement is applicable in those instances in which the incomplete vehicle manufacturer has provided all or a portion of the equipment needed to comply with the standard, but subsequent manufacturing might be expected to change the vehicle such that it may not comply with the standard once finally manufactured. For example, the incomplete vehicle could be equipped with a brake system that would, in many instances, enable the vehicle to comply with the applicable brake standard once the vehicle was complete, but that would not enable it to comply if the completed vehicle's weight or center of gravity height were significantly altered from those specified in the IVD.

The third type of statement, a "Type 3" statement, is one which identifies those standards for which no representation of conformity is made because conformity with the standard is not substantially affected by the design of the incomplete vehicle. A statement of this kind could be made, for example, by a manufacturer of a stripped chassis who may be unable to make any representations about conformity to any crashworthiness standards given that the incomplete vehicle does not contain an occupant compartment.

In the September 11, 2007 final rule amending FMVSS No. 214, the agency declined NTEA's suggestion to exclude the multistage vehicles it identifies from the pole test requirements. We had, and still have, every reason to expect that incomplete vehicle manufacturers will accommodate the needs of final-stage manufacturers. We believe that chassis-cab manufacturers will produce incomplete vehicles with seat- or roof-mounted head/thorax air bag systems already installed and with workable instructions on how the vehicle could be completed to enable the final-stage manufacturer to pass-through the certification. As NHTSA stated in the September 11, 2007, final rule, "As long as the final-stage manufacturer meets the conditions of the incomplete vehicle document (and NTEA has not shown that final stage manufacturers will not be able to meet those conditions) the manufacturers may rely on the incomplete vehicle manufacturer's certification and pass it through when certifying the completed vehicle." 72 FR at 51937–51938.

Further, for final-stage manufacturers that will have to certify the compliance of the vehicle other than by using "pass-through" certification, the agency provided manufacturers until September 1, 2013, approximately six years under the September 11, 2007, final rule (which has been extended to September 1, 2016, under the June 2008 final rule), to work with incomplete vehicle manufacturers and with seat and air bag suppliers to revise current air bag systems and vehicle designs to enable them to certify to the pole test. 72 FR at 51938. The agency determined that this long period will provide enough time for final-stage manufacturers to work with incomplete vehicle manufacturers, seat manufacturers and air bag suppliers, individually or as a consortium, to develop the information to install seat-mounted systems, or other countermeasures that could be developed to meet the pole test. *Id.*

NTEA and the Alliance petitioned for reconsideration of the agency's decision on this issue. NTEA stated that "it will not be possible for chassis [incomplete vehicle] manufacturers to develop compliance strategies for this regulation that would allow multi-stage manufacturers to continue producing the range of diversified work trucks demanded by the marketplace." The petitioner believed that the side air bag system is highly complex and that "it will not be possible for the chassis manufacturers to provide a generic compliance envelope covering any significant portion of the vehicle configurations produced by today's work truck industry." In the alternative, NTEA asked that if the rule is to continue to apply to multi-stage vehicles, the effective date for multi-stage produced vehicles with a gross vehicle weight rating greater than 8,500 pounds be extended to September 1, 2014 (one year later than the effective date for single stage produced vehicles).

The Alliance petitioned to exclude multi-stage and altered vehicles from the pole test requirements because, it asserted, "the extensive variation of possible changes that can be made to vehicles that are built in multiple stages, including the addition of partitions, will affect the performance of original equipment manufacturers' (OEMs') side airbags [sic] systems (side airbags, curtains, sensing systems, and interior and structural components)." The petitioner stated: "Each multi-stage vehicle developed from a single incomplete vehicle could potentially require a unique side airbag system, which could require a unique development process for each system (development process meaning iterative crash testing for occupant response and side sensor calibration development)." The Alliance further stated that, "OEMs will not be in a position to expend engineering resources to develop unique side airbag systems in addition to the systems developed for the associated completed vehicles" and that multi-stage manufacturers "will not necessarily be in a position to collaborate with OEMs and/or restraint suppliers to develop unique systems."

Agency Response

The petitioners' contentions that it would be impossible for incomplete vehicle manufacturers to develop strategies that would allow multi-stage manufacturers to continue producing diversified work trucks are overly general and wholly unsupported. No information was submitted with the petitions substantiating the petitioners' views that final-stage manufacturers will not be able to certify their vehicles to the pole test. No information was provided to show that incomplete vehicle manufacturers will find pass-through certification unachievable. NHTSA cannot find a basis on which to conclude that final-stage manufacturers could not adhere to the instructions of the IVD, when final-stage manufacturers are currently certifying the compliance of their vehicles with FMVSS No. 214, and with FMVSS No. 208, "Occupant crash protection," (frontal air bag technology), FMVSS No. 301, "Fuel system integrity," and other complex safety standards that include crash testing vehicles as part of the agency's compliance tests.

We believe that it will be feasible for final-stage manufacturers to certify their vehicles to the pole test using the IVD provided by the incomplete vehicle manufacturer. The IVD framework was carefully analyzed in the May 15, 2006, final rule (71 FR 28168) that responded to NTEA's petition for reconsideration of the February 14, 2005, rule amending the certification requirements for multi-stage vehicle manufacturers. The agency examined a GM CK Chassis-Cab IVD

that NTEA had appended to its petition for reconsideration as an example of purported deficiencies in IVDs generally (71 FR at 28177). To assess the validity of NTEA's contentions, NHTSA carefully examined the certification statements in the GM IVD that NTEA identified as inadequate. NHTSA determined each of NTEA's claims to be unsubstantiated.

The agency found that the IVD was entirely workable as it related to each of the FMVSSs, including FMVSS No. 214. NTEA had contended that there was no meaningful pass-through opportunity for FMVSS No. 214's crush resistance requirements and the standard's moving deformable barrier test. The GM IVD stated that the vehicle will comply with the requirements of FMVSS No. 214 as long as no alterations were made that affect the properties, environment, or vital spatial clearances of various components and systems in the vehicle, including the air bag system, the door assemblies, hinges, and latches, the door pillars, and the seat and seat belt anchorages and assemblies. The GM IVD was practicable, providing a reasonable envelope within which the final stage manufacturer could complete the vehicle and certify it to FMVSS No. 214. NHTSA determined that (71 FR at 28181)—

> GM has designed vehicles, including the doors and associated structural members, such as pillars, to withstand various forces applied to the side of the vehicle. Ordinarily, GM would have tested the side of a single stage pickup truck. Vehicles completed from a chassis-cab incomplete vehicle have door support structures and doors that are identical to a single stage pickup truck. Unless the final-stage manufacturer makes alterations to the door-related structures and parts enumerated in the IVD, pass-through certification should be available. * * * It would be unreasonable to expect GM or any other incomplete vehicle manufacturer to provide pass-through certification with FMVSS 214, which is directly contingent on the engineering and performance of the systems set forth in the IVD, without a limitation on alteration of those systems.

The agency concluded that a final-stage manufacturer can readily complete its vehicle by mounting a body onto an incomplete GM vehicle, such as a chassis cab, without making modifications that would place it outside the pass-through certification provisions of GM's IVD. *Id.*

The conclusions of the May 15, 2006 final rule concerning the static door strength and the MDB test of FMVSS No. 214 are relevant to today's rulemaking and apply to the issues raised by the petitioners. We anticipate that the IVDs provided by incomplete vehicle manufacturers will offer compliance strategies to final-stage manufacturers for meeting the static door strength and MDB requirements of FMVSS No. 214 just as the IVDs do today, by including statements that the vehicle will comply with the FMVSS No. 214 requirements as long as no alterations are made that affect the properties, environment, or vital spatial clearances of various components and systems in the vehicle, such as the door assemblies, hinges, and latches, the door pillars, and the seat and seat belt anchorages and assemblies. These conditions would be reasonable and logical, since the side crash protection provided by the door assemblies, hinges, latches, structure and padding, and by the seat and seat belt system could be affected if the properties, environment, or vital spatial clearances were modified by a final-stage manufacturer. These conditions for meeting the static door strength and MDB requirements of FMVSS No. 214 can readily be met by final-stage manufacturers, just as they are met today, by making sure that the vehicles are completed without modifying the incomplete vehicle's door assemblies, hinges, and latches, the door structure, pillars, and padding, and the seat and seat belt anchorages and assemblies.

With regard to the pole test requirements which were newly added to FMVSS No. 214 by the September 11, 2007 final rule, the findings of the May 15, 2006 final rule are informative and relevant to this matter as well. The May 15, 2006 final rule discussed NTEA's complaint about the pass-through certification in the GM IVD pertaining to FMVSS No. 208. This discussion is instructive today because both FMVSS No. 208 and the pole test of FMVSS No. 214 specify vehicle crashworthiness requirements in terms of forces and accelerations measured on test dummies in crash tests and by specifying performance requirements that are met by air bags.

As discussed in the May 15, 2006 final rule, the GM IVD provided pass-through certification for FMVSS No. 208 for vehicles, provided that the maximum unloaded vehicle weight specified by GM is not exceeded and no alterations are made that affect the properties, location, or vital spatial clearances of various components, including the number, location and configuration of designated seating positions and seat belt assemblies, the instrument panel, steering wheel, air bag modules and coverings, the Sensor Diagnostic Module (SDM) (which is involved in triggering air bag deployment) and associated wiring, air bag labels, the vehicle frame and structural members, sheet metal, and the engine compartment, that would result in a difference in the modified vehicle's deceleration if it were subject to barrier impact tests under FMVSS No. 208. 71 FR at 28181.

NHTSA found these restrictions in GM's Type 1 IVD to be logical and consistent with a systematic approach to occupant crash protection employed by manufacturers. 71 FR at 28182. Regarding GM's restriction on unloaded vehicle weight and GVWR, vehicle weight is an essential component of crashworthiness standard certification. If the vehicle, as completed and loaded, exceeded the maximum weight for which the incomplete vehicle manufacturer provided pass-through certification (usually based on a crash test the incomplete vehicle manufacturer performed), it would not be reasonable to expect the GM's certification to apply because the excess vehicle weight could cause different and excessive forces and accelerations on crash dummies. Final-stage manufacturers can readily work within weight requirements by taking care to purchase the appropriate incomplete vehicle chassis for the use to which the vehicle will be put.

NHTSA also found not unreasonable the restrictions in the GM IVD on alterations that interfere with the seating positions, seat belts, instrument panel and air bags, SDM, and vehicle frame and body in a way that would result in a difference from the modified vehicle's deceleration if it were subjected to an FMVSS No. 208 barrier test. The restrictions were reasonable because incomplete vehicle manufacturers typically provide pass-through certification based on tests performed on a pickup truck with stock seats provided by the incomplete vehicle manufacturer and test dummies in those seating positions, as specified by FMVSS No. 208. If the seating positions were different, the test results as recorded on the dummies likely would be different. NHTSA determined that it was reasonable that GM should not be held to anticipate performance, as measured on dummies, in these circumstances. NHTSA also found it reasonable that GM would not provide pass-through certification if the seat belt system were changed.

The agency further discussed the IVD's statements relating to FMVSS No. 208, as follows (71 FR 28182):

> Other requirements relate to the air bags and their control unit. GM could not be expected to provide pass-through certification if the final-stage manufacturer modified these items.

Finally, the IVD provides that various structural and sheet metal components cannot be modified if the modifications would result in a difference in the modified vehicle's deceleration in a barrier test under FMVSS No. 208. A basic concept in designing vehicles is to design vehicle structures that minimize the amount of injury-causing crash energy that reaches the occupants. To accomplish this, in part, manufacturers design into the vehicle structural zones that collapse and absorb crash energy. A crashworthy vehicle is designed to deform according to a deceleration-time response, or crash pulse. These vary among vehicles. The frontal structure largely controls the deceleration pulse. Ultimately, the deceleration response of the vehicle affects the response experienced by the test dummies, as gauged by regulatory injury criteria such as the thoracic acceleration of a test dummy. Modifications by a final-stage manufacturer to the frame, sheet metal and other components identified in GM's IVD may change the vehicle's deceleration and its performance in a crash test, including measurements on test dummies. GM could not reasonably be expected to assume certification responsibility in these circumstances. *But the final-stage manufacturer could readily satisfy the conditions of the IVD by not modifying the identified components of the incomplete vehicle when it adds equipment to the chassis of the vehicle.* (*Id.,* emphasis added.)

This discussion applies equally to the IVDs that incomplete vehicle manufacturers will provide concerning the FMVSS No. 214 pole test. We anticipate that the IVD will provide pass-through certification for FMVSS No. 214 for vehicles provided that weight restrictions are not exceeded, and the vehicle is not modified so as to affect the properties, location, or vital spatial clearances of certain components. These components include the location and configuration of the driver and outboard passenger seating positions, the seat belts installed at those seating positions, the side door structure and door assemblies, and the side air bag system. A side air bag system includes the side air bag modules, inflator, sensors triggering air bag deployment, and associated wiring.

A final-stage manufacturer will be able to satisfy the conditions of the IVD in completing the vehicle and certifying it to FMVSS No. 214, just as it is able to work with the IVD in certifying completed vehicles to FMVSS No. 208. The final-stage manufacturer can readily adhere to the weight requirements of the IVD by following the instruction of the IVD. Further, when completing a work vehicle, a final-stage manufacturer typically does not modify the vehicle door trim, side structure or energy absorbing material for the front outboard occupants, and can complete the vehicle without modifying the side air bag system. Because of this, the Alliance's contention that "unique" side air bag systems would have to be developed for "each multi-stage vehicle" developed from a single incomplete vehicle is not substantiated. NHTSA cannot concur with that estimation, based on the information available. Accordingly, we find no basis for excluding all cargo carrying, load bearing and work-performing vehicles manufactured in more than one stage from the pole test.

The petitioners were particularly focused on partitions and bulkheads that final-stage manufacturers install in work vehicles. NTEA stated that these components "protect the driver from loose cargo in the back of the vehicle." The Alliance stated that the addition of partitions will affect the performance of original equipment manufacturers' side impact air bag systems (SIABs).

The September 11, 2007 final rule did not exclude partition-equipped vehicles from the pole test requirements. NHTSA determined that an exclusion of partition-equipped vehicles, or of vehicles with bulkheads, was overly broad on its face and unwarranted when considering the different countermeasures that may be designed to meet the requirements. These possible countermeasures included the use of seat-mounted or door-mounted head/thorax air bag systems, the development of side air curtain technology that involves designs other than tethering the curtain to the A- and C-pillars. 72 FR at 51936. Further, the final rule provided an extra year of lead time to accommodate any necessary manufacturing changes that have to be made to their vehicles. NHTSA stated: "Between [September 11, 2007] and that date, [alterers and final-stage manufacturers] can work with manufacturers of incomplete and complete vehicles to develop seat-mounted SIABs and other technologies that would enable them to install the life-saving devices in vehicles that have partitions." *Id.*

The petitioners did not provide information substantiating its claim that compliance is not practicable for vehicles with partitions or bulkheads. To the contrary, market-based solutions are emerging now. The agency is aware of the availability of partitions [24] in police vehicles that are advertised as compatible with side curtain air bags. For some partition designs, sufficient space is provided to allow for the inflation of the air curtain. If a full width barrier is desired, new air bag systems are emerging to meet that need. GM has announced it will offer a police vehicle with optional front-seat-only side curtain air bags that allow a full-width rear-seat barrier.[25] An air curtain could be tethered from the A- to B-pillar and be compatible with a partition or bulkhead. NHTSA is aware of another manufacturer that intends to build a police car with side curtains and a partition.[26] Further, as explained by the agency in the September 11, 2007 final rule, a head/thorax combination air bag or an air bag that deploys upwards from the window sill [27] could be used. With the lead time provided by the final rule, we expect that more solutions from vehicle manufacturers and aftermarket suppliers will be developed for vehicles with partitions or bulkheads.

Collaboration

There has been no information presented that corroborates the Alliance's assertion that multi-stage manufacturers could not collaborate with OEMs and/or restraint suppliers to develop side air bag systems that would work with their vehicles. The May 15, 2006 final rule discusses at length the cooperative relationships that have existed for years between incomplete and final-stage manufacturers. *See, e.g.,* 71 FR at 28183–28185. Final-stage manufacturer are motor vehicle manufacturers, and they have for many years borne the responsibility under the National Traffic and Motor Vehicle Safety Act to ensure that their vehicles are certified to the FMVSSs. For many years, they have certified their vehicles to a gamut of crash test and other standards using the IVD and their engineering abilities. They have worked with incomplete vehicle manufacturers and suppliers, individually or as part of a consortium, and have the capabilities to continue to do so to develop strategies needed to certify their vehicles to the pole test.

Further, as noted above, in the June 9, 2008, final rule responding to petitions for reconsideration of the September 11,

[24] *See http://www.setina.com.* Setina Manufacturing Co. markets side curtain air bag compatible police equipment partitions for the Chevrolet Impala, Suburban and Tahoe, Chrysler Aspen, Dodge Charger, Magnum and Durango and the Ford Expedition and Explorer.

[25] *http://media.gm.com/servlet/GatewayServlet?target=http://image.emerald.gm.com/gmnews/viewmonthlyreleasedetail.do?domain=74&docid=57260.*

[26] *http://www.carbonmotors.com/pdf/comparison.pdf.*

[27] A door-mounted inflatable curtain was introduced in the 2006 model year Volvo C70 convertible. Nissan has also indicated that a side air bag system under development for convertibles uses a seat mounted thorax air bag and a curtain air bag deployed from the door. *See* NHTSA–2007–29134–0007.1. Upwards-deploying air bags could be used in vehicles with a partition or bulkhead.

2007, final rule on FMVSS No. 214, the agency extended the compliance date on which multi-stage manufacturers and alterers must certify to the pole test, providing additional time to meet the FMVSS No. 214 requirements. That final rule provided vehicles manufactured in more than one stage and altered vehicles until a year after completion of the phase-in for all other vehicle types, *i.e.,* until September 1, 2016, to meet the pole test. This lead time provides even more lead time than the NTEA had requested (petitioner had asked that if the rule is to continue to apply to multi-stage vehicles, the effective date for multi-stage produced vehicles with a GVWR greater than 8,500 pounds be extended to September 1, 2014) and provides ample opportunity for multi-stage manufacturers and alterers to develop and implement strategies for certifying compliance with the FMVSS No. 214 pole test.

Accordingly, for the reasons provided above, we are denying the petitions to exclude vehicles produced in more than one stage, altered vehicles, and vehicles with partitions from the pole test.

*c. Test Procedures*

1. Vehicle Set Up

i. Positioning the Seat

A. Adjusting the Front Seat for the 50th Percentile Male Dummies

For adjusting the front seat for both the SID–IIs and the ES–2re dummies, the final rule adopted the seat positioning procedure used in FMVSS No. 208 for the 5th percentile female Hybrid III dummy (for the ES–2re 50th percentile adult male dummy, the only alteration made was to specify the mid-track position as opposed to full-forward). That seat positioning procedure from FMVSS No. 208 was adopted for use in FMVSS No. 214 because it was more detailed than any other procedure used in the FMVSSs and addressed the wide variety of seat configurations and multi-way power seat adjustments available in vehicles.

In its petition, the Alliance requested that the seat adjustment method for the ES–2re dummy be the same as that in FMVSS No. 208 for the Hybrid III 50th percentile male dummy. It stated it is unclear why NHTSA prescribes a different seating procedure for FMVSS No. 214 than the one prescribed for FMVSS No. 208. The Alliance further noted that the seat adjustment method in FMVSS No. 214 for the SID that had been in place before the amendment resulted in a different mid-point location than the location obtained under the amended FMVSS No. 214 procedure. The seating positioning procedure for the SID (S6.3) used to state, "Adjustable seats are placed in the adjustment position midway between the forward most and rearmost position * * *," whereas S8.3.1.3.2 of the final rule states, "Using only the control that primarily moves the seat fore and aft, move the seat cushion reference point to the mid travel position.* * *"

Agency Response

NHTSA is denying the Alliance's petition to change the seat positioning procedure for the ES–2re.[28] It is correct that the FMVSS No. 214 final rule seating procedure can place the seat, and thus the position of the ES–2re dummy, in a slightly different location compared to the FMVSS No. 208 procedure for the 50th percentile male Hybrid III.[29] Specifically, both the height and mid-point position of the final seat location can vary between the two procedures depending on the number of degrees of freedom designed into the seat adjustment mechanism. However, the FMVSS No. 214 seat positioning procedure takes into account the full range of motion of the seat in determining the seat's mid-point and height, which the FMVSS No. 208 procedure does not. The new procedure is more objective and repeatable than the FMVSS No. 208 procedure, given the wide variety of seat configurations and multi-way power seat adjustments available in vehicles available today. NHTSA thus considers the FMVSS No. 214 seat positioning procedure preferable to the FMVSS No. 208 procedure. As to the petitioner's suggestion that the procedures of FMVSS No. 208 and FMVSS No. 214 should be consistent, we are considering rulemaking to amend FMVSS No. 208 to adopt the FMVSS No. 214 procedure to position the seats. (With regard to the point about positioning the SID, the June 9, 2008 document reinstituted the pre-existing seat adjustment procedure for use with the SID in the MDB test until the phase-in of the new requirements is completed. 73 FR at 32480.)

B. Location of Seat on the Non-Impact Side

The MDB and pole test procedures in the final rule state (S8.3.1.3 and S10.3.2.3, respectively): "If the passenger seat does not adjust independently of the driver seat, the driver seat shall control the final position of the passenger seat." However, if the passenger seat does adjust independently of the driver seat, the final rule was silent on specifying a seat positioning procedure for the non-impacted side of the vehicle.

The Alliance noted that the agency's FMVSS No. 214 Test Procedure manual with the SID dummy [30] has stated: "Adjustable seats (on the impact and non-impact side) are placed in the adjustment position midway between the forwardmost and rearmost position * * *." That is, the passenger seat is in the same fore/aft location as the struck-side seat. The Alliance recommended positioning the seat on the non-impacted side at the same fore/aft location as the struck-side seat.

Agency Response

We agree with the Alliance that the seat on the non-struck side should be aligned with the impacted seat, with regard to two adjacent seats with the ability to adjust independently of each other.

C. Seat Cushion Reference Point

In the ES–2re seating procedure, the seat cushion reference point (SCRP) is located: "* * * on the outboard side of the seat cushion at a horizontal distance between 150 mm (5.9 in) and 250 mm (9.8 in) from the front edge of the seat * * *" To set the height of the SCRP, section S8.3.1.3.3 of the final rule states: "* * * set the height of the seat cushion reference point to the minimum height, with the seat cushion reference line angle set as closely as possible to the angle determined in S8.3.1.3.1."

In its petition, the Alliance said that the seat cushion height adjustment could result in differences in the reference line angle, depending on whether the minimum height was set or the angle was maintained. The Alliance noted that a similar situation exists for seat adjustment to the mid height in

[28] The seat position concerns raised by the Alliance were not raised in the comments to the NPRM or discussed in the final rule.

[29] The seat adjustment procedure first adopted for the 50th percentile male SID when FMVSS No. 214 was amended to include the dynamic test requirements with the MDB (55 FR 45722) was derived from that used in FMVSS No. 208. The September 2007 FMVSS No. 214 final rule adopted a revised seat adjustment procedure for the new requirements as well as for those vehicles being certified to the pre-existing requirements with the SID during the phase-in. The June 2008 response to petitions for reconsideration reinstated the pre-existing seat adjustment procedure when testing with the SID during the phase-in, in response to a petition from the Alliance. In that document, we acknowledged the new seat adjustment procedures can place the SID at a slightly different location in the vehicle when compared to the pre-existing procedure and that it was not the agency's intent to change the certification responsibilities of manufacturers that had certified vehicles using the SID.

[30] (TP214D–08 Part l); K: Adjustable Seats.

S10.3.2.3.3. Therefore, the Alliance recommended that NHTSA specify seat cushion height and angle for conditions under which the SCRP should be determined. The petitioner recommended that priority be given to seat cushion height.

Agency Response

We are denying this request. The SCRP is a guide in locating the seat's mid-track position and setting the seat cushion reference line. The SCRP is simply a reference point located on the seat cushion reference line and does not affect the final location of the seat. In the seating procedure, the angle of the seat cushion reference line is used to define the mid-angle position of the seat cushion adjustability range.[31] Once the mid-angle position is defined, while maintaining that angle, the seat is placed in its lowest possible height position. Using the SCRP as a reference point, the seat is then located at the mid-track position. The priority in the seat adjustment procedure is given to seat cushion angle rather than height. If seat height were given priority over seat cushion angle, the process would be similar to the current FMVSS No. 208 procedure, which is not as clear. The seat adjustment procedure has been used with the 5th percentile female Hybrid III dummy in FMVSS No. 208 by both the agency and industry, and we are not aware of any issues associated with it to determine seat location.

ii. Adjustable Head Restraint Position for the SID–IIs

The final rule requires that the adjustable head restraint be in the lowest and most forward position for the SID–IIs in the pole test. The Alliance recommended adding clarification as to what constitutes the lowest possible range for the head restraint. The petitioner stated that it considers the adjustment positions to be determined by detents on the support bars of the head restraint and that the lowest position may not necessarily be the lowest possible position.

Agency Response

NHTSA agrees with the Alliance that the potential exists where the lowest possible detent position may not be the lowest possible position for the head restraint adjustment. It was the agency's intent to position the head restraint in contact with the top of the seat back as the seat back may provide a "stop" for the downward adjustment of the head restraint, just as a detent does at other positions of adjustment. To further clarify the position of the head restraint when testing with the SID–IIs dummy, we are revising the standard to state that if it is possible to achieve a position lower than that associated with the detent range, the head restraint will be set to its lowest possible position. The change is consistent with the positioning head restraints for testing in FMVSS No. 202, "Head restraints."

iii. Adjustable Seat Belt Shoulder Anchor

The final rule specified that, when testing with the 50th percentile adult male dummies, adjustable belt anchorages are placed at the mid-adjustment position (for the SID, see S12.1 of the regulatory text, and for the ES–2re, S12.2.1).

The Alliance requested the agency use the FMVSS No. 208 procedure, which specifies that the shoulder belt anchorage is placed at the manufacturer's design position. The Alliance stated it does not understand the reason for the difference between FMVSS No. 214 and FMVSS No. 208. Honda stated that the seat belt shoulder anchorage adjustment can be unclear when an adjustable shoulder anchorage does not have a true mid-position and requested NHTSA to clarify the specification.

Agency Response

NHTSA agrees with the Alliance's request to use the specification in FMVSS No. 208 for seat belt anchorage positioning for the 50th percentile male dummy. From our experience with FMVSS No. 208, the adjustable seat belt anchorage is generally specified by the manufacturer at the mid-position, or one detent above or below. We also believe that the specification will address Honda's concern, as the manufacturer will specify the seat belt anchorage position. As with our FMVSS No. 208 compliance test program, when testing to FMVSS No. 214 the agency will contact the manufacturer to determine where the anchorage needs to be placed prior to a vehicle test.

iv. Adjustable Steering Wheels

The final rule's test procedures for the pole test specified procedures for adjusting the steering wheel (S10.5) but did not include a procedure for adjusting telescoping steering columns, while instructions for the latter were included in the MDB test procedure (S8.4).

The Alliance and Honda requested that the agency revise the procedure of S10.5, "Adjustable steering wheel," for the pole test to be consistent with S8.4 for the MDB test.

Agency Response

We agree with the petitioners on the need for more specificity for adjustable steering wheels in the pole test. This was an oversight in the final rule. We are including a provision in S10.5 that states that a telescoping steering column is placed in the mid-position. If there is no mid-position, the steering wheel is moved rearward one position from the mid-position. This is consistent with S8.4 of the standard.

v. Impact Point Reference Line Determination

In S10.11, the standard specifies that the pole test impact reference line is located at the intersection of the vehicle exterior and a vertical plane passing through the center of gravity of the head of the dummy seated in accordance with S12 in the front outboard designated seating position. The vertical plane forms an angle of 285 (or 75) degrees with the vehicle's longitudinal centerline for the right (or left) side impact test.[32] Under S10.12.2, the test vehicle is propelled so that its line of forward motion forms an angle of 285 (or 75) degrees for the right (or left) side impact with the vehicle's longitudinal centerline. The impact reference line is aligned with the center line of the rigid pole surface, as viewed in the direction of vehicle motion, so that when the vehicle-to-pole contact occurs, the center line contacts the vehicle area bounded by two vertical planes parallel to and 38 mm forward and aft of the impact reference line.

The Alliance stated that because of the 75 degree impact angle, the first impact point does not correspond with the center of the pole. The petitioner believes that there is a difference of 34 mm which has to be added to the ±38 mm tolerance provided in the final rule. Additionally, it noted that the CG position of the dummy head is not equivalent to the marking on the outer surface of the head. It noted there is a difference of either 16 mm (SID–IIs) or 17.5 mm (ES–2re) between these two points. See Figure 10 of the petition. Therefore, the Alliance asked for a "more repeatable" and "objective" definition of the impact point location,

[31] For some adjustable seats, the seat bottom cushion can pivot up and down in an arc. The seat cushion reference line is used to identify the full range of travel the seat cushion can pivot in the arc. Once the minimum and maximum positions of travel for the seat cushion reference line have been located, the reference line is then placed at the middle of the range of motion.

[32] The angle is measured counterclockwise from the vehicle's positive X-axis as defined in S10.13 of the standard.

but provided no recommended definition in its petition or in a subsequent submission. (The Alliance stated in its petition that it would submit additional information on this issue, but did not do so.)

Agency Response

NHTSA is denying the request. The regulatory text for the oblique pole test is consistent with the pole-to-head alignment in FMVSS No. 201, and no repeatability or objectivity problems have arisen with regard to FMVSS No. 201.

Furthermore, we believe that the Alliance may have erroneously interpreted the language of the standard with respect to aligning the pole with the center of gravity of the dummy's head. It appears that the petitioner believes that the pole is aligned with a marker on the outer surface of the dummy's head. The regulatory text clearly states that the center of the pole is to be aligned directly with the CG of the dummy's head and not a marking that is projected perpendicular to the surface of the dummy's head. (See the Alliance's petition, Figure 10, page 27, showing the petitioner's interpretation of the impact reference line from the marker on the side surface of the dummy's head.)

In our fleet testing, we aligned the pole such that the reference line went through the measured CG of the head of the dummy. A target was placed on the dummy's head but the marker location was calculated to account for the 75 degree oblique angle to address the exact issue the Alliance identified in its petition.

vi. Vehicle Attitude

In the final rule's specifications for the MDB test, S8.2 states that the pre-test vehicle attitude is "* * * equal to either the as delivered or fully loaded attitude or between the as delivered attitude and fully loaded attitude, ±10 mm."

The Alliance asked for clarification as to why the agency included a ±10 mm tolerance to the vehicle attitude measurement prior to testing with the MDB because the attitude value is not exact. The Alliance stated that it is unclear whether NHTSA intended the ±10 mm tolerance to apply to the full range of values or to another point such as the mid-point between the "as delivered" and "fully loaded" condition.

Agency Response

We agree that the specification needs to be clarified. The final rule added a ±10 mm tolerance because we became aware, through our own testing of vehicles, that it can be difficult to maintain the corridor between the as delivered and fully loaded attitudes because of the weight of the vehicle instrumentation (e.g., high-speed cameras, associated brackets and instrumentation umbilical lines) that are added to the vehicle prior to testing. A tolerance was added to account for the added equipment, to make it slightly easier to meet the vehicle test attitude specification. However, we meant to address the potential weight impact that added instrumentation has on the vehicle at its fully loaded condition only. To clarify the requirement, we are modifying the wording of S8.2 to state that the difference in vehicle test attitude shall not be greater than ±10 mm from "the vehicle's fully loaded condition," and not from "either the as delivered or fully loaded condition." We believe this allowance will not compromise the results of the test but will allow some variation in vehicle attitude for cameras and other instrumentation. Moreover, we have also determined that the reference to the "as delivered" condition is unnecessary and should be removed. S8.2 is revised to state that the pretest attitude is equal to the fully loaded attitude ±10 mm.

vii. Pole Test Pitch and Roll Definitions

S10.2, *Vehicle test attitude,* of the final rule states, inter alia: "* * * The front-to-rear angle (pitch) is measured along a fixed reference on the driver's and front passenger's door sill * * * The left to right angle (roll) is measured along a fixed reference point at the front and rear of the vehicle at the vehicle longitudinal center plane * * *."

The Alliance believes that there might be an error in the vehicle attitude and angle measurements. The petitioner believes that the pitch reference plane should be the longitudinal center plane of the vehicle and the roll angle reference plane is measured across the vehicle width. The petitioner also requested that the agency standardize the measurement procedure of the MDB and the oblique pole test such that all measurements are made in reference to the vehicle plane defined on the test vehicle's body, directly above each wheel opening.

Agency Response

It appears that the Alliance may have misunderstood the definitions in the final rule. A diagram of its understanding of the final rule, showing what the Alliance believed to be the possible error, was provided in Figure 18 of the petition (page 34 of the petition). In that Figure 18, the illustrations of pitch and roll appear to be reversed. A vehicle's pitch is the angle measured along a fixed reference line on the driver's and front passenger's door sill measuring any variation in vehicle height front-to-rear. The roll is the left to right angles measured at the front and rear of the vehicle. (These definitions of pitch and roll are used in the Test Procedure of FMVSS No. 201's pole test.)

NHTSA further believes it is not necessary to standardize the pole test attitude requirements with the MDB test. The pole test approach of directly measuring the pitch and roll angles will better facilitate and more accurately determine the vehicle's attitude for aligning the dummy's head to the pole, which is more relevant for the pole test than the MDB test. Conversely, measuring vehicle height directly is more critical in aligning the vehicle to the MDB than to the pole, and so the MDB test approach is more tailored to that test than the pitch and roll angle measurement of the pole test.

2. Test Dummy Set Up

i. SID–IIs

A. Hip Point Specification

Section 12.3 of the final rule provides a sequence of steps for positioning the SID–IIs dummy involving adjustment of the legs and pelvis of the dummy.

The Alliance petitioned the agency to specify a hip point location when positioning the SID–IIs dummy in the seat since it found hip point movement in its positioning. It noted that as the dummy is adjusted throughout the steps in Section 12.3, the hip point moves in the x-direction, particularly when either the legs or pelvis is adjusted. The Alliance provided data that showed the hip point shifted 12 mm and 16 mm in the x-direction when the 5th percentile dummy was seated in the vehicle. It noted a similar situation exists in sections S12.3.4(e), (h) and (j) of FMVSS No. 214.

Agency Response

NHTSA is denying the petition for a pre-determined hip point position for the SID–IIs.[33] Through our FMVSS No. 208 compliance testing experience we found that while the hip point may slightly shift when the 5th percentile dummy is positioned in the vehicle, we also found that if the 5th percentile female dummy is forced into the seat bight in order to fit an artificial hip point, the lower legs may be off the floor. This results in an unnatural leg position that is not representative of

[33] This hip point specification issue was not raised in the comments to the NPRM or discussed in the final rule.

real-world occupants. This was observed when we originally adopted the 5th percentile Hybrid III dummy and seating position into FMVSS No. 208.[34]

Furthermore, the Alliance provided only data consisting of one data point on two vehicles. While it found that the dummy's hip point shifted 12 mm and 16 mm in the two cases, the Alliance did not show the significance the differences had on test setup repeatability (*i.e.,* whether it would always result in a 12 mm and 16 mm shift in these two vehicles). It is also not known how representative these two vehicles are of the fleet, or whether the slight shifting of the hip point position is problematic. For these reasons, we are denying the request to specify an "official" hip point position.

B. Knee and Ankle Spacing

The final rule states the following regarding the SID–IIs knee and ankle spacing (S12.3.3(a)(6) and S12.3.2(a)(6)): "Place the legs at 120 degrees to the thighs. Set the initial transverse distance between the longitudinal centerlines at the front of the dummy's knees at 160 to 170 mm (6.3 to 6.7 in.), with the thighs and legs of the dummy in vertical planes * * *."

The Alliance recommended specifying spacing measurements for both the knees and ankles to increase the accuracy of the leg positioning. The petitioner stated that some Alliance members reported difficulty in keeping the thighs and legs of the dummy vertical while adjusting the knee spacing.

Agency Response

NHTSA is denying this recommendation to add a spacing measurement for the SID–IIs dummy knees and ankles. By maintaining the dummy's thighs and legs in a vertical plane while separating the knees to the prescribed location, we have defined the location of the knees and ankles. Based upon agency testing experience, with the 10 mm knee spacing tolerance, it is possible to maintain the dummy's thighs and legs in a vertical plane with some manipulation. The positioning of the dummy's knees and ankles are not unmanageable, so no further specification is necessary.

C. Pelvic Angle

For adjusting the pelvic angle, the final rule (S12.3.2(a)(ll)) states: "Measure and set the dummy's pelvic angle using the pelvic angle gage. The angle is set to 20.0 degrees ± 2.5 degrees. If this is not possible, adjust the pelvic angle as close to 20.0 degrees as possible while keeping the transverse instrumentation platform of the head as level as possible by adjustments specified in S12.3.2(a)(9) and (10)."

The Alliance said that it found that it is difficult and in some cases impossible to adjust the pelvic angle using the procedure described in the final rule. (The petitioner did not provide examples of vehicles in which this was reportedly found.) It recommended the following: (1) Adjust the pelvic angle by anteflexing or retroflexing the upper body of the dummy; (2) include language designating that priority be given to achieving a level head by the end of the positioning procedure; and (3) reference the global coordinate system as the system relative to which the pelvic angle should be measured.

Agency Response

NHTSA is denying the request. While it can be difficult at times adjusting the pelvis to a 20 degree angle and maintaining it at that angle to level the dummy's head, our experience has found that it can be done. The Alliance did not provide information or examples for the agency to evaluate if the difficulty is indeed insurmountable. Further, the regulatory text already gives priority to maintaining the dummy's head level in the procedure by stating: "* * * adjust the pelvic angle as close to 20.0 degrees as possible while keeping the transverse instrumentation platform of the head as level as possible * * *" The agency believes this sufficiently addresses the difficulties and that it is unnecessary to add additional regulatory text.

We also do not agree with the Alliance's recommendation to reference the global coordinate system as the system relative to which the pelvic angle should be measured. S12.3.1(a) states: "* * * measure all angles with respect to the horizontal plane unless otherwise stated* * *," which includes the pelvic angle. Hence, a coordinate system is sufficiently defined. We note also that the requirements and procedure to measure the pelvic angle were first adopted for the 5th percentile female dummy in FMVSS No. 208 (68 FR 65179). This method has been reliable and repeatable from our experience and we believe it is unwarranted to amend the procedure based on present knowledge.

D. Adjustment of Lower Neck Bracket to Level Head

S12.3.2(a) of the September 11, 2007 final rule adopted a seating procedure for the SID–IIs driver dummy that included instructions for driver torso/head/seat back angle positioning. Subsections 9 and 10 involve adjustment of the lower neck bracket and leveling of the head. These sections state:

(9) For vehicles without adjustable seat backs, adjust the lower neck bracket to level the head as much as possible. For vehicles with adjustable seat backs, while holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform of the head is level to within ±0.5 degree, making sure that the pelvis does not interfere with the seat bight. Inspect the abdomen to ensure that it is properly installed. If the torso contacts the steering wheel, adjust the steering wheel in the following order until there is no contact: telescoping adjustment, lowering adjustment, raising adjustment. If the vehicle has no adjustments or contact with the steering wheel cannot be eliminated by adjustment, position the seat at the next detent where there is no contact with the steering wheel as adjusted in S10.5. If the seat is a power seat, position the seat to avoid contact while assuring that there is a maximum of 5 mm (0.2 in) distance between the steering wheel as adjusted in S10.5 and the point of contact on the dummy.

(10) If it is not possible to achieve the head level within ±0.5 degrees, minimize the angle.

The Alliance requested clarification of these instructions, specifically with regard to the instructions in S12.3.2(a)(10) to "minimize the angle."[35]

The petitioner noted that the adjustment range of the dummy's lower neck bracket includes four indices upward and downward from a reference point defined as the point where "0" index of the lower neck bracket (Part #180–2006)[36] and "0" index of the upper neck bracket (Part #180–3815) align.[37] The petitioner further said that if, after adjusting the lower neck bracket the head cannot be leveled, NHTSA

[34] Unlike the SAE J826 device (OSCAR) used to locate the 50th percentile male's hip point, there is not an equivalent tool for the 5th percentile dummy.

[35] The Alliance noted that these issues also apply to the instructions for seating the SID–IIs in the rear.

[36] See Docket # NHTSA–2006–25442–12 SID–IIs drawing package. The drawing package has been slightly changed in response to petitions for reconsideration of the SID–IIs final rule (see Docket 2009–0002), but drawings referenced in this discussion are unchanged.

[37] The Alliance stated that the reason for the four calibrations is that it is impossible to adjust beyond these points. Furthermore, the Alliance noted that when using the lower neck bracket with a load cell (SA572–S60) instead of using the upper neck bracket (180–2006) and lower neck assembly (180–3816), the adjustable range is modified. It stated that some mobility is disabled in order to account for the presence of the load cell.

should consider the minimum angle at that condition as the angle referenced in the instruction to "minimize the angle." Alternatively, the petitioner suggested that if a head level position exists within the adjustable range of the neck, the closest adjustment detent to head level should be used.

For vehicles where the seat back angle is adjustable, the Alliance suggested that only the seat back is used to level the head to the ground, and that the lower neck bracket is not used to level the head. "If after all possible efforts to level the head using the seatback adjustment are exhausted and the head cannot be leveled, the minimum angle at that condition should become the angle specified as the angle for use when 'minimi[zing] the angle.' "

Agency Response

For adjustable seats, we are denying the suggestion that the lower neck bracket is not used to level the head. The FMVSS No. 214 seating procedure was patterned after the procedure specified for the 5th percentile Hybrid III dummy in FMVSS No. 208, including the adjustment of the dummy's head. In fact, S12.9 and S12.10 of FMVSS No. 214, which describe adjustment and leveling of the SID–IIs head, are almost exactly the same as S16.3.2.1.9 and S16.3.2.1.10 of FMVSS No. 208 describing adjustment and leveling of the Hybrid III 5th percentile female head.[38] However, we note that the agency's Office of Vehicle Safety Compliance (OVSC) FMVSS No. 208 test procedure (TP–208–14 Appendix G) specifies positioning procedures for the 5th percentile Hybrid III dummy that go into more detail than the procedures for FMVSS No. 214. The OVSC FMVSS No. 208 test procedure specifically calls out the process to align the neck for the Hybrid III 5th percentile dummy as follows:

* * * * *

22. If the seat back is adjustable, rotate the seat back forward while holding the thighs in place. Continue rotating the seat back forward until the transverse instrument platform of the dummy head is level ± 0.5 degrees. *If the head cannot be leveled using the seat back adjustment, or the seat back is not adjustable, use the lower neck bracket adjustment to level the head. If a level position cannot be achieved, minimize the angle.* (S16.3.2.1.9) [Emphasis added.]

____Head Level Achieved. (Check all that apply)

____Head leveled using the adjustable seat back

____Head leveled using the neck bracket.

Head Angle _____ degrees.

To make the FMVSS No. 214 procedure consistent with that of TP–208–14 Appendix G item 22, we will revise the head leveling procedure in FMVSS No. 214 TP–214P–00. We will specify in the latter TP that, in cases where the head cannot be made level to the ground when the dummy's head is positioned at its default neck position and after the seat back angle has been adjusted (as appropriate for seats with adjustable seat backs), the neck assembly should be adjusted using the lower neck bracket. Thus, the lower neck bracket may be used to position the dummy's head when the dummy is seated in vehicles in which the seat back angle can be adjusted and in vehicles in which the seat back angle cannot be adjusted. If the head level cannot be set at level +/- .5 degree tolerance because of lack of mobility, the head is positioned at the closest adjustment detent to that head level.

In addition, we are making two related corrections to S12.3.1(b) of FMVSS No. 214.

First, the Alliance noted a concern relating to when the dummy is fitted with the lower neck load cell (SA572–S60), instead of the upper neck bracket (180–2006) and lower neck assembly (180–3816). According to the SID–IIs drawing (SA572–S60), the lower neck load cell assembly is non-adjustable and duplicates the position of standard brackets (180–2006 and 180–3815) in their "0" angle position. Therefore, if the load cell is used with the SID–IIs, the dummy's head may not be able to be made level. Since the agency does not measure the load on the dummy's neck at this time in FMVSS No. 214 compliance tests, there is no need for the load cell to be installed at the time of the test. Without the load cell, the problem is avoided. To avoid this problem, we are clarifying the FMVSS No. 214 test procedure to note that in the SID–IIs dummy we use in the compliance test, the fixed lower neck load cell will not be installed.

Second, there is a sentence in S12.3.2 of FMVSS No. 214, and in S12.3.3 and S12.3.4, noting that the abdomen of the dummy is inspected to ensure it is properly installed. Since the SID–IIs dummy's abdomen is not a separate piece like the Hybrid III 5th percentile female dummy, this sentence is out of place. We are thus removing it from S12.3.2, S12.3.3, and S12.3.4.

E. Other Corrections

This document further corrects the regulatory text for positioning the SID–IIs adopted by the September 11, 2007 final rule to address the following:

- Honda identified misplaced text in S12.3.3, a section that specifies dummy positioning procedures for a SID–IIs in the front passenger position. S12.3.3(b)(3) specifies a foot positioning procedure for a dummy in the rear seat passenger position, which is out of place in S12.3.3. Honda also noted redundant text in S12.3.4(k)(1) for positioning the dummy's feet in the rear seat.
- In addition, Honda noted that S11.1 (b) of FMVSS No. 214 final rule specified the SID–IIs shoe sizes to be as specified in military regulation MIL–S–2171E. The correct specification is MIL–S–21711E.
- The foot positioning procedure for the SID–IIs front passenger inadvertently did not include a provision that is in FMVSS No. 208 for the Hybrid III 5th percentile female dummy regarding situations in which the dummy's feet do not contact the floor. We have added the same specification that is in FMVSS No. 208 to S12.3.3(b)(3) of FMVSS No. 214.

ii. ES–2re

A. Head CG Location Variability

The September 11, 2007 final rule, at S12.2.1, provides instructions for positioning the ES–2re dummy. S12.2.1 does not include subsections providing instructions on positioning the ES–2re dummy head.

The Alliance noted that the ES–2re neck assembly does not provide any mechanism for adjusting the fore-aft position of the dummy's head. The petitioner believed that since the ES–2re dummy's neck assembly includes a flexible rubber neck buffer support, the actual neck angle (and thus head CG location) depends on the condition of the rubber buffer. It stated that the stiffness of this rubber buffer can vary from one dummy to another and can degrade over time. The Alliance believed that stresses placed on the dummy's neck while in storage can also induce material fatigue and thus affect the condition of the rubber buffer. The petitioner provided measurements of the head CG locations vs. neck bracket angle for several ES–2 [39] dummies. It believed that there can be large variations in the actual fore-aft CG location of the dummy head from one dummy to another.

Agency Response

The location of the ES–2re head is based on the dummy positioning procedure specified in S12. The head cannot be independently adjusted due

[38] There are slight differences in the descriptions of steering wheel adjustment methods, which are referenced in these sections of FMVSSs No. 214 and No. 208.

[39] The ES–2 and the ES–2re dummies have identical neck assembly structures.

to its design. However, we do not believe that the concern about head location variation is warranted. The ES–2re's neck assembly includes flexible rubber neck buffer supports that control the neck angle and therefore, the location of the head CG. In 49 CFR part 572, the agency specified neck qualification procedures and performance criteria for the ES–2re dummy's neck, and we expect the qualification corridors to be met prior to any vehicle testing. If the neck is out of specification for qualification, the testing laboratory should tune or replace the neck buffer assemblies accordingly. It is expected that if the buffers were significantly degraded, the dummy would not meet the neck performance criteria. To the extent that improper storage or handling of the dummy have affected the buffers,[40] the condition of the buffers will be assessed in the Part 572 performance test when the neck qualification tests are conducted.

Finally, the Alliance provided no recommended approach that would address their concerns. It stated in its petition that it is "currently working on formulating a practicable solution that mitigates the risks associated with poor test repeatability and will submit additional comments to the agency in the near future." The agency has not received that information to date.

For the above reasons, the agency is denying this aspect of the petition.

B. Knee Spacing

The final rule positions the knees of the ES–2re dummy such that their outside surfaces are 150 ±10 mm (5.9 ±0.4 inches) from the plane of symmetry of the dummy. This specific language is used in United Nations under Economic Commission for Europe Regulation 95 (ECE R95), "Uniform provisions concerning the approval of vehicles with regard to the protection of the occupants in the event of a lateral collision," and was adopted in the FMVSS No. 214 final rule.

The Alliance was concerned about how to measure the knee spacing. It noted that the ES–2re requirements differ from both the knees spacing measurements for the 50th percentile Hybrid III dummy in FMVSS No. 208 and the SID–IIs in FMVSS No. 214. For the Hybrid III dummy in FMVSS No. 208, S10.5 requires that the "* * * distance between the outboard knee clevis flange surfaces shall be 10.6 inches [270 mm]." S16.3.2.1.6 describes the driver knee spacing as, "* * * transverse distance between the longitudinal centerlines at the front of the dummy's knees at 160 to 170 mm (6.3 to 6.7 in) * * *." This is similar to the positioning procedure for the SID–IIs in FMVSS No. 214 (S12.3.3(a)(6)), which states: "Set the initial transverse distance between the longitudinal centerlines at the front of the dummy's knees at 160 to 170 mm (6.3 to 6.7 in) * * *."

The Alliance petitioned for common procedures for the ES–2re and SID–IIs dummies by either adopting the measurement procedure used for FMVSS No. 208 Hybrid III dummy or the measurement procedure used for the SID–IIs dummy. Alternatively, if the agency maintains the positioning procedure for the ES–2re prescribed in the final rule, the Alliance requested a more detailed definition for the knee "outside surface" locations.

Agency Response

We are denying the Alliance petition to adopt the FMVSS No. 208 Hybrid III or the SID–IIs dummy knee spacing procedure for the ES–2re. The final rule harmonized with the ES–2 dummy installation procedure defined by ECE R95. That procedure has proven to be objective and repeatable. The Alliance provided no justification for changing to the Hybrid III or SID–IIs knee spacing, except to make the procedures common, which are not reason enough to change the specification at this time. No data was provided to show that the Hybrid III or SID–IIs knee spacing is appropriate for the ES–2re dummy.

Additionally, NHTSA does not find a need to add specifications in the regulatory text or the test procedure to further define the location on the knee from where to take the measurements. The outer surface of the knee is unremarkable, and given the tolerances specified, we believe that further elaboration is unwarranted.

C. Corrections

The final rule (S11.5 of FMVSS No. 214 regulatory text) specified a channel filter class of 600 Hz for the ES–2re rib deflection data. The Alliance petitioned to revise the filter class designation since the current ECE R95 regulation specifies a channel filter class of 180 Hz for the ES–2re rib deflection data and there is already regulatory experience with the measurement in Europe. The Alliance also presented data showing the filter class chosen has little overall effect on the measure rib deflection data.

Agency Response

The specification of the 600 Hz channel filter class was in error; we agree to changing it to 180 Hz. The testing the agency conducted with the ES–2re was processed with a 180 Hz filter to measure the rib deflections and our intent was to specify this filter. A 180 Hz channel filter was also specified for the rib deflection measurement in the final rule incorporating the ES–2re into Part 572 (71 FR 75335). We are correcting S11.5 of the regulatory text to specify that the rib deflection data are filtered at channel frequency class 180 Hz.

3. Miscellaneous Corrections

i. Exclusion of Rear Seats That Cannot Accommodate a SID in the MDB Test

Currently, the MDB test generally specifies that a SID (50th percentile adult male test dummy) is placed in the rear seat of the test vehicle. However, until the September 11, 2007 final rule, the standard had excluded from the rear seat requirements (S3(b)) vehicles "that have rear seating areas that are so small that the Part 572, subpart F [SID] test dummies cannot be accommodated according to the positioning procedure specified in S7." The September 11, 2007 final rule amended the MDB test so that at the end of the phase-in, only the SID–IIs (5th percentile adult female) test dummy will be used in the rear and not the SID. The final rule continued the complementary provision that has excluded rear seats from the MDB test requirements that are too small to accommodate the relevant test dummy, specifying at S5(b)(3) that rear seats that are so small that the SID–IIs cannot be accommodated are excluded from the rear seat requirements.

In making the change to the SID–IIs, however, the agency removed the provision that had excluded small rear seats that cannot accommodate the SID before the effective date for changing over to the SID–IIs. The Alliance petitioned the agency to reinstate the provision to exclude rear seats that are too small to accommodate the SID until completion of the phase-in schedule, since, the petitioner stated, many vehicles will not be able to be certified to the MDB requirements without the exclusion.

Agency Response

We agree to reinstating the exclusion provision. Removal of the exclusion of rear seats that are too small to accommodate the SID was an oversight. We will reinstate a provision in S5 as

[40] According to the ES–2re User's Manual from First Technology Safety Systems (FTSS), "ES–2re Eurosid-2 50th percentile Side Impact Crash Test Dummy with Rib Extension," when stored, the dummy should be supported by the eye bolt in the neck bracket. The FTSS User Manual also states, "* * * do not forget to support the head in such a way that the neck is not under tension."

requested, since the provision is relevant as long as the SID is used in FMVSS No. 214.

ii. FMVSS No. 301 and FMVSS No. 305 Test Dummy Applications

The Alliance and Honda petitioned the agency to revise the regulatory text in FMVSS No. 301, "Fuel system integrity," to account for the use of the new ES–2re and SID–IIs dummies. The current regulatory text references the now interim SID dummy. Honda also petitioned the agency to revise FMVSS No. 305, "Electric-powered vehicles: electrolyte spillage and electrical shock protection," for the same reason. The Alliance and Honda both state the current regulatory text creates an inconsistency with the phase-in of the new dummies required for the MDB crash test that would preclude using the same crash test for certification with FMVSS Nos. 301 and 305.

Agency Response

We agree with the petitioners. It was an oversight in the final rule not to account for the use of the new test dummies in FMVSS No. 301 and No. 305. Referring to the ES–2re and SID–IIs dummies in those standards facilitates consolidating the impact tests for the various standards.

iii. Metric Conversion

The Alliance noted conversion errors in load requirements in S6.1.2, S6.1.3, S6.2.2 and S6.2.3. The load requirements in metric units did not match the English units in magnitude. To correct these errors, in S6.1.2, we are replacing "1,557 N" with "15,569 N." In S6.1.3, we are replacing "3,114 N" with "31,138 N." In S6.2.2, we are replacing "1,946 N" with "19,460 N." In S6.2.3, we are replacing "5,338 N" with "53,378 N."

The Alliance also noted that the ES–2re chest deflection criteria in metric units (44 mm) did not match the English units in magnitude in S7.2.5(b) and S9.2.1(b). We are correcting those errors by changing "1.65 inches" to "1.73 inches" in those paragraphs.

iv. Typographical Errors

This document corrects the regulatory text adopted by the September 11, 2007 final rule to address the following typographical errors:

- In S12.3.2(a)(1), there is a reference to "S12.3.3(a)(11)." The correct reference is to "S12.3.2(a)(11)."
- In S12.3.3(a)(1), the word "line" is missing from the term "seat cushion reference line angle" when that term is used in the second sentence for the first time.
- In S12.3.2(b)(6), there is a reference to "S12.3.2(b)(1)(i)–(ii)." (72 FR at 51970.) The reference should be to "S12.3.2(b)(6)(i)–(iii)."

4. Clarifying Effective Date for Convertibles in the MDB Test

The June 9, 2008 final rule responding to petitions for reconsideration delayed the compliance date on which convertible vehicles must be certified to the oblique pole test requirements until after completion of the phase-in for other vehicle types, *i.e.,* until September 1, 2015. The Alliance asked for confirmation that the delay of the effective date for convertibles also applied to the upgraded MDB requirements. In a July 23, 2008 petition for reconsideration, the Alliance asked the agency to make clear that the oblique pole and MDB effective date for convertibles are aligned, *i.e.,* to specify that convertibles not be required to meet the upgraded MDB requirements until September 1, 2015. The Alliance stated that due to the use of the new test dummies and modified seat positioning procedures, manufacturers cannot be assured that current-design convertibles will meet the new MDB requirements without some redesign. The petitioner stated that aligning the dates avoids requiring manufacturers to redesign the same vehicle twice. Furthermore, petitioner stated, convertibles have typically lower sales volumes and thus have a greater need to spread redesign costs over fewer total vehicle sales to reduce burdens.

Agency Response

We are granting the request. It was our intent to align the MBD effective date with the pole test, to reduce the burden on manufacturers for this class of vehicle. This is shown in the following passage from the September 11, 2007 final rule (72 FR at 51946–51947):

> After consideration of the comments, NHTSA has decided to adopt a phase-in for the MDB test, and align the phase-in schedule with the oblique pole test requirements, with advance credits. An aligned phase-in will allow manufacturers to optimize engineering resources to design vehicles that meet the MDB and pole test requirements simultaneously, thus reducing costs.

In the June 9, 2008 final rule, NHTSA "extend[ed] the lead time period before manufacturers must begin phasing in vehicles to meet the upgraded FMVSS No. 214 requirements to September 1, 2010" and "adjust[ed] the phase-in schedule of manufacturers' vehicles that are required to meet the new requirements. * * *" The agency did not limit the adjusted lead time period and phase-in schedule to vehicles other than convertibles. Moreover, NHTSA stated that, "The adjusted schedule will also continue to couple the phase-in of the MDB with the pole test to enhance the practicability of meeting the new requirements." (73 FR at 32477.) These statements show that, for convertibles, the oblique pole and MDB effective date are aligned, *i.e.,* convertibles are not required to meet the upgraded MDB requirements until September 1, 2015. We are adding a provision in S7.2.4(a) to make clear that convertibles manufactured before September 1, 2015 are not subject to the upgraded MDB requirements.[41]

5. Bosch's Petition

Bosch's petition to allow sensor information to be fed into the restraint triggering algorithms is denied. It is beyond the scope of the rulemaking.

In the petition, Bosch stated that it fully supported the pole test but asked that NHTSA "modify the test set-up by optionally allowing information being made available from the Electronic Stability Control [ESC] on the vehicle CAN-bus. This would allow advanced restraint electronics to achieve the same performance and occupant protection as in real world accidents." Bosch stated that in the test set-up specified in the final rule, no ESC signals are communicated on the vehicle CAN-bus,[42] since the vehicle is not sliding laterally with wheels moving on the ground. As a result, the petitioner stated, "advanced restraint triggering algorithms cannot utilize any ESC data, resulting in significantly later TTF [time-to-fire] and thus reduced occupant protection." Bosch believed that certain sensor information should be used to trigger the side curtain air bags and torso side air bags as soon as possible. Bosch recommended that the agency should "directly feed-in the lateral velocity of 20 mph cos (15°)," or feed in "the ESC-data communicated on the CAN-bus during a real lateral pole crash (with 20 mph under 75°)" provided by the original equipment manufacturer.

In a July 22, 2008 follow-up submission, Bosch outlined a test procedure for the agency to consider, verifying that a vehicle is able to measure lateral velocity and the

[41] Convertibles manufactured prior to September 1, 2015 are subject to current FMVSS No. 214 MDB requirements that test with the SID.

[42] According to Bosch's Web site, a CAN-bus or Controller Area Network is a data transmission architecture that enables the in-vehicle computer(s) to monitor sensor data and issue commands for electronic systems such as power door locks, climate control, electronic stability control and automatic restraints. *http://researchinfo.bosch.com/content/language2/html/5585.htm.*

restraint algorithm actually uses this data as part of its crash sensing system for air bag deployment. The procedure entailed executing several driving maneuvers with the vehicle undergoing lateral sliding. External instrumentation would be used to directly measure the vehicle's lateral velocity as a reference and determine that the lateral velocity is read on the CAN-bus. Bosch believed that this would confirm that in a real-world crash, the side impact restraints algorithm calculates lateral velocity as part of its deployment criteria. Bosch suggested that, once this determination is made, NHTSA could upload a reference signal simulating a lateral velocity onto the CAN-bus prior to an oblique pole test. The format of the signal would be agreed upon with the specific vehicle manufacturer.

Agency Response

Bosch's petition is beyond the scope of the rulemaking and is thus denied. During the course of the rulemaking,[43] the agency was not presented with any suggested modifications to the vehicle pre-crash test to account for the various sensors that monitor its real time dynamic state. Therefore, it was not considered.

We note some unknowns about Bosch's suggestion. The agency does not know what affect Bosch's requested test set-up would have in conducting our compliance tests (both the potential benefits and unintended consequences). It has been agency practice to minimize the amount of alteration to the vehicle prior to testing. At this point in time, there is no way of knowing what affect artificially inputting a pre-crash test speed into the restraint algorithm might have on the pole test when compared to testing the vehicle in the "as delivered" condition. Bosch stated that it would result in "significantly later TTF (time to fire)" but did not provide any comparative data (specifically dummy injury data) to support its case. We would also have to consider the test burden of a test procedure that entails the execution of several driving maneuvers with the vehicle undergoing lateral sliding, and how such a test procedure might complicate the agency's compliance program and enforcement efforts. In addition, we must consider the safety implications of Bosch's approach, *e.g.,* how feeding in ESC data of a 20 mph crash could affect the real-world performance of the side impact air bag sensing system in crashes.

We acknowledge that the oblique pole test is conducted in a laboratory where real world conditions are not duplicated completely. We also appreciate that the industry continues to consider the latest sensor technology and the integration of more data into restraint algorithms to make continued improvements in real-world safety. We do not want our FMVSSs to preclude future innovative technology developments. However, given the agency focus on other priorities and the wide array of technologies that could be utilized for advanced side impact sensors, we believe industry is better positioned to develop proposed test procedure revisions to encompass these technologies. The agency is interested in data showing how the current test procedures limit advanced sensor technologies, that take into account safety implications and test burdens, and that provide detail on how the procedures should be revised. With such information, NHTSA can begin to assess the role that sensor information could and should have in an FMVSS compliance test.

In the meantime, with the additional lead time that we provided in the June 9, 2008 final rule, we believe that industry can develop crash sensing strategies to meet the pole test requirements without the agency altering the test set-up to allow for manually inputting pre-crash parameters from the ESC sensors, or other data sources the manufacturers may otherwise use to make real time air bag deployment decisions in the field. Given that vehicles are typically designed to be sensitive enough to deploy air bags in the MDB test, the IIHS side impact test, and the FMVSS No. 201 pole test, we do not believe that a vehicle's time-to-fire would be "significantly later," as Bosch said, without the pre-crash ESC input. From our own fleet testing, we know it is possible for air bags to deploy in a timely manner, and for dummies to meet the requirements without imputing data into the crash sensing system.

## VI. Rulemaking Analyses and Notices

*Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

This rulemaking document was not reviewed by the Office of Management and Budget under E.O. 12866. It is not considered to be significant under E.O. 12866 or the Department's Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). This document corrects or clarifies aspects of the test procedures specified by the September 11, 2007 final rule or makes minor adjustments to those procedures. The minimal impacts of today's amendment do not warrant preparation of a regulatory evaluation.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980, as amended, requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities. Small organizations and small governmental units will not be significantly affected since the potential cost impacts associated with this action will not affect the price of new motor vehicles.

The rule denies requests to exclude multistage vehicles or those with partitions from the upgraded FMVSS No. 214, for the reasons explained in this document. However, in the agency's June 9, 2008 final rule that provided the first response to the petitions for reconsideration, we have provided more time to final-stage manufacturers and alterers to meet the requirements of the September 11, 2007 final rule. That action will have a positive impact on those manufacturers, as they will be given more time and thus more flexibility to manage their engineering designs and resources in planning for compliance with the FMVSS No. 214 upgrade.

*Executive Order 13132 (Federalism)*

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999) and concluded that no additional consultation with States, local governments, or their representatives is mandated beyond the rulemaking process. The agency has concluded that the rule does not have sufficient federalism implications to warrant either consultation with State and local officials or preparation of a federalism summary impact statement. The rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and the responsibilities among the various levels of government."

Further, no consultation is needed to discuss the issue of preemption in connection with today's final rule. The issue of preemption can arise in connection with NHTSA rules in two ways.

First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision: "When a motor vehicle safety standard is in effect under

[43] RIN 2127–AJ10.

this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter." 49 U.S.C. 30103(b)(1). It is this statutory command that unavoidably preempts State legislative and administrative law, not today's rulemaking, so consultation is unnecessary.

Second, the Supreme Court has recognized the possibility of implied preemption in some instances. State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as an obstacle to the accomplishment and execution of some of the NHTSA safety standards. When such a conflict is discerned, the Supremacy Clause of the Constitution makes the State requirements unenforceable. *See Geier* v. *American Honda Motor Co.,* 529 U.S. 861 (2000).

NHTSA has considered the nature (*e.g.,* the language and structure of the regulatory text) and purpose of today's final rule and does not foresee any potential State requirements that might conflict with it. Without any conflict, there could not be any implied preemption of State law, including State tort law.

*Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually (adjusted annually for inflation, with base year of 1995). This final rule will not result in expenditures by State, local or tribal governments, in the aggregate, or by the private sector in excess of $100 million annually.

*National Environmental Policy Act*

NHTSA has analyzed this final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

*Civil Justice Reform*

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows.

The issue of preemption is discussed above in connection with E.O. 13132. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

*Paperwork Reduction Act (PRA)*

Under the PRA of 1995, a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. The September 11, 2007 final rule contained a collection of information because of the phase-in reporting requirements. There was no burden to the general public.

The September 11, 2007, final rule required manufacturers of passenger cars and of trucks, buses and MPVs with a GVWR of 4,536 kg (10,000 lb) or less, to annually submit a report, and maintain records related to the report, concerning the number of such vehicles that meet the vehicle-to-pole and MDB test requirements of FMVSS No. 214 during the phase-in of those requirements. The purpose of the reporting and recordkeeping requirements is to assist the agency in determining whether a manufacturer of vehicles has complied with the requirements during the phase-in period. The June 9, 2008 final rule extended the lead time period and phase-in of both the pole and MDB test requirements. Today's final rule has no further reporting or recordkeeping requirements.

*National Technology Transfer and Advancement Act*

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113), all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.

Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the International Organization for Standardization (ISO) and the Society of Automotive Engineers. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

There are no voluntary consensus standards applicable to this final rule that have not been previously discussed in the September 11, 2007 and June 9, 2008 final rules.

*Plain Language*

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please write to us with your views.

**List of Subjects in 49 CFR Part 571**

Imports, Incorporation by reference, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

■ In consideration of the foregoing, NHTSA amends 49 CFR Chapter V as set forth below.

## PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

■ 1. The authority citation for Part 571 continues to read as follows:

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50.

■ 2. Section 571.214 is amended by:
■ a. Revising S5(b)(3), S6.1.2, S6.1.3, S6.2.2, S6.2.3;
■ b. Adding S7.2.4(a)(3); and
■ c. Revising S7.2.5(b), S8.2, S9.2.1(b), S10.3.2.2, S10.5, S11.1(b), S11.5(b)(1),

S12.1, S12.2.1, S12.3.2(a)(1) and (9), S12.3.2(b)(6), S12.3.3(a)(1) and (9); and S12.3.3(b)(3), S12.3.4(h), and S12.3.4(k).

The revisions and addition read as follows:

**§ 571.214 Standard No. 214; Side impact protection.**

* * * * *

S5 * * *

(b) * * *

(3) Passenger cars, multipurpose passenger vehicles, trucks and buses need not meet the requirements of S7 (moving deformable barrier test) as applied to the rear seat for side-facing rear seats and for rear seating areas that are so small that a Part 572 Subpart V dummy representing a 5th percentile adult female cannot be accommodated according to the positioning procedure specified in S12.3.4 of this standard. Vehicles that are manufactured before September 1, 2010, and vehicles that manufactured on or after September 1, 2010, that are not part of the percentage of a manufacturer's production meeting the moving deformable barrier test requirements with advanced test dummies (S7.2 of this section) or are otherwise excluded from the phase-in requirements of S7.2, need not meet the requirements of the moving deformable barrier test as applied to the rear seat for rear seating areas that are so small that a Subpart F dummy (SID) cannot be accommodated according to the positioning procedure specified in S12.1 of this standard.

* * * * *

S6 * * *

S6.1.2 Intermediate crush resistance. The intermediate crush resistance shall not be less than 15,569 N (3,500 lb).

S6.1.3 Peak crush resistance. The peak crush resistance shall not be less than two times the curb weight of the vehicle or 31,138 N (7,000 lb), whichever is less.

* * * * *

S6.2.2 Intermediate crush resistance. The intermediate crush resistance shall not be less than 19,460 N (4,375 lb).

S6.2.3 Peak crush resistance. The peak crush resistance shall not be less than three and one half times the curb weight of the vehicle or 53,378 N (12,000 lb), whichever is less.

* * * * *

S7.2.4 * * *

(a) * * *

(3) Convertibles manufactured before September 1, 2015, are not subject to S7.2.1 or S7.2.2 of this section. These vehicles may be voluntarily certified to meet the MDB test requirements prior to September 1, 2015. Vehicles manufactured on or after September 1, 2015 are subject to S7 and S7.2.2.

S7.2.5 * * *

* * * * *

(b) Thorax. The deflection of any of the upper, middle, and lower ribs, shall not exceed 44 mm (1.73 inches).

* * * * *

S8.2 *Vehicle test attitude.* Determine the distance between a level surface and a standard reference point on the test vehicle's body, directly above each wheel opening, when the vehicle is in its fully loaded condition at the test site, with all tires inflated to the manufacturer's specifications listed on the vehicle's tire placard, and with the vehicle filled to 100 percent of all fluid capacities. The "fully loaded condition" is the test vehicle loaded in accordance with S8.1 of this standard (49 CFR 571.214). The load placed in the cargo area is centered over the longitudinal centerline of the vehicle. The pretest vehicle attitude is equal to the fully loaded attitude ± 10 mm.

* * * * *

S9.2.1 * * * *

(b) Thorax. The deflection of any of the upper, middle, and lower ribs, shall not exceed 44 mm (1.73 inches).

* * * * *

S10.3.2.2 *Other seat adjustments.* Position any adjustable parts of the seat that provide additional support so that they are in the lowest or non-deployed adjustment position. Position any adjustable head restraint in the lowest and most forward position. If it is possible to achieve a position lower than the effective detent range, the head restraint should be set to its lowest possible position. Place adjustable seat backs in the manufacturer's nominal design riding position in the manner specified by the manufacturer. If the position is not specified, set the seat back at the first detent rearward of 25° from the vertical.

* * * * *

S10.5 *Adjustable steering wheel.* Adjustable steering controls are adjusted so that the steering wheel hub is at the geometric center of the locus it describes when it is moved through its full range of driving positions. If there is no setting detent in the mid-position, lower the steering wheel to the detent just below the mid-position. If the steering column is telescoping, place the steering column in the mid-position. If there is no mid-position, move the steering wheel rearward one position from the mid-position.

* * * * *

S11.1 * * *

* * * * *

(b) *5th percentile female.* The 49 CFR part 572 subpart V test dummy representing a 5th percentile female is clothed in formfitting cotton stretch garments with short sleeves and about the knee length pants. Each foot has on a size 7.5W shoe that meets the configuration and size specifications of MIL–S–21711E or its equivalent.

* * * * *

S11.5 * * *

* * * * *

(b) *Subpart U (Es-2re 50th percentile male) test dummy.*

(1) The rib deflection data are filtered at channel frequency class 180 Hz. Abdominal and pubic force data are filtered at channel frequency class of 600 Hz.

* * * * *

S12.1 *50th percentile male test dummy—49 CFR part 572 subpart F (SID).* Position a correctly configured test dummy, conforming to the applicable requirements of part 572 Subpart F of this chapter, in the front outboard seating position on the side of the test vehicle to be struck by the moving deformable barrier and, if the vehicle has a second seat, position another conforming test dummy in the second seat outboard position on the same side of the vehicle, as specified in S12.1.3. Each test dummy is restrained using all available belt systems in all seating positions where such belt restraints are provided. Place any adjustable anchorages at the manufacturer's nominal design position for a 50th percentile adult male occupant. In addition, any folding armrest is retracted. Additional positioning procedures are specified below.

* * * * *

S12.2.1 *Positioning an ES–2re dummy in all seating positions.* Position a correctly configured ES–2re test dummy, conforming to the applicable requirements of part 572 of this chapter, in the front outboard seating position on the side of the test vehicle to be struck by the moving deformable barrier or pole. Restrain the test dummy using all available belt systems in the seating positions where the belt restraints are provided. Place any adjustable anchorages at the manufacturer's nominal design position for a 50th percentile adult male occupant. Retract any folding armrest.

* * * * *

S12.3.2 * * *

(a) * * *

(1) With the seat in the position determined in S10.3.2, use only the control that moves the seat fore and aft to place the seat in the rearmost position. If the seat cushion reference line angle automatically changes as the

seat is moved from the full forward position, maintain, as closely as possible, the seat cushion reference line angle determined in S10.3.2.3.3, for the final forward position when measuring the pelvic angle as specified in S12.3.2(a)(11). The seat cushion reference line angle position may be achieved through the use of any seat or seat cushion adjustments other than that which primarily moves the seat or seat cushion fore-aft.

* * * * *

(9) For vehicles without adjustable seat backs, adjust the lower neck bracket to level the head as much as possible. For vehicles with adjustable seat backs, while holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform of the head is level to within ± 0.5 degree, making sure that the pelvis does not interfere with the seat bight. If the torso contacts the steering wheel, adjust the steering wheel in the following order until there is no contact: telescoping adjustment, lowering adjustment, raising adjustment. If the vehicle has no adjustments or contact with the steering wheel cannot be eliminated by adjustment, position the seat at the next detent where there is no contact with the steering wheel as adjusted in S10.5. If the seat is a power seat, position the seat to avoid contact while assuring that there is a maximum of 5 mm (0.2 in) distance between the steering wheel as adjusted in S10.5 and the point of contact on the dummy. Adjust the lower neck bracket to level the head as much as possible.

* * * * *

(b) * * *

(6) If the left foot does not contact the floor pan, place the foot parallel to the floor and place the leg as perpendicular to the thigh as possible. If necessary to avoid contact with the vehicle's brake pedal, clutch pedal, wheel-well, or foot rest, use the three foot position adjustments listed in S12.3.2(b)(6)(i) through (iii). The adjustment options are listed in priority order, with each subsequent option incorporating the previous. In making each adjustment, move the foot the minimum distance necessary to avoid contact. If it is not possible to avoid all prohibited foot contact, priority is given to avoiding brake or clutch pedal contact:

* * * * *

S12.3.3 * * *

(a) * * *

(1) With the seat at the mid-height in the full-forward position determined in S10.3.2, use only the control that primarily moves the seat fore and aft to place the seat in the rearmost position, without adjusting independent height controls. If the seat cushion reference line angle automatically changes as the seat is moved from the full forward position, maintain, as closely as possible, the seat cushion reference line angle determined in S10.3.2.3.3, for the final forward position when measuring the pelvic angle as specified in S12.3.3(a)(11). The seat cushion reference line angle position may be achieved through the use of any seat or seat cushion adjustments other than that which primarily moves the seat or seat cushion fore-aft.

* * * * *

(9) For vehicles without adjustable seat backs, adjust the lower neck bracket to level the head as much as possible. For vehicles with adjustable seat backs, while holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform of the head is level to within ± 0.5 degree, making sure that the pelvis does not interfere with the seat bight.

* * * * *

(b) * * *

(3) If either foot does not contact the floor pan, place the foot parallel to the floor pan and place the lower leg as perpendicular to the thigh as possible.

* * * * *

S12.3.4 * * *

* * * * *

(h) For vehicles without adjustable seat backs, adjust the lower neck bracket to level the head as much as possible. For vehicles with adjustable seat backs, while holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform of the head is level to within ± 0.5 degrees, making sure that the pelvis does not interfere with the seat bight.

* * * * *

(k) *Passenger foot positioning.*

(1) Place the rear seat passenger's feet flat on the floor pan and beneath the front seat as far as possible without front seat interference.

(2) If either foot does not contact the floor pan, place the foot parallel to the floor and place the leg as perpendicular to the thigh as possible.

* * * * *

■ 3. Section 571.301 is amended by revising S6.3(b), to read as follows:

**§ 571.301 Standard No. 301; Fuel system integrity.**

* * * * *

S6.3 * * *

* * * * *

(b) *Vehicles manufactured on or after September 1, 2004.* When the vehicle is impacted laterally on either side by a moving deformable barrier at 53 ± 1.0 km/h with the appropriate 49 CFR part 572 test dummies specified in 571.214 at positions required for testing by S7.1.1, S7.2.1, or S7.2.2 of Standard 214, under the applicable conditions of S7 of this standard, fuel spillage shall not exceed the limits of S5.5 of this standard.

* * * * *

■ 4. Section 571.305 is amended by revising S6.3 and S7.5, to read as follows:

**§ 571.305 Standard No. 305; Electric-powered vehicles: electrolyte spillage and electrical shock protection.**

* * * * *

S6.3 *Side moving deformable barrier impact.* The vehicle must meet the requirements of S5.1, S5.2 and S5.3 when it is impacted from the side by a barrier that conforms to part 587 of this chapter that is moving at any speed up to and including 54 km/h, with the appropriate 49 CFR part 572 test dummies specified in 571.214 of this chapter.

* * * * *

S7.5 *Side moving deformable barrier impact test conditions.* In addition to the conditions of S7.1 and S7.2, the conditions of S8.9, S8.10, and S8.11 of 571.214 of this chapter apply to the conduct of the side moving deformable barrier impact test specified in S6.3.

* * * * *

Issued: March 9, 2010.

**David L. Strickland,**

*Administrator.*

[FR Doc. 2010–5575 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–59–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 648

**[Docket No. 0907221160–91412–02]**

**RIN 0648–AY01**

### Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Monkfish Fishery

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to amend the Monkfish Fishery

Management Plan (FMP) to allow projects funded through the Monkfish Research Set-Aside (RSA) Program to carryover unused monkfish RSA days-at-sea (DAS) into the following fishing year. This final rule also makes minor technical changes to the monkfish regulations. The changes are purely technical amendments to ensure consistency with the operations of the Monkfish RSA Program and to clarify the intent of the regulations implementing this program.

**DATES:** This rule is effective April 14, 2010.

**ADDRESSES:** This document and other supporting material are available online at *http://www.regulations.gov* or *www.nero.nmfs.gov*.

**FOR FURTHER INFORMATION CONTACT:** Anna Macan, Fishery Management Specialist, phone (978) 281–9165, or by e-mail at *Anna.Macan@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

This final rule implements measures to the FMP to allow unused monkfish RSA DAS to carryover into the following fishing year. A proposed rule for this action was published on October 26, 2009 (74 FR 54945), with public comments accepted through November 25, 2009. The details on the development of this action, including the alternatives considered by NMFS, were contained in the preamble of the proposed rule and are not repeated here.

During the development of the Monkfish RSA Program through Amendment 2 to the FMP, NMFS implemented a regulation under its administrative authority, at section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) to prohibit the carryover of unused monkfish RSA DAS (§ 648.92(c)(1)(v)). NMFS took this action due to the status of the stock at the time; at the time Amendment 2 was being implemented, monkfish were considered overfished in both management areas, with little sign of rebuilding. Since the stock is now considered to be rebuilt, the restriction on carrying over RSA DAS is no longer necessary.

This regulatory amendment allows for the rollover of all unused monkfish RSA DAS. Allowing Monkfish RSA DAS to carryover into the following fishing year will provide researchers the flexibility they need to complete projects funded through the Monkfish RSA Program. If carryover DAS are discontinued in the commercial fishery, NMFS will reconsider whether rollover of RSA DAS should be allowed under the Monkfish RSA Program.

**Comments and Responses**

Two comments were received, both in support of the proposed measure to allow the rollover of all unused RSA DAS, which NMFS is implementing through this final rule.

*Comment 1*: One commenter supported the action because, in past years, attempts to utilize RSA DAS to conduct key research were constrained by the available number of RSA DAS and issues related to time and revenue recovery. The commenter stated that this action will provide for more flexible implementation of the RSA Program and will hopefully promote interest in industry-sponsored research.

*Response*: NMFS agrees, and is implementing the measures in this final rule.

*Comment 2*: The second comment acknowledged general support for this action.

*Response*: NMFS is implementing the measures in this final rule.

**Changes from the Proposed Rule**

This final rule makes additional technical amendments to the monkfish research regulatory text at § 648.92(c). The minor changes clarify the intent of the regulations and ensure consistency with the operations of the Monkfish RSA Program.

In § 648.92(c)(1)(i), language stating that NMFS will publish a Request for Proposals (RFP) in the **Federal Register** at least 3 months prior to the start of the upcoming fishing year has been removed. This will allow NMFS to publish an RFP in accordance with NOAA Grants Office procedures. The text "from industry" at the end of that paragraph has also been removed to clarify that proposals are solicited from an inclusive range of applicants (e.g., research institutions) and are not limited to fishing industry members only.

Section § 648.92(c)(1)(ii) has been revised to reflect that the review panel will include subject matter experts, as opposed to technical experts.

Section § 648.92(c)(1)(ii)(B) has been revised to reflect that NMFS and the NOAA Grants Office will consider each panels recommendations, and that NOAA will provide the final approval of projects, which is the current procedure.

The last sentence in § 648.92(c)(1)(ii)(B) has been removed because this action will allow monkfish RSA DAS to carry into the following fishing year, making this sentence no longer relevant.

**Classification**

The Administrator for the Northeast Region, NMFS, determined that the FMP amendment is necessary for the conservation and management of the monkfish fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

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

In accordance with 5 U.S.C. 553(b)(B), the Assistant Administrator finds that advance notice and public comment on the portion of this rule that implements the technical changes to the regulations implementing the Monkfish RSA Program is not necessary. These technical changes are not substantive. They merely revise the regulations to clarify their intent and to be consistent with current procedures of the Monkfish RSA Program, and are consistent with the FMP.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification appeared in the preamble of the proposed rule. No comments were received regarding the economic impact of this action. As a result, a regulatory flexibility analysis was not required and none was prepared.

**List of Subjects in 50 CFR Part 648**

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 9, 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 648 is amended as follows:

## PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.92, paragraphs (c)(1)(i), (c)(1)(ii), (c)(1)(ii)(B), (c)(1)(iii), and (c)(1)(v) are revised to read as follows:

**§ 648.92 Effort-control program for monkfish limited access vessels.**

* * * * *

(c) * * *

(1) * * *

(i) NMFS shall publish a Request for Proposals (RFP) in the **Federal Register**

consistent with procedures and requirements established by the NOAA Grants Office to solicit proposals for the upcoming fishing year that are based on research priorities identified by the Councils.

(ii) NMFS shall convene a review panel that may include members of the Councils' Monkfish Oversight Committee, the Council's Research Steering Committee, and other subject matter experts, to review proposals submitted in response to the RFP.

* * * * *

(B) NMFS and the NOAA Grants Office shall consider each panel member's recommendation, and NOAA shall provide final approval of the projects, and notify applicants of the grant award through written notification to the project proponent. The Regional Administrator may exempt selected vessel(s) from regulations specified in each of the respective FMPs through the exempted fishing permit (EFP) process specified under § 600.745(b)(2).

(iii) The grant awards approved under the RFPs shall be for the upcoming fishing year. Proposals to fund research that would start prior to the fishing year are not eligible for consideration. Multi-year grant awards may be approved under an RFP for an upcoming fishing year, so long as the research DAS available under subsequent RFPs are adjusted to account for the approval of multi-year awards.

* * * * *

(v) If the Regional Administrator determines that the annual allocation of research DAS will not be used in its entirety once all of the grant awards have been approved, the Regional Administrator shall reallocate the unallocated research DAS as exempted DAS to be authorized as described in paragraph (c)(2) of this section, and provide notice of the reallocation of DAS in the **Federal Register**. Any allocated research DAS that are not used during the fishing year for which they are granted may be carried over into the next fishing year. Any unallocated research DAS may not be carried over into the next fishing year.

* * * * *

[FR Doc. 2010–5601 Filed 3–12–10; 8:45 am]

BILLING CODE 3510–22–S

# Proposed Rules

Federal Register
Vol. 75, No. 49
Monday, March 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 ENERGY

### 10 CFR Part 430

**[Docket No. EE–2009–BT–STD–0022]**

**RIN 1904–AC06**

## Energy Conservation Program for Consumer Products: Energy Conservation Standards for Residential Furnaces

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Notice of public meeting and availability of a rulemaking analysis plan.

**SUMMARY:** The U.S. Department of Energy (DOE) will hold a public meeting to discuss and receive comments on the product classes that DOE plans to analyze for purposes of amending energy conservation standards for certain residential furnaces, and the analytical approach, models, and tools that DOE is using to evaluate amended standards for these products. DOE also encourages written comments on these subjects. A detailed discussion of these topics can be found in the rulemaking analysis plan (RAP) for residential furnaces, which is available at: *http://www.eere.energy.gov/buildings/appliance_standards/residential/furnaces_boilers.html.*

**DATES:** DOE will hold a public meeting on Wednesday, March 31, 2010, from 9 a.m. to 5 p.m. in Washington, DC. Any person requesting to speak at the public meeting should submit such a request, along with an electronic copy of the statement to be given at the public meeting, before 4 p.m., Wednesday, March 24, 2010. Written comments are welcome, especially following the public meeting and should be submitted by April 14, 2010.

**ADDRESSES:** The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 8E–089, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures. If a foreign national wishes to participate in the meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed. Interested persons may submit comments, identified by the notice title, the NOPM for Energy Conservation Standards for Residential Furnaces, and provide the docket number EE–2009–BT–STD–0022 and/or regulatory identifier number (RIN) 1904–AC06. Comments may be submitted using any of the following methods:

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

2. *E-mail: Res-Furnaces-2009-STD-0022@ee.doe.gov.* Include docket number EE–2009–BT–STD–0022 and/or RIN, 1904–AC06 in the subject line of the message.

3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, NOPM for Energy Conservation Standards for Residential Furnaces, 1000 Independence Avenue, SW., Washington, DC, 20585–0121. Please submit one signed paper original.

4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. Please submit one signed paper original.

*Instructions:* All submissions received must include the agency name and docket number.

*Docket:* For access to the docket to read background documents or comments received, visit the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

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

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC, 20585–0121. Telephone: (202) 586–5827. E-mail: *Eric.Stas@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Statutory Authority

*1. General*

Title III of the Energy Policy and Conservation Act (EPCA) sets forth a variety of provisions designed to improve energy efficiency. Part A [1] of Title III (42 U.S.C. 6291–6309) establishes the Energy Conservation Program for Consumer Products Other Than Automobiles. The program covers consumer products and certain commercial equipment (referred to hereafter as "covered products"), including the residential furnaces that are subject to this rulemaking. (42 U.S.C. 6292(a)(5)) EPCA prescribed the initial energy conservation standards for residential furnaces. (42 U.S.C. 6295(f)(1)–(2)) The statute further provides DOE with the authority to conduct rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(f)(4)).

EPCA provides criteria for prescribing new or amended standards for covered products. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, EPCA precludes DOE from adopting any standard that would not result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) EPCA also provides that, in deciding whether a standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must do so after receiving comments on the proposed standard and by considering, to the greatest extent practicable, the following seven factors:

[1] This part was originally titled Part B. It was redesignated Part A in the United States Code for editorial reasons.

1. The economic impact of the standard on manufacturers and consumers of the products subject to the standard;
2. The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the imposition of the standard;
3. The total projected amount of energy (or, as applicable, water) savings likely to result directly from the imposition of the standard;
4. Any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard;
5. The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;
6. The need for national energy and water conservation; and
7. Other factors the Secretary considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Prior to proposing a standard, DOE typically seeks public input on the analytical framework, models, and tools that will be used to evaluate standards. DOE is publishing this notice of public meeting (NOPM) to announce the availability of the rulemaking analysis plan (RAP), which details the plans for the rulemaking approach, key data sources DOE plans to use in its analyses, and a list of key issues DOE would like comment upon. In addition, DOE is announcing a public meeting to solicit feedback from interested parties on the RAP, models, and data sources.

*2. Regional Standards*

a. General

Section 306(a) of the Energy Independence and Security Act of 2007 (EISA 2007; Pub. L. 110–140) amended EPCA to allow DOE to consider the establishment of separate regional standards for furnaces. (42 U.S.C. 6295(o)(6)(A)) Specifically, EPCA allows for the establishment of a single more-restrictive regional standard in addition to the base national standard. (42 U.S.C. 6295(o)(6)(B)) EPCA stipulates that the regions must include only contiguous states (with the exception of Alaska and Hawaii, which can be included in regions that they are not contiguous with), and that each state may be placed in only one region (*i.e.,* a state cannot be divided among two regions). (42 U.S.C. 6295(o)(6)(C))

EPCA mandates that a regional standard must produce significant energy savings in comparison to a single national standard. Further, EPCA provides that DOE must determine that the additional standards are economically justified and consider the impact of the additional regional standards on consumers, manufacturers, and other market participants, including product distributors, dealers, contractors, and installers. (42 U.S.C. 6295(o)(6)(C)–(D)) For this rulemaking, DOE will consider the impacts of regional standards in addition to national standards. The RAP gives an overview of DOE's proposed methodology for analyzing impacts of a regional standard for furnaces, and additional detail about DOE's proposed approach is provided throughout the RAP in the applicable sections and subsections.

**B. History of the Standards Rulemaking for Residential Furnaces**

*1. Background*

Energy conservation standards for residential furnaces were initially specified by EPCA in terms of annual fuel utilization efficiency (AFUE). EPCA set minimum standards for all furnaces except for mobile home furnaces and "small" furnaces (*i.e.,* those units with an input capacity less than 45,000 British thermal units per hour (Btu/h)) at 78-percent AFUE, with a compliance date of January 1, 1992. EPCA specified a separate 75-percent AFUE standard for mobile home furnaces with a compliance date of September 1, 1990. (42 U.S.C. 6295(f)(1)–(2)) For furnaces with an input capacity less than 45,000 Btu/h, DOE published a final rule on November 17, 1989 that set the minimum standard for those products at 78-percent AFUE, with a compliance date of January 1, 1992. 54 FR 47916.

On November 19, 2007, DOE published a final rule (hereafter referred to as the "November 2007 final rule") amending the minimum energy conservation standards for four product classes of residential furnaces (*i.e.,* non-weatherized gas, weatherized gas, mobile home gas, and non-weatherized oil). 72 FR 65136. This rulemaking set standards that would apply to any covered products manufactured for sale in the United States, or imported into the United States, on or after November 19, 2015.

In response to the November 2007 final rule, the state of New York, city of New York, state of Connecticut, commonwealth of Massachusetts, and Natural Resources Defense Council filed a joint lawsuit against DOE in the United States Court of Appeals for the Second Circuit. The petitioners asserted that the standards for residential furnaces promulgated by the November 2007 final rule did not reflect the "maximum improvement in energy efficiency" that "is technologically feasible and economically justified," as required by section 325(o)(2)(A) of EPCA. On April 16, 2009, DOE and the petitioners agreed to a voluntary remand that would require DOE to revisit its initial conclusions outlined in the November 2007 final rule. As part of the remand agreement, DOE has until May 1, 2011 to issue a final rule amending the energy conservation standards for residential furnaces.

In addition, section 310(3) of the Energy Independence and Security Act of 2007 (EISA 2007) amended EPCA to require that energy conservation standards address standby mode and off mode energy use for a certain subset of products. (42 U.S.C. 6295(gg)) Specifically, when DOE adopts new or amended standards for certain covered products after July 1, 2010, the final rule must, if justified by the criteria for adoption of standards in section 325(o) of EPCA, incorporate standby mode and off mode energy use into a single standard if feasible, or otherwise adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)) Because this rulemaking is scheduled for issuance after July 1, 2010, DOE plans to address the standby mode and off mode energy use in this rulemaking. Additional discussions of the standby mode and off mode energy use for residential furnaces can be found in the RAP.

*2. Current Rulemaking for Energy Conservation Standards for Residential Furnaces*

Section 307 of EISA 2007 amended EPCA by removing the requirement for DOE to publish an advanced notice of proposed rulemaking (ANOPR) when amending standards for consumer products. DOE believes, however, that early opportunities for DOE to vet its assumptions and analyses and for interested parties to provide comments and data can be valuable in developing energy conservation standards. For this rulemaking, DOE developed an alternative rulemaking pathway, consisting of a NOPM and RAP. These documents represent the first step in the process of revising the energy conservation standards set forth in the November 2007 final rule for residential furnaces. DOE is issuing this NOPM to receive feedback on the methodologies, data, and key assumptions that will be used for the analyses before performing the notice of proposed rulemaking (NOPR) analyses. The analyses and proposed methodologies that will be used for the NOPR phase of this rulemaking are described in detail in the RAP, available at the Web link provided in the **SUMMARY** section of this notice.

Subsequently, DOE intends to issue the NOPR for public comment.

### C. Specific Issues for Which DOE Is Seeking Comment

DOE is specifically presenting two issues regarding the energy conservation standards rulemaking for residential furnaces in today's notice. DOE presents additional issues throughout the RAP for which DOE also seeks comment. The issues for which DOE seeks comment are presented throughout the RAP and summarized at the end.

*1. Consensus Agreement*

On January 26, 2010, the Air-Conditioning, Heating and Refrigeration Institute (AHRI), American Council for an Energy Efficient Economy (ACEEE), Alliance to Save Energy (ASE), Appliance Standards Awareness Project (ASAP), Natural Resources Defense Council (NRDC), and Northeast Energy Efficiency Partnerships (NEEP) submitted a joint comment (hereafter referred to as the Join Comment) to DOE recommending minimum energy conservation standards for residential central air conditioners, heat pumps, and furnaces. (AHRI, ACEEE, ASE, ASAP, NRDC, and NEEP, the Joint Comment, No. 1 at pp. 1–33) The Joint Comment stated the original consensus agreement was completed on October 13, 2009 and had 15 signatories, including AHRI, ACEEE, ASE, NRDC, ASAP, NEEP, Northwest Power and Conservation Council (NPCC), California Energy Commission (CEC), Bard Manufacturing Company Inc., Carrier Residential and Light Commercial Systems, Goodman Global Inc., Lennox Residential, Mitsubishi Electric & Electronics USA, National Comfort Products, and Trane Residential.

The Joint Comment recommends standards that divide the nation into three regions for residential central air conditioners and two regions for residential furnaces based on the population-weighted number of heating degree days (HDD) of each state. States with 5000 HDD or more are considered as part of the northern region, while states with less than 5000 HDD are considered part of the southern region. For residential central air conditioners, the Joint Comment establishes a third region—the "southwest" region—which is comprised of California, Arizona, New Mexico, and Nevada. For furnaces, the southwest region states are included in the southern region. The compliance date specified in the agreement is May 1, 2013 for non-weatherized furnaces and January 1, 2015 for weatherized furnaces.

In addition to the RAP, DOE is making available on its Web site the Joint comment, which can be found: *http://www1.eere.energy.gov/buildings/appliance_standards/residential/furnaces_boilers.html*. DOE specifically invites comment from interested parties on the Joint Comment. In particular, DOE is interested in comments relating to the proposed AFUE requirements, the proposed regional divisions, and the proposed compliance dates for residential furnace standards.

*2. Combined Rulemaking Approach*

DOE is currently conducting or planning separate standards rulemakings for three interrelated products: (1) Central air conditioners and heat pumps; (2) gas furnaces; and (3) furnace fans. DOE is required by a Court-ordered consent decree to publish a final rule addressing the energy conservation standards for residential central air conditioners and heat pumps by June 30, 2011. A final rule published by DOE in November 2007 amending the minimum energy conservation standards for gas furnaces was remanded by the Courts to DOE under the mandate that DOE publish a new final rule by May 1, 2011. EISA 2007 amended EPCA to require that DOE publish a final rule establishing energy conservation standards for "the electricity used for purposes of circulating air through duct work" (*i.e.,* the electrical energy consumed by furnace fans) by January 1, 2013. (42 U.S.C. 6295(f)(4)(D))

Rather than analyze each set of products separately, DOE is considering combining the analyses to examine how the interaction between the three products impacts the cost to consumers and the energy savings resulting from potential amended standards. If DOE conducts such an analysis and the results indicate that a combined approach yields additional savings beyond what can be achieved by considering each product separately, DOE may decide to pursue a combined standards rulemaking that addresses all three products, or two of the three products (*i.e.,* central air conditioners and heat pumps and residential furnaces), simultaneously. If such a combined rulemaking is pursued, DOE would be required to publish the combined final rule by May 1, 2011 in order to comply with the conditions of the remand agreement for residential furnaces. DOE is seeking comment from interested parties relating to a combined rulemaking regarding energy conservation standards for residential central air conditioners and heat pumps, residential furnaces, and furnace fans.

### D. Summary of the Analyses To Be Performed by DOE

For residential furnaces, DOE is planning to conduct in-depth technical analyses for the NOPR in the following areas: (1) Engineering, (2) markups to determine product price, (3) energy-use characterization, (4) life-cycle cost (LCC) and payback period (PBP), (5) national impacts, (6) manufacturer impacts, (7) utility impacts, (8) environmental impacts, (9) employment impacts, and (10) regulatory impacts.

*1. Engineering Analysis*

The engineering analysis establishes the relationship between the cost and efficiency of a product DOE is evaluating for amended energy conservation standards. This relationship serves as the basis for cost-benefit calculations for individual consumers, manufacturers, and the nation. The engineering analysis will identify representative baseline products, which is the starting point for analyzing technologies that provide energy efficiency improvements. Baseline product refers to a model or models having features and technologies typically found in products currently offered for sale. The baseline model in each product class represents the characteristics of products in that class and, for products already subject to energy conservation standards, usually is a model that just meets the current standard.

*2. Markups To Determine Product Price*

DOE uses markups to convert the manufacturer costs estimated in the engineering analysis to consumer prices, which then are used in the life-cycle cost (LCC) and payback period (PBP) and manufacturer impact analyses. DOE calculates markups for baseline products (baseline markups) and for more efficient products (incremental markups). The incremental markup relates the change in the manufacturer sales price of higher-efficiency models (the incremental cost increase) to the change in the retailer or distributor sales price. To develop markups, DOE identifies how the products are distributed from the manufacturer to the customer. After establishing appropriate distribution channels, DOE relies on economic data from the U.S. Census Bureau and other sources to define how prices are marked up as the products pass from the manufacturer to the customer.

*3. Energy Use Characterization*

The purpose of the energy use analysis is to determine the annual energy consumption of residential

furnaces in representative U.S. homes and to assess the energy-savings potential of increased product efficiencies. DOE will estimate the annual energy consumption of residential furnaces at specified energy efficiency levels across a range of climate zones. The annual energy consumption includes use of natural gas or oil for heat production as well as use of electricity for the blower and auxiliary components. The annual energy consumption of residential furnaces will be used in subsequent analyses, including the LCC, PBP, and National Impact Analyses.

*4. Life-Cycle Cost and Payback Period Analyses*

The LCC and PBP analyses evaluate the economic impact of potential standards on individual consumers. The LCC is the total consumer expense for a product over the life of the product. The LCC analysis will compare the LCC of products designed to meet possible energy conservation standards with the LCC of products likely to be installed in the absence of standards. DOE will determine LCCs by considering (1) Total installed cost to the purchaser (which consists of manufacturer selling price, sales taxes, distribution chain markups, and installation cost); (2) the operating expenses of the products (energy use and repair and maintenance); (3) product lifetime; and (4) a discount rate that puts the LCC in present-value terms. The PBP represents the number of years needed to recover the increase in purchase price (including installation cost) of more efficient products through savings in the operating cost of the product. It is the change in total installed cost due to increased efficiency divided by the change in annual operating cost from increased efficiency.

*5. National Impacts Analysis*

The NIA estimates the national energy savings (NES) and the net present value (NPV) of total consumer costs and savings expected to result from new standards at specific efficiency levels. DOE calculates NES and NPV for each efficiency level as the difference between a base-case forecast (without new standards) and the standards case forecast (with standards). DOE determines national annual energy consumption by multiplying the number of units in use (by vintage) by the average unit energy consumption (also by vintage). Cumulative energy savings are the sum of the annual NES determined over a specified time period. The national NPV is the sum over time of the discounted net savings each year, which consists of the difference between total operating cost savings and increases in total installed costs. Critical inputs to this analysis include shipments projections, retirement rates (based on estimated product lifetimes), and estimates of changes in shipments in response to changes in product costs due to standards.

*6. Manufacturer Impact Analysis*

The purpose of the manufacturer impact analysis (MIA) is to identify and quantify the likely impacts of amended energy conservation standards on manufacturers of residential furnaces. Using industry research, public comments, and interviews with manufacturers and other interested parties, DOE will analyze and consider a wide range of quantitative and qualitative industry impacts that may occur due to amended energy conservation standards. Based on the information gathered during interviews and other research, DOE will assess impacts on competition, manufacturing capacity, employment, and regulatory burden.

*7. Utility Impact Analysis*

The utility impact analysis examines the effects of amended energy conservation standards on the installed generation capacity of electric, gas, and oil utilities. The utility impact analysis reports the changes in installed capacity and generation between the base case and the standards cases that result from each standard level by plant type.

*8. Environmental Impact Analysis*

The purpose of the environmental impact analysis is to quantify and consider the environmental effects of amended energy conservation standards for furnaces. The environmental analysis will assess impacts of amended energy conservation standards on the following types of energy-related emissions—carbon dioxide ($CO_2$), oxides of nitrogen ($NO_X$), sulfur dioxide ($SO_2$), and mercury (Hg). As part of the environmental impacts analysis, DOE plans to monetize the benefits associated with emissions reductions using a range of values.

*9. Employment Analysis*

The employment analysis will estimate indirect national job creation or elimination resulting from possible standards. Indirect employment impacts may result from expenditures shifting between goods (the substitution effect) and changes in income and overall expenditure levels (the income effect) that occur due to the standards. DOE defines indirect employment impacts from standards as net jobs eliminated or created in the general economy as a result of increased spending driven by increased equipment prices and reduced spending on energy.

*10. Regulatory Impact Analysis*

The regulatory impact analysis addresses the potential for non-regulatory approaches to supplant or augment energy conservation standards in order to improve the energy efficiency or reduce the energy consumption of the products covered under this rulemaking. DOE will base its assessment on the actual impacts of any such initiatives to date, but will also consider information presented regarding the impacts that any existing initiative might have in the future.

*11. Additional Supporting Analyses*

DOE will also conduct several analyses that support the analyses listed above, including the market and technology assessment and the screening analysis, which contribute to the engineering analysis, and the shipments analysis, which contributes to the NIA. DOE also conducts an LCC subgroup analysis, which evaluates economic impacts on selected groups of consumers who might be adversely affected by a change in the national energy conservation standards for the considered products.

DOE further describes each analysis, including the methodologies, key data sources, and issues for which DOE seeks public comment in the RAP. The RAP is available at the Web address given in the **SUMMARY** section of this notice.

DOE considers public participation to be a very important part of the process for setting energy conservation standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Beginning with the NOPM, and during each subsequent public meeting and comment period, interactions with and between members of the public provide a balanced discussion of the issues to assist DOE in the standards rulemaking process.

Accordingly, DOE encourages those who wish to participate in the public meeting to obtain the RAP from DOE's Web site and to be prepared to discuss its contents. A copy of the RAP is available at the Web address given in the **SUMMARY** section of this notice. However, public meeting participants need not limit their comments to the topics identified in the RAP. DOE is also interested in receiving views concerning other relevant issues that participants believe would affect energy

conservation standards for residential furnaces or that DOE should address in the NOPR.

Furthermore, DOE welcomes all interested parties, regardless of whether they participate in the public meeting, to submit in writing by April 14, 2010, comments and information on matters addressed in the RAP and on other matters relevant to consideration of standards for residential furnaces.

The public meeting will be conducted in an informal, conference style. A court reporter will be present to record the minutes of the meeting. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by United States antitrust laws.

After the public meeting and the expiration of the period for submitting written statements, DOE will consider all comments and additional information that is obtained from interested parties or through further analyses, and it will prepare a NOPR. The NOPR will include proposed energy conservation standards for the products covered by the rulemaking, and members of the public will be given an opportunity to submit written and oral comments on the proposed standards.

Issued in Washington, DC, on February 22, 2010.

**Cathy Zoi,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

[FR Doc. 2010–5564 Filed 3–12–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0102; Directorate Identifier 2010–NE–09–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Ontic Engineering and Manufacturing, Inc. Propeller Governors, Part Numbers C210776, T210761, D210760, and J210761

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain serial numbers (S/Ns) of Ontic Engineering and Manufacturing, Inc. propeller governors, part numbers (P/Ns) C210776, T210761, D210760, and J210761. This proposed AD would require removal of the affected propeller governors from service. This proposed AD results from three reports received of failed propeller governors. We are proposing this AD to prevent loss of propeller pitch control, damage to the propeller governor, and internal damage to the engine, which could prevent continued safe flight or safe landing.

**DATES:** We must receive any comments on this proposed AD by May 14, 2010.

**ADDRESSES:** Use one of the following addresses to comment on this proposed AD.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *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:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact Ontic Engineering and Manufacturing, Inc., 20400 Plummer Sreet, Chatsworth, CA 91311, e-mail: *Bill.nolan@ontic.com;* telephone (818) 725–2323; fax (818) 725–2535; or e-mail: *Susan.hunt@ontic.com;* telephone (818) 725–2121; fax (818) 725–2535, or on the Web at *http://www.ontic.com/pdf/SB–DES–353_Rev_A.pdf* for a copy of the service information identified in this proposed AD.

**FOR FURTHER INFORMATION CONTACT:** Roger Pesuit, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712; e-mail: *roger.pesuit@faa.gov;* telephone (562) 627–5251, fax (562) 627–5210.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send us any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA–2010–0102; Directorate Identifier 2010–NE–09–AD" in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, *etc.*). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

### Examining the AD Docket

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

### Discussion

We received three reports of failure of Ontic Engineering and Manufacturing, Inc. propeller governors. One of the reports was of a Diamond DA–40 airplane losing propeller pitch control during flight. The propeller governor controls propeller pitch by regulating oil pressure to the propeller pitch change mechanism. Changes in governor oil pressure are made by small changes in axial displacement of the governor's pilot valve plunger assembly. A fly weight governor opposes a compressed spring that rides on a collar which forms a part of the pilot valve plunger assembly. Investigation revealed that the set screw securing the collar to the pilot valve plunger assembly shaft may not be installed properly on a batch of parts permitting the pilot valve plunger to float on the shaft. The pilot valve shaft plunger and captive thrust bearing are then free to move axially along the pilot valve shaft. When the pilot valve is unconstrained in the axial direction, the propeller governor cannot control oil pressure to the propeller pitch control mechanism. This results in a loss of propeller pitch control. Further, concurrent thrust bearing failure permits bearing debris to flow with the oil into the engine lubrication system. The engine in the incident airplane was internally damaged as a result of a

propeller governor bearing ball becoming lodged between the valve lifter and engine case. This condition, if not corrected, could result in loss of propeller pitch control, damage to the propeller governor, and internal damage to the engine, which could prevent continued safe flight or safe landing.

**Relevant Service Information**

We have reviewed and approved the technical contents of Ontic Engineering and Manufacturing, Inc. Mandatory Service Bulletin (MSB) No. SB–DES–353, Revision A, dated December 16, 2009. That MSB lists the affected propeller governors by P/N and S/N, and describes procedures for returning them to the manufacturer for repair.

**FAA's Determination and Requirements of the Proposed AD**

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD, which would require removal of affected propeller governors from service. The proposed AD would require you to use the service information described previously to identify the affected S/Ns of propeller governors.

**Costs of Compliance**

We estimate that this proposed AD would affect 45 propeller governors installed on airplanes of U.S. registry. We also estimate that it would take about four work-hours per airplane to perform the proposed actions, and that the average labor rate is $85 per work-hour. Required repair parts would cost about $842 per propeller governor. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $83,790. Our cost estimate is exclusive of possible warranty coverage.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. You may get a copy of this summary at the address listed under **ADDRESSES**.

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

Under the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by adding the following new airworthiness directive:

**Ontic Engineering and Manufacturing, Inc.:** Docket No. FAA–2010–0102; Directorate Identifier 2010–NE–09–AD.

**Comments Due Date**

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by May 14, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Ontic Engineering and Manufacturing, Inc. propeller governors, part numbers (P/Ns) C210776, T210761, D210760, and J210761, as listed by serial number on pages 3 and 4 of Ontic Engineering and Manufacturing, Inc. Mandatory Service Bulletin (MSB) No. SB–DES–353, Revision A, dated December 16, 2009.

(d) These propeller governors are installed on, but not limited to, American Champion Aircraft Corporation Model 7GCAA (governor P/N T210761), Diamond Aircraft Industries, Inc. Model DA–40 (governor P/N C210776), Hawker Beechcraft Model A36 (governor P/N D210760), and Industria Aeronautica Neiva S/A (subsidiary of Embraer) model EMB–202A (governor P/N J210761) airplanes.

**Unsafe Condition**

(e) This AD results from three reports received of failed propeller governors. We are issuing this AD to prevent loss of propeller pitch control, damage to the propeller governor, and internal damage to the engine, which could prevent continued safe flight or safe landing.

**Compliance**

(f) You are responsible for having the actions required by this AD performed within 100 flight hours after the effective date of this AD, unless the actions have already been done.

(g) Remove affected propeller governors from service.

(h) After the effective date of this AD, do not install an affected propeller governor unless it has been inspected, repaired, and permanently marked with "SB–DES–353 Rev. A Date * * *." near the data plate, by Ontic Engineering and Manufacturing, Inc.

**Alternative Methods of Compliance**

(i) The Manager, Los Angeles Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

**Related Information**

(j) Contact Roger Pesuit, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712; e-mail: *roger.pesuit@faa.gov;* telephone (562) 627–5251, fax (562) 627–5210, for more information about this AD.

(k) Ontic Engineering and Manufacturing, Inc. MSB No. SB–DES–353, Revision A, dated December 16, 2009, pertains to the subject of this AD. Contact Ontic Engineering and Manufacturing, Inc., 20400 Plummer Street, Chatsworth, CA 91311, e-mail: *Bill.nolan@ontic.com;* telephone (818) 725–2323; fax (818) 725–2535; or e-mail: *Susan.hunt@ontic.com;* telephone (818) 725–2121; fax (818) 725–2535, or on the Web at *http://www.ontic.com/pdf/SB–DES–353_Rev_A.pdf* for a copy of this service information.

Issued in Burlington, Massachusetts, on March 5, 2010.

**Peter A. White,**

*Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.*

[FR Doc. 2010–5549 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0250; Directorate Identifier 2010–CE–011–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; PILATUS Aircraft Ltd. Model PC–7 Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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

This Airworthiness Directive (AD) is prompted due to the discovery of corrosion at the bonding strap connections on the left and right lower longerons between fuselage frames 1 and 1A. The possibility of corrosion is increased because of the high electrical current flow between the tinned copper terminal lug of the bonding strap and the aluminum longeron.

Such a condition, if left uncorrected, could lead to failure of the longeron and will prejudice the structural integrity of the aircraft.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by April 29, 2010.

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

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

### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0250; Directorate Identifier 2010–CE–011–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

### Discussion

The Federal Office of Civil Aviation (FOCA), which is the aviation authority for Switzerland, has issued FOCA AD HB–2010–001, dated February 12, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) is prompted due to the discovery of corrosion at the bonding strap connections on the left and right lower longerons between fuselage frames 1 and 1A. The possibility of corrosion is increased because of the high electrical current flow between the tinned copper terminal lug of the bonding strap and the aluminum longeron.

Such a condition, if left uncorrected, could lead to failure of the longeron and will prejudice the structural integrity of the aircraft. In order to correct and control the situation, this AD requires a one time inspection of the longeron structure and the terminal lugs of the bonding straps for signs of corrosion.

For left and right lower longerons where corrosion is found during the inspection, the MCAI also requires repair of any longeron where corrosion is found. You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

PILATUS Aircraft Ltd. has issued PILATUS PC–7 Service Bulletin No. 53–007, dated January 5, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

### FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

### Differences between this Proposed AD and the MCAI or Service Information

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

### Costs of Compliance

We estimate that this proposed AD will affect 10 products of U.S. registry. We also estimate that it would take about 4.5 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,825, or $383 per product.

In addition, we estimate that any necessary follow-on actions would take

about 3 work-hours and require parts costing $500, for a cost of $755 per product. We have no way of determining the number of products that may need these actions.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**PILATUS Aircraft Ltd.:** Docket No. FAA–2010–0250; Directorate Identifier 2010–CE–011–AD.

**Comments Due Date**

(a) We must receive comments by April 29, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Model PC–7 airplanes, all serial numbers, certificated in any category.

**Subject**

(d) Air Transport Association of America (ATA) Code 53: Fuselage.

**Reason**

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

This Airworthiness Directive (AD) is prompted due to the discovery of corrosion at the bonding strap connections on the left and right lower longerons between fuselage frames 1 and 1A. The possibility of corrosion is increased because of the high electrical current flow between the tinned copper terminal lug of the bonding strap and the aluminum longeron.

Such a condition, if left uncorrected, could lead to failure of the longeron and will prejudice the structural integrity of the aircraft.

In order to correct and control the situation, this AD requires a one time inspection of the longeron structure and the terminal lugs of the bonding straps for signs of corrosion.

For left and right lower longerons where corrosion is found during the inspection, the MCAI also requires repair of any longeron where corrosion is found.

**Actions and Compliance**

(f) Unless already done, do the following actions:

(1) Within the next 120 days after the effective date of this AD, perform a visual inspection of the forward bonding points and the terminal lugs on the left and right lower longerons between fuselage frames 1 and 1A for signs of corrosion. Do the inspection following paragraphs 3.C.(1), (2), and (3) of PILATUS PC–7 Service Bulletin No. 53–007, dated January 5, 2010.

(2) If during the inspection required in paragraph (f)(1) of this AD, any signs of corrosion are found, prior to further flight, perform corrective actions in accordance with the Accomplishment Instructions in paragraph 3.D of PILATUS PC–7 SB No. 53–007, dated January 5, 2010. If the corrosion damage is out of limits, record the values and apply to PILATUS for a repair scheme at: PILATUS AIRCRAFT LTD., Customer Service Manager, CH–6371 STANS, Switzerland; telephone: +41 (0) 41 619 62 08; fax: +41 (0) 41 619 73 11.

**Note 1:** The Federal Office of Civil Aviation (FOCA), which is the airworthiness authority for Switzerland, will work with PILATUS in reviewing the results of the initial inspection required by this AD. From this, a repetitive inspection requirement or other action may be established. The FAA will evaluate any such action and determine whether further rulemaking is necessary.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(h) Refer to MCAI FOCA AD HB–2010–001, dated February 12, 2010; and PILATUS PC–7 Service Bulletin No. 53–007, dated January 5, 2010, for related information.

Issued in Kansas City, Missouri, on March 4, 2010.

**Sandra J. Campbell,**

*Acting Manager, Small Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–5508 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 39**

**[Docket No. FAA–2010–0223; Directorate Identifier 2009–NM–105–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Bombardier, Inc. Model CL–600–2B19 (Regional Jet Series 100 & 440), CL–600–2C10 (Regional Jet Series 700, 701 & 702), CL–600–2D15 (Regional Jet Series 705), and CL–600–2D24 (Regional Jet Series 900) Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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

> Several cases of corrosion in lower structural members of the passenger door have been reported. It was subsequently determined that a drainage ramp (constructed from resin) had deteriorated with time and was retaining moisture. * * * Corrosion left undetected could eventually affect the structural integrity of the door and surrounding structure.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by April 29, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Craig Yates, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7355; fax (516) 794–5531.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0223; Directorate Identifier 2009–NM–105–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

### Discussion

Transport Canada Civil Aviation, which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2009–23, dated May 19, 2009 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Several cases of corrosion in lower structural members of the passenger door have been reported. It was subsequently determined that a drainage ramp (constructed from resin) had deteriorated with time and was retaining moisture. The ramp, therefore, requires removal, both to prevent further corrosion and to allow full access to the door structure during future scheduled inspections. Corrosion left undetected could eventually affect the structural integrity of the door and surrounding structure.

The required actions include a general visual inspection for corrosion and damage of the lower inner section of the door, repair if necessary, and application of corrosion inhibitor compound. You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

Bombardier has issued the modification summary packages listed in the following table. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

SERVICE INFORMATION

| Model | Bombardier service information | Revision | Date |
|---|---|---|---|
| CL-600–2B19 | Bombardier Modification Summary IS601R52110030 | A1 | April 24, 2009. |
| CL–600–2C10, CL–600–2D15 and CL–600–2D24 | Bombardier Modification Summary IS67052110074 | A1 | April 24, 2009. |

**FAA's Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

**Differences Between This AD and the MCAI or Service Information**

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

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

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about 1,072 products of U.S. registry. We also estimate that it would take about 28 work-hours per product to comply with the basic requirements of this proposed AD. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $2,551,360, or $2,380 per product.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**Bombardier, Inc:** Docket No. FAA–2010–0223; Directorate Identifier 2009–NM–105–AD.

**Comments Due Date**

(a) We must receive comments by April 29, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to the Bombardier, Inc. airplanes identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD, certificated in any category.

(1) Model CL–600–2B19 (Regional Jet Series 100 & 440) airplanes, serial numbers 7003 through 8089 inclusive;

(2) Model CL–600–2C10 (Regional Jet Series 700, 701 & 702) airplanes, serial numbers 10003 through 10265 inclusive; and

(3) Model CL–600–2D15 (Regional Jet Series 705) and CL–600–2D24 (Regional Jet Series 900) airplanes, serial numbers 15001 through 15173 inclusive.

**Subject**

(d) Air Transport Association (ATA) of America Code 52: Doors.

**Reason**

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

Several cases of corrosion in lower structural members of the passenger door have been reported. It was subsequently determined that a drainage ramp (constructed from resin) had deteriorated with time and was retaining moisture. The ramp, therefore, requires removal, both to prevent further corrosion and to allow full access to the door structure during future scheduled inspections. Corrosion left undetected could eventually affect the structural integrity of the door and surrounding structure.

The required actions include a general visual inspection for corrosion and damage of the lower inner section of the door, repair if necessary, and application of corrosion inhibitor compound.

**Compliance**

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

**Actions**

(g) Before the accumulation of 15,000 total flight hours, or within 5,000 flight hours after the effective date of this AD, whichever occurs later, do the actions specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD.

(1) Remove the lower passenger door ramp, in accordance with the applicable Bombardier modification summary package specified in Table 1 of this AD.

(2) Do a general visual inspection for any damage and corrosion behind the drainage ramp in the lower portion of the passenger door. If any damage or corrosion is found, before further flight repair in accordance with a method approved by the Manager, New York Aircraft Certification Office, FAA; or Transport Canada Civil Aviation (TCCA) (or its delegated agent).

(3) Remove the lower passenger door ramp and apply corrosion inhibitor compound, in accordance with the applicable Bombardier modification summary package specified in Table 1 of this AD. Applying corrosion inhibitor compound is a terminating action for the requirements of this AD.

TABLE 1—SERVICE INFORMATION

| Applicable airplanes | Bombardier service information | Revision | Date |
|---|---|---|---|
| Model CL–600–2B19 airplanes | Bombardier Modification Summary Package IS601R52110030. | A1 | April 24, 2009. |
| Model CL–600–2C10, CL–600–2D15, and CL–600–2D24 airplanes. | Bombardier Modification Summary Package IS67052110074. | A1 | April 24, 2009. |

(4) Inspections and modifications accomplished before the effective date of this AD according to Bombardier Modification Summary Package IS601R52110030, Revision A, dated July 5, 2006; or IS67052110074, Revision A, dated July 5, 2006; as applicable; are considered acceptable for compliance with the corresponding inspection or modification specified in this AD.

**FAA AD Differences**

**Note 1:** This AD differs from the MCAI and/or service information as follows:

The MCAI does not require an inspection or application of a corrosion inhibitor compound. This AD requires both actions.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(i) Refer to MCAI Canadian Airworthiness Directive CF–2009–23, dated May 19, 2009, and the Bombardier modification summary packages listed in Table 1 of this AD, for related information.

Issued in Renton, Washington on March 4, 2010.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–5515 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0225; Directorate Identifier 2009–NM–203–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Short Brothers PLC Model SD3 Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, * * * Special Federal Aviation Regulation 88 (SFAR88) * * * required a safety review of the aircraft Fuel Tank System * * *.

* * * * *

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' * * *. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by April 29, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Short Brothers PLC, Airworthiness, P.O. Box 241, Airport Road, Belfast, BT3 9DZ Northern Ireland; telephone +44(0)2890 –462469; fax +44(0)2890–468444; e-mail *michael.mulholland@aero.bombardier.com*; Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

**Examining the AD Docket**

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

**FOR FURTHER INFORMATION CONTACT:** Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0225; Directorate Identifier 2009–NM–203–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

**Discussion**

On June 5, 2006, we issued AD 2006–12–18, Amendment 39–14644 (71 FR 34801, June 16, 2006). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2006–12–18, we have determined that additional limitations for fuel tank systems and Critical Design Control Configuration Limitations (CDCCLs) are necessary. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2006–0198, dated July 11, 2006 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA published Special Federal Aviation Regulation 88 (SFAR88) in June 2001. SFAR 88 required a safety review of the aircraft Fuel Tank System to determine that the design meets the requirements of FAR [Federal Aviation Regulation] § 25.901 and § 25.981(a) and (b).
>
> A similar regulation has been recommended by the JAA [Joint Aviation Authorities] to the European National Aviation Authorities in JAA letter 04/00/02/07/03–L024 of 3 February 2003. The review was requested to be mandated by NAA's [National Airworthiness Authorities] using JAR [Joint Aviation Requirement] § 25.901(c), § 25.1309.
>
> In August 2005 EASA published a policy statement on the process for developing instructions for maintenance and inspection of Fuel Tank System ignition source prevention (EASA D 2005/CPRO, *www.easa.eu.int/home/cert_policy_statements_en.html*) that also included the EASA expectations with regard to compliance times of the corrective actions on the unsafe and the not unsafe part of the harmonised design review results. On a global scale the TC [type certificate] holders committed themselves to the EASA published compliance dates (see EASA policy statement). The EASA policy statement has been revised in March 2006: the date of 31–12–2005 for the unsafe related actions has now been set at 01–07–2006.
>
> Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' as defined in FAA's memo 2003–112–15 'SFAR 88—Mandatory Action Decision Criteria'. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.
>
> This EASA Airworthiness Directive mandates the Fuel System Airworthiness Limitations, comprising maintenance/inspection tasks and Critical Design Control Configuration Limitations (CDCCL) for the type of aircraft, that resulted from the design reviews and the JAA recommendation and EASA policy statement mentioned above.
>
> Revision History: PAD [proposed airworthiness directive] 06–018R1 has been issued to endorse comments received for PAD 06–018 and due to the change of the EASA policy statement on fuel tank safety on March 2006.

You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled "Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements" (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 ("SFAR 88," Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (*i.e.*, type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) issued a regulation that is similar to SFAR 88. Under that regulation, the JAA stated that all members of the European Civil Aviation Conference (ECAC) that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

**Relevant Service Information**

Bombardier has issued the temporary revisions (TRs) listed in the following table.

AMM TEMPORARY REVISIONS

| Model— | Bombardier temporary revision— | Dated— | To the AMM— |
|---|---|---|---|
| SD3–60 airplanes | TR360–AMM–55 | November 11, 2005 | Bombardier SD3–60 AMM, 360/MM SD3–60. |
| SD3–60 airplanes | TR360–AMM–56 | November 11, 2005 | Bombardier SD3–60 AMM, 360/MM SD3–60. |

The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

**FAA's Determination and Requirements of this Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

**Differences Between This AD and the MCAI or Service Information**

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

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

**Costs of Compliance**

Based on the service information, we estimate that this proposed AD would affect about 54 products of U.S. registry.

The actions that are required by AD 2006–12–18 and retained in this proposed AD take about 41 work-hours per product, at an average labor rate of $85 per work hour. Required parts cost about $10 per product. Based on these figures, the estimated cost of the currently required actions is $3,495 per product.

We estimate that it would take about 1 work-hour per product to comply with the new basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $4,590, or $85 per product.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by removing Amendment 39–14644 (71 FR 34801, June 16, 2006) and adding the following new AD:

**Short Brothers PLC:** Docket No. FAA–2010–0225; Directorate Identifier 2009–NM–203–AD.

**Comments Due Date**

(a) We must receive comments by April 29, 2010.

**Affected ADs**

(b) This AD supersedes AD 2006–12–18, Amendment 39–14644.

**Applicability**

(c) This AD applies to all Short Brothers PLC Model SD3–60 SHERPA, SD3–SHERPA, SD3–30, and SD3–60 airplanes, certificated in any category.

**Note 1:** This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (l) of this AD. The request should include a description of changes to the required inspections that will ensure the continued damage tolerance of the affected structure. The FAA has provided guidance for this determination in Advisory Circular (AC) 25–1529.

**Subject**

(d) Air Transport Association (ATA) of America Code 28: Fuel.

**Reason**

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

Subsequent to accidents involving Fuel Tank System explosions in flight * * * and on ground, the FAA published Special Federal Aviation Regulation 88 (SFAR88) in June 2001. SFAR 88 required a safety review of the aircraft Fuel Tank System to determine that the design meets the requirements of FAR [Federal Aviation Regulation] § 25.901 and § 25.981(a) and (b).

A similar regulation has been recommended by the JAA [Joint Aviation Authorities] to the European National Aviation Authorities in JAA letter 04/00/02/07/03–L024 of 3 February 2003. The review was requested to be mandated by NAA's [National Airworthiness Authorities] using JAR [Joint Aviation Requirement] § 25.901(c), § 25.1309.

In August 2005 EASA [European Aviation Safety Agency] published a policy statement on the process for developing instructions for maintenance and inspection of Fuel Tank System ignition source prevention (EASA D 2005/CPRO, *www.easa.eu.int/home/cert_policy_statements_en.html*) that also included the EASA expectations with regard to compliance times of the corrective actions on the unsafe and the not unsafe part of the harmonised design review results. On a global scale the TC [type certificate] holders committed themselves to the EASA published compliance dates (see EASA policy statement). The EASA policy statement has been revised in March 2006: the date of 31–12–2005 for the unsafe related actions has now been set at 01–07–2006.

Fuel Airworthiness Limitations are items arising from a systems safety analysis that have been shown to have failure mode(s) associated with an 'unsafe condition' as defined in FAA's memo 2003–112–15 'SFAR 88—Mandatory Action Decision Criteria'. These are identified in Failure Conditions for which an unacceptable probability of ignition risk could exist if specific tasks and/or practices are not performed in accordance with the manufacturers' requirements.

This EASA Airworthiness Directive mandates the Fuel System Airworthiness Limitations, comprising maintenance/inspection tasks and Critical Design Control Configuration Limitations (CDCCL) for the type of aircraft, that resulted from the design reviews and the JAA recommendation and EASA policy statement mentioned above.

Revision History: PAD [proposed airworthiness directive] 06–018R1 has been issued to endorse comments received for PAD 06–018 and due to the change of the EASA policy statement on fuel tank safety on March 2006.

**Compliance**

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

**Restatement of Requirements of AD 2006–12–18, With Revised Service Information**

*Revision of Airplane Flight Manual (AFM) With Additional AFM References in Table 1 of This AD*

(g) Within 30 days after July 21, 2006 (the effective date of AD 2006–12–18), revise the Limitations and Normal Procedures sections of the AFMs as specified in Table 1 of this AD to include the information in the applicable Shorts advance amendment bulletins as specified in Table 1 of this AD. The advance amendment bulletins address operation during icing conditions and fuel system failures. Thereafter, operate the airplane according to the limitations and procedures in the applicable advance amendment bulletin.

**Note 2:** The requirements of paragraph (g) of this AD may be done by inserting a copy of the applicable advance amendment bulletin into the AFM. When the applicable advance amendment bulletin has been included in general revisions of the AFM, the general revisions may be inserted into the AFM and the advance amendment bulletin may be removed, provided the relevant information in the general revision is identical to that in the advance amendment bulletin.

TABLE 1—AFM REVISIONS

| Airplane model— | Shorts advance amendment bulletin— | AFM— |
|---|---|---|
| SD3–30 airplanes | 1/2004, dated July 13, 2004 | SBH.3.2, SBH.3.3, SBH.3.6, SBH.3.7, SBH.3.8, and SB.3.9. |
| SD3–60 airplanes | 1/2004, dated July 13, 2004 | SB.4.3, SB.4.6, and SB.4.8. |
| SD3–60 SHERPA airplanes | 1/2004, dated July 13, 2004 | SB.5.2 or 6.2. |
| SD3–SHERPA airplanes | 1/2004, dated July 13, 2004 | SB.6.2 or 5.2. |

*Revision of Airworthiness Limitation (AWL) Section*

(h) Within 180 days after July 21, 2006: Revise the AWL section of the Instructions for Continued Airworthiness by incorporating airplane maintenance manual (AMM) Sections 5–20–01 and 5–20–02 as introduced by the Shorts temporary revisions (TR) specified in Table 2 of this AD into the AWL section of the AMMs for the airplane models specified in Table 2 of this AD, except as required by paragraph (j) of this AD. Thereafter, except as provided by paragraph (l)(1) of this AD, no alternative structural inspection intervals may be approved for the longitudinal skin joints in the fuselage pressure shell.

**Note 3:** The requirements of paragraph (h) of this AD may be done by inserting a copy of the applicable TR into the applicable AMM. When the TR has been included in general revisions of the AMM, the general revisions may be inserted in the AMM and the TR may be removed, provided the relevant information in the general revision is identical to that in the TR.

TABLE 2—AMM TEMPORARY REVISIONS

| Airplane model— | Temporary revision— | Dated— | AMM— |
|---|---|---|---|
| SD3–30 airplanes | TR330–AMM–13 | June 21, 2004 | SD3–30 AMM. |
| SD3–30 airplanes | TR330–AMM–14 | June 21, 2004 | SD3–30 AMM. |
| SD3–60 airplanes | TR360–AMM–33 | July 27, 2004 | SD3–60 AMM. |
| SD3–60 airplanes | TR360–AMM–34 | July 27, 2004 | SD3–60 AMM. |
| SD3–60 SHERPA airplanes | TRSD360S–AMM–14 | July 29, 2004 | SD3–60 SHERPA AMM. |
| SD3–60 SHERPA airplanes | TRSD360S–AMM–15 | July 29, 2004 | SD3–60 SHERPA AMM. |
| SD3–SHERPA airplanes | TRSD3S–AMM–15 | July 28, 2004 | SD3 SHERPA AMM. |
| SD3–SHERPA airplanes | TRSD3S–AMM–16 | July 28, 2004 | SD3 SHERPA AMM. |

*Resistance Check, Inspection, and Jumper Installation*

(i) Within 180 days after July 21, 2006: Perform the insulation resistance check, general visual inspections, and bonding jumper wire installations; in accordance with Shorts Service Bulletin SD330–28–37, SD360–28–23, SD360 SHERPA–28–3, or SD3 SHERPA–28–2; all dated June 2004; as applicable. If any defect or damage is discovered during any inspection or check required by this AD, before further flight, repair the defect or damage using a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; the Civil Aviation Authority (CAA) (or its delegated agent); or EASA (or its delegated agent).

**Note 4:** For the purposes of this AD, a general visual inspection is: "A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked."

**New Requirements of This AD**

*Actions and Compliance*

Revision of AWL Section: New Limitations and CDCCLs

(j) Within 90 days after the effective date of this AD: Revise the AWL section of the Instructions for Continued Airworthiness by incorporating aircraft maintenance manual (AMM) Sections 5–20–01 and 5–20–02 as introduced by the Bombardier temporary revisions (TRs) specified in Table 3 of this AD into the AWL section of the AMMs for the airplane models specified in Table 3 of this AD. Doing this revision terminates the requirement to incorporate Shorts TRs TR360–AMM–33, dated July 27, 2004; and TR360–AMM–34, dated July 27, 2004; specified in paragraph (h) of this AD. After doing this revision, TR360–AMM–33, dated July 27, 2004; and TR360–AMM–34, dated July 27, 2004; required by paragraph (h) of this AD may be removed.

TABLE 3—AMM TEMPORARY REVISIONS

| Model— | Bombardier temporary revision— | Dated— | To this AMM— |
|---|---|---|---|
| SD3–60 airplanes | TR360–AMM–55 | November 11, 2005 | Bombardier SD3–60 AMM, 360/MM. |
| SD3–60 airplanes | TR360–AMM–56 | November 11, 2005 | Bombardier SD3–60 AMM, 360/MM. |

**Note 5:** The requirements of paragraph (j) of this AD may be done by inserting a copy of the applicable TR into the applicable AMM. When the TR has been included in general revisions of the AMM, the general revisions may be inserted in the AMM and the TR may be removed, provided the relevant information in the general revision is identical to that in the TR.

(k) After accomplishing the actions specified in paragraph (j) of this AD, no alternative inspections, inspection intervals, or CDCCLs may be used unless the inspections, intervals, or CDCCLs are approved as an alternative method of compliance (AMOC), in accordance with the procedures specified in paragraph (l) of this AD.

*Explanation of CDCCL Requirements*

**Note 6:** Notwithstanding any other maintenance or operational requirements, components that have been identified as airworthy or installed on the affected airplanes before the revision of the AMM, as required by paragraph (h) or (j) of this AD, do not need to be reworked in accordance with the CDCCLs. However, once the AMM has been revised, future maintenance actions on these components must be done in accordance with the CDCCLs.

**FAA AD Differences**

**Note 7:** This AD differs from the MCAI and/or service information as follows: No differences.

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(m) Refer to MCAI EASA Airworthiness Directive 2006–0198, dated July 11, 2006; Shorts Service Bulletins SD330–28–37, SD360–28–23, SD360 SHERPA–28–3, and SD3 SHERPA–28–2, all dated June 2004; and the service information listed in Tables 1, 2, and 3 of this AD; for related information.

Issued in Renton, Washington, on March 4, 2010.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–5516 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2010–0222; Directorate Identifier 2008–NM–012–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; BAE SYSTEMS (Operations) Limited Model Avro 146–RJ and BAe 146 Airplanes

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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

A potential fleet wide problem has been identified regarding the interchanging of wing links on all BAe 146 & AVRO 146–RJ aircraft during scheduled maintenance. Some

operators erroneously believed that these parts were interchangeable. The effects of changing winglinks has resulted in either a shorter or longer wing link being fitted, which introduces local stresses in the wing top and bottom surfaces local to rib 2, wing links and wing link fitting attachment and the fuselage local to Frames 26 and 29. This condition, if not corrected, could result in a reduction of structural integrity of the fuselage/wing attachment with possible catastrophic consequences.

The unsafe condition could result in loss of a wing or controllability of the airplane. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

**DATES:** We must receive comments on this proposed AD by April 29, 2010.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact BAE Systems Regional Aircraft, 13850 McLearen Road, Herndon, Virginia 20171; telephone 703–736–1080; e-mail *raebusiness@baesystems.com*; Internet *http://www.baesystems.com/Businesses/RegionalAircraft/index.htm*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221 or 425–227–1152.

### Examining the AD Docket

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

**FOR FURTHER INFORMATION CONTACT:** Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0222; Directorate Identifier 2008–NM–012–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We have lengthened the 30-day comment period for proposed ADs that address MCAI originated by aviation authorities of other countries to provide adequate time for interested parties to submit comments. The comment period for these proposed ADs is now typically 45 days, which is consistent with the comment period for domestic transport ADs.

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

### Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2008–0003, dated January 8, 2008 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> A potential fleet wide problem has been identified regarding the interchanging of wing links on all BAe 146 & AVRO 146–RJ aircraft during scheduled maintenance. Some operators erroneously believed that these parts were interchangeable. The effects of changing winglinks has resulted in either a shorter or longer wing link being fitted, which introduces local stresses in the wing top and bottom surfaces local to rib 2, wing links and wing link fitting attachment and the fuselage local to Frames 26 and 29. This condition, if not corrected, could result in a reduction of structural integrity of the fuselage/wing attachment with possible catastrophic consequences.
>
> For the reasons described above, the present Airworthiness Directive (AD) requires the accomplishment of inspections and rectification actions, as necessary.

The unsafe condition could result in loss of a wing or controllability of the airplane. The inspections include inspecting wing links for incorrect part numbers (*i.e.,* parts that are not original), inspecting to determine wing geometry measurements, and inspecting the wing link, bores, bolts, and nuts for corrosion. Corrective actions include installing wing-to-fuselage fairings and repairing. You may obtain further information by examining the MCAI in the AD docket.

### Relevant Service Information

BAE Systems (Operations) Limited has issued Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

### FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

### Differences Between This AD and the MCAI or Service Information

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

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

### Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 1 product of U.S. registry. We also estimate that it would take about 180 work-hours per product to comply with the basic requirements of

this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on the U.S. operator to be $15,300.

**Authority for This Rulemaking**

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

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

**Regulatory Findings**

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

For the reasons discussed above, I certify this proposed regulation:

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

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

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

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

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

**§ 39.13 [Amended]**

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

**BAE SYSTEMS (Operations) Limited:** Docket No. FAA–2010–0222; Directorate Identifier 2008–NM–012–AD.

**Comments Due Date**

(a) We must receive comments by April 29, 2010.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to BAE Systems (Operations) Limited Model BAe 146–100A, –200A, and –300A; and Avro 146–RJ70A, 146–RJ85A, and 146–RJ100A airplanes; all serial numbers; certificated in any category; as identified in paragraph 1.A.(1) of BAE (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007.

**Subject**

(d) Air Transport Association (ATA) of America Code 57: Wings.

**Reason**

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

"A potential fleet wide problem has been identified regarding the interchanging of wing links on all BAe 146 & AVRO 146–RJ aircraft during scheduled maintenance. Some operators erroneously believed that these parts were interchangeable. The effects of changing winglinks has resulted in either a shorter or longer wing link being fitted, which introduces local stresses in the wing top and bottom surfaces local to rib 2, wing links and wing link fitting attachment and the fuselage local to Frames 26 and 29. This condition, if not corrected, could result in a reduction of structural integrity of the fuselage/wing attachment with possible catastrophic consequences.

"For the reasons described above, the present Airworthiness Directive (AD) requires the accomplishment of inspections and rectification actions, as necessary."

The unsafe condition could result in loss of a wing or controllability of the airplane. The inspections include inspecting wing links for incorrect part numbers (i.e., parts that are not original), inspecting to determine wing geometry measurements, and inspecting the wing link, bores, bolts, and nuts for corrosion. Corrective actions include installing wing-to-fuselage fairings and repairing.

**Compliance**

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

**Actions**

(g) Do the following actions.

(1) For airplanes subject to Maintenance Review Board Report (MRBR) requirements: Within 30 days after the effective date of this AD, revise the supplemental structural inspection (SSI) portion of the airplane inspection schedule, in accordance with paragraph 1.D.(2) of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. Do the initial inspection at the applicable time, and repeat at the applicable intervals, as specified in Appendix 3 of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. Where Appendix 3 of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, does not specify a compliance time in either flight cycles or in flight hours, use flight cycles.

(2) For airplanes subject to MRBR requirements: Accomplishing the inspections and all applicable corrective actions of paragraph 1.D.(3) of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, terminates the revisions to the SSI portion of the airplane inspection schedule incorporated in accordance with paragraph (g)(1) of this AD, provided that if any corrosion is found during any inspection specified in "Part C" or "Part D" of paragraph 2.C. of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, repair is accomplished before further flight using a method approved by the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(3) For operational airplanes subject to MRBR-to-Supplemental-Structural-Inspection-Document (SSID) transition requirements or to SSID requirements: Within 5,000 flight cycles after the effective date of this AD, do the inspections and all applicable corrective actions, in accordance with paragraph 2.C. of the Accomplishment Instructions of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, except if any corrosion is found during any inspection specified in "Part C" or "Part D" of paragraph 2.C. of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, repair must be accomplished using a method approved by the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent). Do all applicable corrective

actions before further flight, except that replacements of all the wing links that are not within the specified tolerance must be done before the airplane reaches its MRBR airframe life limit.

**Note 1:** For the purposes of this AD, a detailed inspection is: "An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required."

(4) For any inspection done in accordance with paragraph (g)(2) or (g)(3) of this AD: Send reports to BAE SYSTEMS, Customer Liaison, Customer Support (Building 37), BAE SYSTEMS (Operations) Limited, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland, Fax +44 (0) 1292 675432, e-mail *raengliason@baesystems.com,* at the applicable time in paragraph (g)(4)(i) or (g)(4)(ii) of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the number of landings and flight hours on the airplane.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(5) For airplanes that are non-operational as of the effective date of this AD and that are subject to MRBR-to-SSID transition requirements or to SSID requirements: Before returning any airplane to service, do the inspections and all applicable corrective actions, in accordance with paragraph 2.C. of the Accomplishment Instructions of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, except if any corrosion is found during any inspection specified in "Part C" or "Part D" of paragraph 2.C. of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007, repair must be accomplished using a method approved by the Manager, International Branch, ANM 116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(6) Actions accomplished before the effective date of this AD in accordance with BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, dated December 21, 2006, are considered acceptable for compliance with the corresponding action specified in this AD.

**FAA AD Differences**

**Note 2:** This AD differs from the MCAI and/or service information as follows: The MCAI does not specify a corrective action if corrosion is found during accomplishment of the actions specified in "Part C" and "Part D" of paragraph 2.C. of BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007. This AD requires that if any corrosion is found, a repair must be done in accordance with a method approved by the FAA or EASA (or its delegated agent).

**Other FAA AD Provisions**

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

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

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

**Related Information**

(i) Refer to MCAI EASA Airworthiness Directive 2008–0003, dated January 8, 2008; and BAE SYSTEMS (Operations) Limited Inspection Service Bulletin ISB.53–175, Revision 1, dated April 2, 2007; for related information.

Issued in Renton, Washington on March 4, 2010.

**Suzanne Masterson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 2010–5513 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2009–1167; Airspace Docket No. 09–ASW–33]**

## Establishment of Class E Airspace; Marianna, AR

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to establish Class E airspace at Marianna/Lee County Airport-Steve Edwards Field, Marianna, AR, to accommodate new Standard Instrument Approach Procedures (SIAPs) at Marianna/Lee County Airport-Steve Edwards Field. This action would enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at the airport.

**DATES:** 0901 UTC. Comments must be received on or before April 29, 2010.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–1167/Airspace Docket No. 09–ASW–33, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to

Docket No. FAA–2009–1167/Airspace Docket No. 09–ASW–33.'' The postcard will be date/time stamped and returned to the commenter.

**Availability of NPRMs**

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd, Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

**The Proposal**

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by establishing Class E airspace extending upward from 700 feet above the surface for SIAPs operations at Marianna/Lee County Airport-Steve Edwards Field, Marianna, AR. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, signed August 27, 2009 and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, part a, subpart i, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish controlled airspace at Lee County Airport-Steve Edwards Field, Marianna, AR.

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

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

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

* * * * *

**ASW AR E5 Marianna, AR [New]**

Marianna/Lee County Airport–Steve Edwards Field
(Lat. 34°46′58″ N., long. 90°48′36″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Marianna/Lee County Airport–Steve Edwards Field.

Issued in Fort Worth, TX, on February 24, 2010.

**Walter Tweedy,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2010–5574 Filed 3–12–10; 8:45 am]

**BILLING CODE 4901–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2009–1184; Airspace Docket No. 09–ASW–39]**

## Class E Airspace; Manila, AR

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class E airspace at Manila, AR. Decommissioning of the Manila non-directional beacon (NDB) at Manila Municipal Airport has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** 0901 UTC. Comments must be received on or before April 29, 2010.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number, FAA–2009–1184/Airspace Docket No. 09–ASW–39, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Dockets Office (telephone 1–800–647–5527) is on the ground floor of the building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire.

Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2009–1184/Airspace Docket No. 09–ASW–39." The postcard will be date/time stamped and returned to the commenter.

**Availability of NPRMs**

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

**The Proposal**

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Manila Municipal Airport, Manila, AR. Airspace reconfiguration is necessary due to the decommissioning of the Manila NDB and the cancellation of the NDB approach. Adjustment to the geographic coordinates would be made in accordance with the FAA's National Aeronautical Charting Office. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, dated August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Manila Municipal Airport, Manila, AR.

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

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

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

* * * * *

**ASW AR E5 Manila, AR [Amended]**

Manila Municipal Airport, AR
(Lat. 35°53′40″ N., long. 90°09′16″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Manila Municipal Airport.

Issued in Fort Worth, TX on February 24, 2010.

**Walter Tweedy,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2010–5567 Filed 3–12–10; 8:45 am]

**BILLING CODE 4901–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2009–1181; Airspace Docket No. 09–ASW–36]**

## Class E Airspace; Mountain View, AR

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class E airspace at Mountain View, AR. Decommissioning of the Wilcox non-directional beacon (NDB) at Mountain View Wilcox Memorial Field Airport has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** 0901 UTC. Comments must be received on or before April 29, 2010.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–1181/Airspace Docket No. 09–ASW–36, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket

containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2009–1181/Airspace Docket No. 09–ASW–36." The postcard will be date/time stamped and returned to the commenter.

**Availability of NPRMs**

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

**The Proposal**

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Mountain View Wilcox Memorial Field Airport, Mountain View, AR. Airspace reconfiguration is necessary due to the decommissioning of the Wilcox NDB and the cancellation of the NDB approach. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, dated August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Mountain View Wilcox Memorial Field Airport, Mountain View, AR.

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

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

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

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

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

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

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

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

* * * * *

**ASW AR E5 Mountain View, AR [Amended]**

Mountain View Wilcox Memorial Field Airport, AR
(Lat. 35°51′52″ N., long. 92°05′25″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Wilcox Memorial Field Airport and within 1.8 miles each side of the 273° bearing from the airport extending from the 6.4-mile radius to 11.5 miles west of the airport, and within 2 miles each side of the 093° bearing from the airport extending from the 6.4-mile radius to 12.1 miles east of the airport.

Issued in Fort Worth, TX, on February 24, 2010.

**Walter Tweedy,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2010–5571 Filed 3–12–10; 8:45 am]

**BILLING CODE 4901–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2009–1177; Airspace Docket No. 09–ASW–34]**

## Class E Airspace; Batesville, AR

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class E airspace at Batesville, AR. Decommissioning of the Independence County non-directional beacon (NDB) at Batesville Regional Airport has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** 0901 UTC. Comments must be received on or before April 29, 2010.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–1177/Airspace Docket No. 09–ASW–34, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2009–1177/Airspace Docket No. 09–ASW–34." The postcard will be date/time stamped and returned to the commenter.

### Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

### The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by amending Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Batesville Regional Airport, Batesville, AR. Airspace reconfiguration is necessary due to the decommissioning of the Independence County NDB and the cancellation of the NDB approach. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, dated August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Batesville Regional Airport, Batesville, AR.

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

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

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

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

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

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

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

* * * * *

**ASW AR E5 Batesville, AR [Amended]**

Batesville Regional Airport, AR
(Lat. 35°43′34″ N., long. 91°38′51″ W.)

That airspace extending upward from 700 feet above the surface within a 9.3-mile radius of Batesville Regional Airport and within 4 miles each side of the 260° bearing from the airport extending from the 9.3-mile radius to 12.2 miles west of the airport.

Issued in Fort Worth, TX, on February 24, 2010.

**Walter Tweedy,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2010–5572 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 71

**[Docket No. FAA–2009–0697; Airspace Docket No. 09–ACE–10]**

## Class E Airspace; Beatrice, NE

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class E airspace at Beatrice, NE. Decommissioning of the Shaw non-directional beacon (NDB) at Beatrice Municipal Airport has made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** 0901 UTC. Comments must be received on or before April 29, 2010.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2009–0697/Airspace Docket No. 09–ACE–10, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

**FOR FURTHER INFORMATION CONTACT:** Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2009–0697/Airspace Docket No. 09–ACE–10." The postcard will be date/time stamped and returned to the commenter.

### Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

### The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), Part 71 by amending Class E airspace extending upward from 700 feet above the surface for standard instrument approach procedures at Beatrice Municipal Airport, Beatrice, NE. Airspace reconfiguration is necessary due to the decommissioning of the Shaw NDB and cancellation of the NDB approach. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Paragraph 6005 of FAA Order 7400.9T, dated August 27, 2009, and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at Beatrice Municipal Airport, Beatrice, NE.

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration

proposes to amend 14 CFR part 71 as follows:

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

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

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

**§ 71.1 [Amended]**

2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

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

* * * * *

**ACE NE E5 Beatrice, NE [Amended]**

Beatrice Municipal Airport, TX
(Lat. 40°18′05″ N., long. 96°45′15″ W.)
Beatrice VOR/DME
(Lat. 40°18′05″ N., long. 96°45′17″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Beatrice Municipal Airport and within 2.4 miles each side of the 320° radial from the Beatrice VOR/DME extending from the 6.5-mile radius to 7.5 miles northwest of the airport, and within 2.4 miles each side of the 003° radial from the Beatrice VOR/DME extending from the 6.5-mile radius to 7.5 miles north of the airport.

Issued in Fort Worth, TX, on February 24, 2010.

**Walter Tweedy,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2010–5569 Filed 3–12–10; 8:45 am]

**BILLING CODE 4901–13–P**

## CONSUMER PRODUCT SAFETY COMMISSION

## 16 CFR Part 1450

## Virginia Graeme Baker Pool and Spa Safety Act; Public Accommodation

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Proposed interpretive rule.

**SUMMARY:** The Consumer Product Safety Commission ("Commission" or "CPSC") is issuing this proposed rule to interpret the term "public accommodation" as used in the Virginia Graeme Baker Pool and Spa Safety Act.

**DATES:** Written comments in response to this document must be received no later than April 14, 2010.

**ADDRESSES:** You may submit comments, identified by Docket No. CPSC–2010–0018, by any of the following methods:

**Electronic Submissions**

Submit electronic comments in the following way:

*Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer accepting comments submitted by electronic mail (e-mail) except through *http://www.regulations.gov.*

**Written Submissions**

Submit written submissions in the following way:

*Mail/Hand delivery/Courier (for paper (preferably in five copies), disk, or CD–ROM submissions), to:* Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

*Instructions:* All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information electronically. Such information should be submitted in writing.

*Docket:* For access to the docket to read background comments or comments received, go to *http://www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Barbara E. Little, Regulatory Affairs Attorney, Office of General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814–4408; *blittle@cpsc.gov.*

**SUPPLEMENTARY INFORMATION:**

### A. Background

The Virginia Graeme Baker Pool and Spa Safety Act, 15 U.S.C. 8001, ("VGB Act" or "Act") requires that drains in public pools and spas be equipped with ASME/ANSI A112.19.8 compliant drain covers, and that each public pool and spa with a single main drain other than an unblockable drain be equipped with certain secondary anti-entrapment systems. Section 1404(c) of the Act. The Act defines "public pool and spa" to include a swimming pool or spa that is "open exclusively to patrons of a hotel or other public accommodations facility." Section 1404(c)(2)(B)(iii) of the Act. The term "public accommodations facility" is not defined in the Act.

The Commission has received numerous inquiries regarding what constitutes a public accommodations facility under the VGB Act. This proposed interpretive rule would define "public accommodation" as the term in used in the Virginia Graeme Baker Pool and Spa Safety Act.[1]

### B. Legal Analysis

In adopting a reasonable interpretation of "public accommodations facility," the Commission examined how other federal statutes define this same term. The Americans with Disabilities Act (ADA) defines "public accommodation" in relevant part as "an inn, hotel, motel, or other place of lodging, *except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor*" (emphasis added). 42 U.S.C. § 12181(7). Under this definition, pools or spas found at bed and breakfasts with five or fewer rooms for rent or hire and that are actually occupied by the proprietor would not be considered "public pools or spas" under the VGB Act, nor would pools or spas that are located on single family home rental properties.

The Civil Rights Act (CRA) employs the same definition of "public accommodation" in relevant part as does the ADA, i.e., "any inn, hotel, motel, or other establishment which provides lodging to transient guests, *other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence*" (emphasis added). 42 U.S.C. 2000(b). This definition, then, is used in two prominent federal statutes addressing civil rights. Operators of inns, hotels, and lodging establishments likely are aware of these statutes addressing civil rights and the definitions they employ.

The phrase "public accommodation" also appears in a Federal statute administered by the CPSC. Section 104(c) of the Consumer Product Safety Improvement Act of 2008 (CPSIA) provides that it is a violation of the Consumer Product Safety Act for "any person to which this subsection applies to manufacture * * * or otherwise place in the stream of commerce a crib that is not in compliance with a

[1] The Commissioners voted 4–1 (Commissioner Robert Adler dissenting) to issue this proposed interpretive rule. Commissioner Robert Adler filed a statement, a copy of which is available from the Office of the Secretary or on the Commission's Web site at *http://www.cpsc.gov.*

standard promulgated under subsection (b) [of section 104]." Section 104(c)(2)(D) of the CPSIA provides, in relevant part, that section 104(c) of the CPSIA applies to any person who "*owns or operates a public accommodation* affecting commerce (as defined in section 4 of the Federal Fire Prevention and Control Act of 1974 (FFPCA) (15 U.S.C. 2203)" (emphasis added). Section 4 of the FFPCA defines a place of public accommodation as "any inn, hotel, or other establishment not owned by the Federal Government that provides lodging to transient guests, *except that such term does not include* an establishment treated as an apartment building for purposes of any State or local law or regulation or *an establishment located within a building that contains not more than 5 rooms for rent or hire and that is actually occupied as a residence by the proprietor of such establishment*" (emphases added). 15 U.S.C. 2203(7). The FFPCA contains the same exclusion from public accommodation as do the ADA and CRA; in other words, all three statutes exclude an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied as a residence by the proprietor of such establishment. The FFPCA, like the VGB Act, is a statute intended to promote public safety. Further, the FFPCA's definition is used in the CPSIA, a statute which is administered by the CPSC. Parties familiar with the CPSC may already be familiar with the definition of "public accommodation" as used in the CPSIA. Thus, the Commission believes it is appropriate to enforce the same interpretation of the phrase "public accommodation" in the VGB Act as used in the CPSIA, especially given the similar public safety goals of the statutes.

**List of Subjects in 16 CFR Part 1450**

Consumer protection, Infants and children, Law enforcement.

**C. Conclusion**

For the reasons stated above, the Commission proposes to amend chapter II of title 16 of the Code of Federal Regulations by adding a new part 1450 to read as follows:

## PART 1450—VIRGINIA GRAEME BAKER POOL AND SPA SAFETY ACT REGULATIONS

Sec.
1450.1 Scope.
1450.2 Definitions.

**Authority:** 15 U.S.C. 2051–2089, 86 Stat. 1207; 15 U.S.C. 8001–8008, 121 Stat. 1794

**§ 1450.1 Scope.**

This part pertains to the Virginia Graeme Baker Pool and Spa Safety Act, ("Act"), 15 U.S.C. 8001 *et seq.,* which is designed to prevent child drowning, drain entrapments and eviscerations in pools and spas.

**§ 1450.2 Definitions.**

(a) *Public accommodations facility* means an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor.

(b) [Reserved.]

Dated: March 4, 2010.

**Todd A. Stevenson,**

*Secretary, Consumer Product Safety Commission.*

[FR Doc. 2010–5130 Filed 3–12–10; 8:45 am]

**BILLING CODE 6355–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R03–OAR–2010–0039; FRL–9127–3]**

## Approval and Promulgation of Air Quality Implementation Plans; Delaware; Control of Nitrogen Oxide Emissions From Industrial Boilers and Process Heaters at Petroleum Refineries

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Delaware. The revision adds a new section, Section 2—Control of Nitrogen Oxide Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries to Delaware's Regulation No. 1142/SIP Regulation No. 42— Specific Emission Control Requirements for controlling nitrogen oxide ($NO_X$) emissions from industrial boilers. This action is being taken under the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before April 14, 2010.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA–R03–OAR–2010–0039 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–2010–0039, Cristina Fernandez, 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–2010–0039. 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:** Gregory Becoat, (215) 814–2036, or by e-mail at *becoat.gregory@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Background

On November 17, 2009, the Delaware Department of Natural Resources and Environmental Control (DNREC) submitted a revision to its SIP for an amendment to Regulation No. 1142/SIP Regulation No. 42—Specific Emission Control Requirements. This SIP revision added a new section, Section 2—Control of Nitrogen Oxide Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries. The regulation was adopted in order to require new and/or additional controls on industrial boilers and process heaters with heat input capacities of equal to or greater than 200 million British thermal units per hour (mmBTU/hr) at petroleum refining facilities and to help Delaware attain and maintain the national ambient air quality standards (NAAQS) for the 1997 8-hour ozone standard by 2010.

## II. Summary of SIP Revision

Regulation No.1142/SIP Regulation No. 42 establishes applicability and compliance dates to any industrial boiler or process heater with a maximum heat input capacity of equal to or greater than 200 mmBTU/hr, which is operated or permitted to operate within a petroleum refinery facility (except for any Fluid Catalytic Cracking Unit carbon monoxide (CO) boiler). Regulation No.1142/SIP Regulation No. 42 establishes $NO_X$ emission limitations for any industrial boiler or process heater with a maximum heat input capacity of equal to or greater than 200 mmBTU/hr, which is operated or permitted to operate within a petroleum refinery facility. The regulation also requires compliance with monitoring, recordkeeping, and reporting requirements.

## III. Proposed Action

EPA is proposing to approve the amendment to Delaware's SIP revision Regulation No. 1142/SIP Regulation No. 42—Specific Emission Control Requirements submitted on November 17, 2009. This regulation will help to reduce $NO_X$ emissions from Delaware's large industrial boilers and process heaters that are located at petroleum refineries and help Delaware attain and maintain the NAAQS for the 1997 8-hour ozone standard by 2010. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

## IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely 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 Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, pertaining to Delaware's amendment to add a new section, Section 2—Control of Nitrogen Oxide Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries to Regulation No. 1142/SIP Regulation No. 42—Specific Emission Control Requirements, 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, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: February 25, 2010.

**W.C. Early,**

*Acting Regional Administrator, Region III.*

[FR Doc. 2010–5583 Filed 3–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 622

**[Docket No. 100210083–0085–01]**

**RIN 0648–AY67**

### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic; Commercial King and Spanish Mackerel Fisheries of the Gulf of Mexico; Control Date

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

**ACTION:** Advanced notice of proposed rulemaking; request for comments.

**SUMMARY:** This notice announces that the Gulf of Mexico Fishery Management Council (Council) is considering additional management measures to further limit the number of participants or levels of participation in the commercial king and Spanish mackerel components of the coastal migratory pelagic fishery operating in the exclusive economic zone (EEZ) of the Gulf of Mexico. If such management

measures are implemented, the Council is considering June 30, 2009, as a possible control date for king mackerel and March 31, 2010, as a possible control date for Spanish mackerel. These dates may serve to determine eligibility of catch histories in the commercial king and Spanish mackerel fisheries. NMFS invites comments on the revision of these control dates.

**DATES:** Comments must be submitted by April 14, 2010.

**ADDRESSES:** You may submit comments, identified by RIN 0648–AY67, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal *http://www.regulations.gov*
- Mail: Susan Gerhart, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701

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. Comments should apply to the control date as an eligibility requirement for a catch share program, not the catch share program itself.

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov*, enter "NOAA-NMFS–2010–0031" 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.

**SUPPLEMENTARY INFORMATION:** The commercial fishery for mackerel in the Gulf of Mexico is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared jointly by the South Atlantic Fishery Management Council and the Gulf of Mexico Fishery Management Council (Council), and implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

The Council anticipates that future action may be necessary to further control effort or participation of Gulf of Mexico (Gulf) king and Spanish mackerel through additional management actions. At its February 2010 meeting, the Council approved a motion to revise control dates for king and Spanish mackerel. Specifically, the Council may consider creating additional restrictions to limit participation including creating a catch share program. To discourage accelerated effort to develop a catch history before the program is implemented, the Council may establish eligibility criteria based on catch histories from, and before, the most recent full fishing seasons. The proposed control date for king mackerel would be June 30, 2009, and the proposed control date for Spanish mackerel would be March 31, 2010. Thus, landings of the respective species after these dates may not count toward potential eligibility under a future management program. The implementation of a future program to restrict access in the fishery would require preparation of an amendment to the FMP and publication of a notice of availability of the amendment with a comment period, publication of a proposed rule with a public comment period, approval of the amendment, and issuance of a final implementing rule.

The current control date for both king and Spanish mackerel is October 16, 1995. This current notice proposes an adjustment of the control dates for these fisheries to the end of the most recent fishing year to allow incorporation of more recent as well as historical fishing activity.

The revision of control dates for king and Spanish mackerel does not commit the Council or NMFS to any particular management regime. The Council may or may not make use of these control dates as part of the qualifying criteria for participation in any potential future catch share or fishery management program for Gulf group mackerel. Fishermen are not guaranteed future participation in the fishery, regardless of their entry date or intensity of participation in the fishery before or after the control dates under consideration. Future determinations of the Council may give variably weighted consideration to fishermen active in the fishery before and after the control dates. Other qualifying criteria, such as documentation of landings and sales, may be applied for entry into the fishery. Additionally, the Council may choose to take no further action to control entry or access to the fishery, in which case the control dates may be rescinded.

This notification also gives the public notice that interested participants should locate and preserve records that substantiate and verify their participation in the commercial king and Spanish mackerel fisheries in the Gulf EEZ.

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

Dated: March 9, 2010.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator For Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2010–5603 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–22–S**

# Notices

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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

### Office of the Secretary

### Notice of the National Agricultural Research, Extension, Education, and Economics Advisory Board Meeting

**AGENCY:** Research, Education, and Economics, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, 5 U.S.C. App. 2, the United States Department of Agriculture announces a meeting of the National Agricultural Research, Extension, Education, and Economics Advisory Board.

**DATES:** The National Agricultural Research, Extension, Education, and Economics Advisory Board will meet March 29–31, 2010.

The public may file written comments before or up to two weeks after the meeting with the contact person identified in this notice.

**ADDRESSES:** The meeting will take place at the Washington Court Hotel, 525 New Jersey Avenue, NW., Washington, DC 20001. Written comments from the public may be sent to the Contact Person identified in this notice at: The National Agricultural Research, Extension, Education, and Economics Advisory Board; Research, Education, and Economics Advisory Board Office, Room 3901, South Building, United States Department of Agriculture, STOP 0321, 1400 Independence Avenue, SW., Washington, DC 20250–2255.

**FOR FURTHER INFORMATION CONTACT:** Karen Hunter, Executive Director, National Agricultural Research, Extension, Education, and Economics Advisory Board; *telephone:* (202) 720–3684; *fax:* (202) 720–6199; or *e-mail: Shirley.morgan@ars.usda.gov.*

**SUPPLEMENTARY INFORMATION:** The entire meeting to include orientation is open to the public. On Monday, March 29, 2010, an orientation session for new members and interested incumbent members will be held from 10:30 a.m.–12 p.m. (noon). The full Advisory Board will convene at 12 p.m. (noon) with introductory remarks by the Chair of the Advisory Board. There will be brief introductions of new Board members, incumbents, and guests followed by general Board business. Comments will be heard from a variety of distinguished leaders and experts, as well as officials and/or leaders from the four agencies in the USDA Research, Education, and Economics mission area. Speakers will provide information for the Board to consider while developing recommendations regarding enhancement of USDA research, extension, education, and economic programs for the protection of U.S. food, fiber, fuel and agricultural systems. USDA officials have been invited to provide brief remarks and welcome the new Board members. On Tuesday, March 30, 2010 a focus session on the topic of Food Security will begin at 8 a.m. and adjourn at 5:30 p.m. On Wednesday, March 31, 2010, the meeting will reconvene at 8 a.m. to continue discussions on Food Security and draft preliminary recommendations. An opportunity for public comment will be offered at the end of each day. The Advisory Board Meeting will adjourn by 12:00 (noon) on Wednesday.

Written comments by attendees or other interested individuals will be welcomed for the public record before and up to two weeks following the Board meeting (by close of business Wednesday, April 14, 2010). All statements will become a part of the official record of the National Agricultural Research, Extension, Education, and Economics Advisory Board and will be kept on file for public review in the Research, Extension, Education, and Economics Advisory Board Office.

**Margaret M. Jahn,**

*Acting, Under Secretary, Research, Education, and Economics.*

[FR Doc. 2010–5570 Filed 3–12–10; 8:45 am]

**BILLING CODE 3410–03–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2010–0001]**

### Notice of Availability of a Draft Pest Risk Assessment on Honey Bees Imported from Australia

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service has prepared an evaluation of the pest risks associated with the importation of honey bees from Australia. The draft pest risk assessment considers potential pest risks involved in the importation of honeybees into the United States from Australia after concerns that exotic honey bee pathogens or parasites may have been introduced into Australia. We are making the draft pest risk assessment available to the public for review and comment.

**DATES:** We will consider all comments that we receive on or before May 14, 2010.

**ADDRESSES:** You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0001*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS–2010–0001, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. APHIS–2010–0001.

*Reading Room:* You may read any comments that we receive on the draft pest risk assessment in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to

help you, please call (202) 690–2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

**FOR FURTHER INFORMATION CONTACT:** Dr. Colin D. Stewart, Senior Entomologist, PPQ, APHIS, 4700 River Road Unit 133, Riverdale, MD 20737–1237; (301) 734–0774.

**SUPPLEMENTARY INFORMATION:**

**Background**

The regulations in 7 CFR part 322 restrict the importation, interstate movement, and transit through the United States of bees, beekeeping byproducts, and beekeeping equipment to prevent the introduction of pests into the United States through the importation of honeybees from approved regions. Australia is currently on the list of approved regions from which adult honeybees maybe imported into the United States under certain conditions.

In March 2002, APHIS issued a report assessing the risks of pest introduction into the United States in imports of honey bees (*Apis mellifera* L.) from Australia. The evaluation identified 15 pathogens and pests of bees in that country, all of which occur in the United States. The evaluation concluded that there were no quarantine-significant honey bee pathogens or pests occurring in Australia.

In the 7 years since the completion of the evaluation for Australian bees, new threats to the U.S. honey bee population have emerged. The most prominent threat is Colony Collapse Disorder, a mysterious syndrome characterized by the abrupt disappearance of a colony's adult worker bee population, leaving a substantial population of healthy brood, an absence of dead bees, and the delayed invasion of hive pests and robbing of hive stores by neighboring colonies. A link between the disorder, first reported in the United States in 2006, and honey bee imports from Australia has been suggested. The May 2007 discovery of colonies of the Asian honey bee (*Apis cerana*) near Cairns, Victoria, also has raised concerns that exotic honey bee pathogens or parasites may have been introduced into Australia with the arrival of this foreign bee. These developments suggest a need to reevaluate the risks involved in importation of bees from Australia.

APHIS' review and analysis of the risks associated with the importation of honey bees from Australia are documented in detail in a draft pest risk assessment (PRA) titled, "Evaluation of Pest Risks Associated with Importation of Honey Bees (*Apis mellifera* L.) from Australia" (November 2009). Findings presented in the draft PRA state that there are honey bee viruses present in Australia that are not known to occur in the United States. The draft PRA concludes that zoosanitary measures may be necessary to reduce the possibility of the introduction of these viruses to the United States via the importation of honey bees from Australia.

We are making the draft PRA available to the public for review and comment. We will consider all comments that we receive on or before the date listed under the heading **DATES** at the beginning of this notice. The draft PRA and the comments received may be the basis for a future change in the regulations.

The draft PRA may be viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for instructions for accessing Regulations.gov and information on the location and hours of the reading room). You may request paper copies of the draft PRA by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the draft PRA when requesting copies.

Done in Washington, DC, this 8th day of March 2010.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2010–5573 Filed 3–12–10; 8:45 am]

**BILLING CODE 3410–34–S**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS-2009-0101]**

### Notice of Availability of a Draft Response to Petitions for the Reclassification of Light Brown Apple Moth as a Non-Quarantine Pest

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** We are advising the public that the Animal and Plant Health Inspection Service is making available, for public review and comment, a draft response to two petitions we received requesting the reclassification of light brown apple moth [*Epiphyas postvittana* (Walker)] as a non-quarantine pest. Following the review period, APHIS will consider the comments prior to the release of a final petition response.

**DATES:** We will consider all comments that we receive on or before May 14, 2010.

**ADDRESSES:** You may submit comments by either of the following methods:

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0101*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS-2009-0101, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0101.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690-2817 before coming.

*Other Information:* Additional information about APHIS and its programs is available on the Internet at (*http://www.aphis.usda.gov*).

**FOR FURTHER INFORMATION CONTACT:** Ms. Andrea Simao, National Program Manager, Emergency and Domestic Programs, PPQ, APHIS, 4700 River Road, Unit 26, Riverdale, MD 20737-1231; (301) 734-0930.

**SUPPLEMENTARY INFORMATION:**

**Background**

Light brown apple moth (*Epiphyas postvittana [Walker]*) (LBAM) is a plant pest with a broad host range of over 2,000 plant species, including stone fruit (peaches, plums, nectarines, cherries, and apricots), apples, pears, grapes, and citrus. LBAM larvae feed on the leaves and fruit of host plants and, under appropriate conditions, may result in significant damage. The pest can be very difficult to eradicate once it is established in an area. To date, natural enemies of leaf rollers have not impacted LBAM populations in the infested areas of California and few predators or parasites of LBAM have been observed.

Although LBAM was first detected in the late 1800s in Hawaii, it is present only at elevations of 1,394 feet or above in the State. Because most agricultural production in Hawaii occurs in the coastal regions, at elevations below 1,394 feet, LBAM has not been considered a pest of concern within the State. However, the interstate movement from Hawaii of cut flowers, fruits and vegetables, plants, and portions of plants, including LBAM host material, is currently prohibited unless the articles are first inspected and found free of plant pests (including LBAM) or are treated for plant pests.

Moths suspected of being LBAM were detected in Alameda and Contra Costa Counties, CA, in February 2007, and were subsequently confirmed as LBAM on March 16, 2007. Due to California's cooler climate and the potential impact of LBAM on a wide range of crops, an aggressive response program has been conducted by the State of California with support from the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture.

On September 12, 2008, and February 4, 2009, petitions were submitted to the Secretary of Agriculture requesting that APHIS reclassify LBAM from an actionable, quarantine-significant pest to a non-actionable, non-quarantine pest and that APHIS relieve the Federal restrictions placed on the interstate movement of LBAM host articles from areas where the pest had been detected. The petitions also questioned APHIS' ability to eradicate LBAM, the appropriateness of technologies used to support an eradication program, the potential impacts of these technologies on the environment and to human health and safety, and the effectiveness of the communication strategies used to inform the public about the LBAM program.

This document announces the availability of our draft response to those petitions, titled "APHIS Draft Response to Petitions for the Reclassification of Light Brown Apple Moth [*Epiphyas postvittana* (Walker)] as a Non-Quarantine Pest." For the sake of clarity, the discussion in our response focused on the petitioners' request to reclassify LBAM. Questions raised by the petitions regarding regulatory and other actions are distinctly different discussions and are addressed separately in an accompanying document that provides additional information on the LBAM program in a frequently asked questions (FAQ) format.

The text of the petitions, APHIS' draft petition response, and FAQ may be viewed on the Internet at the Regulations.gov Web site (see **ADDRESSES** above for instructions on accessing Regulations.gov). The draft response and FAQ may also be viewed on the APHIS Web site at (*http://www.aphis.usda.gov/plant_health/plant_pest_info/lba_moth/index.shtml*). You may request paper copies of the documents by calling or writing to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to the title of the documents when requesting copies. The documents are also available for review in our reading room (information on the location and hours of the reading room is listed under the heading **ADDRESSES** at the beginning of this notice).

After evaluating public comments we receive during the comment period (see **DATES** at the beginning of this notice), APHIS will determine whether or not to continue Federal enforcement of mandatory phytosanitary domestic quarantine regulations and the application of mandatory procedures for the official control of LBAM. We will then publish a document in the **Federal Register** announcing our determination.

Done in Washington, DC, this 9th day of March 2010.

**Kevin Shea,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2010–5599 Filed 3–12–10; 12:46 pm]

**BILLING CODE 3410–34–S**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Proposed Information Collection; Comment Request; Defense Priorities and Allocations System

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

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before May 14, 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 Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Abstract**

This recordkeeping requirement is necessary for administration and enforcement of delegated authority under the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061, et seq.) and the Selective Service Act of 1948 (50 U.S.C. App. 468). Any person who receives a priority-rated order under the implementing Defense Priorities and Allocations System regulation (15 CFR part 700) must retain the records for at least 3 years.

**II. Method of Collection**

Records retention.

**III. Data**

*OMB Control Number:* 0694–0053.

*Form Number(s):* None.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 707,000.

*Estimated Time per Response:* 1 to 32 minute(s).

*Estimated Total Annual Burden Hours:* 14,477.

*Estimated Total Annual Cost to Public:* $290,000.

**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: March 10, 2010.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010–5546 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### Bureau of Industry and Security

### Proposed Information Collection; Comment Request; Request for Special Priorities Assistance

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

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before May 14, 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 Larry Hall, BIS ICB Liaison, (202) 482–4895, *lhall@bis.doc.gov.*

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

The information collected from defense contractors and suppliers on Form BIS–999, Request for Special Priorities Assistance, is required for the enforcement and administration of special priorities assistance under the Defense Production Act, the Selective Service Act and the Defense Priorities and Allocation System regulation.

#### II. Method of Collection

Submitted electronically or in paper form.

#### III. Data

*OMB Control Number:* 0694–0057.

*Form Number(s):* BIS–999.

*Type of Review:* Regular submission.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 1,200.

*Estimated Time per Response:* 30 minutes.

*Estimated Total Annual Burden Hours:* 600.

*Estimated Total Annual Cost to Public:* $0.

#### 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: March 10, 2010.

**Gwellnar Banks,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010–5547 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–33–P**

## DEPARTMENT OF COMMERCE

### Census Bureau

### Proposed Information Collection; Comment Request; AGE Search Service

**AGENCY:** U.S. Census Bureau.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

**DATES:** To ensure consideration, written comments must be submitted on or before May 14, 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(s) and instructions should be directed to Angela Feldman Harkins, Assistant Division Chief (Processing), United States Census Bureau, National Processing Center, Jeffersonville, Indiana 46132, on (812) 218–3434 (or e-mail at *angela.m.feldman.harkins@census.gov*).

**SUPPLEMENTARY INFORMATION:**

#### I. Abstract

Age Search is a service provided by the U.S. Census Bureau for persons who need official transcripts of personal data as proof of age for pensions, retirement plans, Medicare, and social security. The transcripts are also used as proof of citizenship to obtain passports or to provide evidence of family relationship for rights of inheritance. The Age Search forms are used by the public in order to provide the Census Bureau with the necessary information to conduct a search of historical population decennial census records in order to provide the requested transcript. The Age Search service is self-supporting and is funded by the fees collected from the individuals requesting the service.

#### II. Method of Collection

The Form BC–600, Application for Search of Census Records, is a public use form that is submitted by applicants requesting information from the decennial census records. Applicants are requested to enclose appropriate fee by check or money order with the completed and signed Form BC–600 and return by mail to the U.S. Census Bureau, Personal Census Search Unit, in Jeffersonville, Indiana. The BC–600 (SP) is a Spanish version of the BC–600. The Form BC–649(L), which is called a "Not Found", advises the applicant that search for information from the census records was unsuccessful. The BC–658(L), is sent to the applicant when insufficient information has been received on which to base a search of the census records. These two forms request additional information from the applicant to aid in the search of census records.

#### III. Data

*OMB Control Number:* 0607–0117.

*Form Number:* BC–600, BC–600 (SP), BC–649(L), BC–658(L).

*Type of Review:* Regular submission.

*Affected Public:* Individuals or households.

*Estimated Number of Respondents:* 3653 Total (BC–600 & BC–600 (SP), 642; BC–649(L), 847; BC–658(L), 164).

*Estimated Time Per Response:* BC–600 or BC–600 (SP), 12 minutes; BC–649(L), 6 minutes; BC–658(L), 6 minutes.

*Estimated Total Annual Burden Hours:* 630 hours.

*Estimated Total Annual Cost:* The Age Search processing fee is $65.00 per case. An additional charge of $20 per case for expedited requests requiring results within one day is also available.

*Respondents Obligation:* Voluntary. May be required to obtain/retain benefits.

**Legal Authority:** Title 13, United States Code, Section 8.

**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: March 10, 2010.

**Glenna Mickelson,**

*Management Analyst, Office of the Chief Information Officer.*

[FR Doc. 2010–5554 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–07–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before April 5, 2010. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

*Docket Number:* 10–001. *Applicant:* United States Environmental Protection Agency, 26 W. MLK Ave., ML 681, Cincinnati, OH 45268. *Instrument:* Electron Microscope. *Manufacturer:* JEOL, Japan. *Intended Use:* The instrument will be used to investigate material and biological, micro and nano-sized phenomena from a variety of sources. The samples will be fixed, sectioned and attached to grids to be viewed in the instrument. *Justification for Duty-Free Entry:* There are no domestic manufacturers of this instrument. *Application accepted by Commissioner of Customs:* January 29, 2010.

Dated: March 9, 2010.

**Christopher Cassel,**

*Director, IA Subsidies Enforcement Office.*

[FR Doc. 2010–5594 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Application(s) for Duty-Free Entry of Scientific Instruments

Pursuant to Section 6(c) of the Educational, Scientific and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, as amended by Pub. L. 106–36; 80 Stat. 897; 15 CFR part 301), we invite comments on the question of whether instruments of equivalent scientific value, for the purposes for which the instruments shown below are intended to be used, are being manufactured in the United States.

Comments must comply with 15 CFR 301.5(a)(3) and (4) of the regulations and be postmarked on or before April 5, 2010. Address written comments to Statutory Import Programs Staff, Room 3720, U.S. Department of Commerce, Washington, DC 20230. Applications may be examined between 8:30 a.m. and 5 p.m. at the U.S. Department of Commerce in Room 3720.

*Docket Number:* 10–002.

*Applicant:* University of Michigan, 1301 Beal Avenue, Ann Arbor, MI 49109–2122.

*Instrument:* Tester for TFT Imager.

*Manufacturer:* Siemens AG, Corporate Technology, Germany.

*Intended Use:* This instrument will be used to analyze the image capturing capability of amorphous silicon TFT and organic photo-diode. This instrument must be capable of measuring dynamic rate, linearity and noise. It must also support voltages in the rate of -10 V to 20 V and support maximum 60 Hz scanning speed. Another pertinent specification for this instrument is that it must be capable of working with an imager, having 128 rows and 128 columns.

*Justification for Duty-Free Entry:* No instruments of same general category are manufactured in the United States. Application accepted by Commissioner of Customs: January 29, 2010.

Dated: March 9, 2010.

**Christopher Cassel,**

*Director, IA Subsidies Enforcement Office.*

[FR Doc. 2010–5592 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–840]**

### Certain Frozen Warmwater Shrimp from India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, Notice of Intent to Rescind Review in Part, and Notice of Intent to Revoke Order in Part

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

**SUMMARY:** The Department of Commerce (Department) is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from India with respect to 159 companies.[1] The respondents which the Department selected for individual examination are Devi Sea Foods Limited (Devi), Falcon Marine Exports Limited (Falcon), and the Liberty Group.[2] The respondents which were not selected for individual examination are listed in the "Preliminary Results of Review" section of this notice. This is the fourth

[1] This figure does not include those companies for which the Department is rescinding the administrative review.

[2] The Liberty Group consists of the following companies: Devi Marine Food Exports Private Limited, Kader Exports Private Limited, Kader Investment and Trading Company Private Limited, Liberty Frozen Foods Private Limited, Liberty Oil Mills Ltd., Premier Marine Products, and Universal Cold Storage Private Limited (collectively, "Liberty Group").

administrative review of this order. The period of review (POR) is February 1, 2008, through January 31, 2009.

We preliminarily determine that sales made by Devi have not been made at below normal value (NV), while those made by Falcon and the Liberty Group have been made at below NV, and, therefore, are subject to antidumping duties. In addition, based on the preliminary results for the respondents selected for individual examination, we have preliminarily determined a margin for those companies that were not individually examined. Finally, we have also preliminarily determined to revoke the antidumping duty order with respect to shrimp from India produced and exported by Devi.

If the preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

**EFFECTIVE DATE:** March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Henry Almond or Blaine Wiltse, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0049 or (202) 482–6345, respectively.

**SUPPLEMENTARY INFORMATION:**

## Background

In February 2005, the Department published in the **Federal Register** an antidumping duty order on certain frozen warmwater shrimp from India. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from India*, 70 FR 5147 (Feb. 1, 2005) (Shrimp Order). On February 4, 2009, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order of certain frozen warmwater shrimp from India for the period February 1, 2008, through January 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 74 FR 6013 (Feb. 4, 2009). In response to timely requests from interested parties pursuant to 19 CFR 351.213(b)(1) and (2) to conduct an administrative review of the U.S. sales of shrimp by numerous Indian producers/exporters, the Department published a notice of initiation of administrative review for 332 companies. *See Certain Frozen Warmwater Shrimp From Brazil, India and Thailand: Notice of Initiation of Administrative Reviews*, 74 FR 15699 (Apr. 7, 2009) (*Initiation Notice*).

In the *Initiation Notice*, we indicated that the Department would select mandatory respondents for individual examination based upon CBP entry data, and that we would limit the respondents selected for individual examination in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act). *See Initiation Notice*, 74 FR at 15708. In April 2009, we received comments on the issue of respondent selection from the Marine Products Export Development Authority, the Seafood Exporters Association of India, and the Embassy of India, as well as from Devi, Falcon, the Domestic Processors,[3] and the petitioner.[4]

In April and May 2009, we received statements from 46 companies that indicated that they had no shipments of subject merchandise to the United States during the POR. During these months, we also received requests from the petitioner and Domestic Processors requesting that the Department determine whether antidumping duties had been absorbed by the respondents that were to be required to participate in this review.

In May 2009, after considering the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. *See* Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from Holly Phelps, Analyst, Office 2, AD/CVD Operations, entitled: "2008–2009 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from India: Selection of Respondents for Individual Review," dated May 13, 2009 (Respondent Selection Memo). As a result, we selected the three largest producers/exporters of certain frozen warmwater shrimp from India during the POR (i.e., Devi, Falcon, and the Liberty Group) for individual examination in this segment of the proceeding. Accordingly, we issued the antidumping duty questionnaire to these companies on May 14, 2009.

In June and July 2009, we received responses from Devi, Falcon, and the Liberty Group to section A (*i.e.*, the section related to general information), sections B and C (*i.e.*, the sections covering comparison market and U.S. sales, respectively), and section D (*i.e.*, the section covering cost of production (COP)) of the questionnaire. Also in July 2009, the petitioner withdrew its requests for review of 144 companies, in accordance with 19 CFR 351.213(d)(1), and we issued a supplemental questionnaire to the Liberty Group regarding the products sold in its third country markets.

In August and September 2009, we issued supplemental sales and cost questionnaires to each respondent, and Devi and the Liberty Group responded to these questionnaires. Also, in September 2009, the Department requested that Devi submit proof that its unaffiliated purchasers paid the antidumping duties assessed on its POR entries in order to determine whether duty absorption occurred.

On October 20, 2009, the Department extended the preliminary results in the current review to no later than March 1, 2010. *See Certain Frozen Warmwater Shrimp From India and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Fourth Administrative Reviews*, 74 FR 53700 (Oct. 20, 2009).

From October through December 2009, the Department issued additional supplemental sales questionnaires to Devi and Falcon, as well as a supplemental cost questionnaire to Devi. Also, in these months each of the respondents submitted responses to each of the Department's outstanding requests for information, and Devi responded to the Department's duty absorption inquiry. From December 9 through 11, 2009, the Department verified the U.S. sales data reported by Devi's U.S. affiliate, Devi Seafoods, Inc. (Devi Inc.).

In January 2010, the Department issued a second supplemental sales questionnaire and a third supplemental cost questionnaire to the Liberty Group, and the Liberty Group responded to these questionnaires.

In February 2010, the Department verified the sales data reported by Devi in India and selected Japan as the appropriate third country comparison market for both Falcon and the Liberty Group. *See* the Memorandum to James Maeder, Director, Office 2, AD/CVD Operations, from Holly Phelps, Analyst, Office 2, AD/CVD Operations, entitled, "2008–2009 Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from India - Selection of the Appropriate Third Country Market for Falcon Marine Exports Limited," dated February 26, 2010 (Third Country Market Memo).

[3] The Domestic Processors consist of the American Shrimp Processors Association and the Louisiana Shrimp Association.

[4] The petitioner is the Ad Hoc Shrimp Trade Action Committee.

Also in this month, Falcon and the Liberty Group submitted updated sales information at the Department's request. In March 2010, the Department plans to verify the cost data reported by Devi in India.

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary results of this review is now March 8, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

**Scope of the Order**

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the Penaeidae family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (Macrobrachium rosenbergii), giant tiger prawn (Penaeus monodon), redspotted shrimp (Penaeus brasiliensis), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and ten percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

**Partial Rescission of Review**

On July 6, 2009, the petitioner withdrew its requests for an administrative review for each of the following 133 companies within the time limits set forth in 19 CFR 351.213(d)(1):

1) A.S. Marine Industries Pvt Ltd.
2) Adani Exports Ltd
3) Aditya Udyog
4) Agri Marine Exports Ltd.
5) AL Mustafa Exp & Imp
6) Alapatt Marine Exports
7) All Seas Marine P. Ltd.
8) Alsa Marine & Harvests Ltd.
9) Ameena Enterprises
10) Amison Foods Ltd.
11) Amison Seafoods Ltd.
12) Anjani Marine Traders
13) Aqua Star Marine Foods
14) Arsha Seafood Exports Pvt. Ltd.
15) ASF Seafoods
16) Ashwini Frozen Foods
17) Aswin Associates
18) Balaji Seafood Exports I Ltd.
19) Bell Foods (Marine Division)
20) Bharat Seafoods
21) Bhisti Exports
22) Bilal Fish Suppliers
23) Capital Freezing Complex
24) Cham Exports Ltd.
25) Cham Ocean Treasures Co., Ltd.
26) Cham Trading Organization
27) Chand International
28) Cherukattu Industries (Marine Div.)
29) Danda Fisheries
30) Dariapur Aquatic Pvt. Ltd.
31) Deepmala Marine Exports
32) Dhanamjaya Impex P. Ltd.
33) Dorothy Foods
34) El–Te Marine Products
35) Excel Ice Services/Chirag Int'l
36) Firoz & Company
37) Freeze Engineering Industries (Pvt. Ltd.)
38) Gajula Exim P. Ltd.
39) Gausia Cold Storage P. Ltd.
40) Global Sea Foods & Hotel Ltd.
41) Goan Bounty
42) Gold Farm Foods (P) Ltd.
43) Golden Star Cold Storage
44) Gopal Seafoods
45) Gtc Global Ltd.
46) HA & R Enterprises
47) Hanswati Exports P. Ltd.
48) HMG Industries Ltd.
49) Honest Frozen Food Company
50) India CMS Adani Exports
51) India Seafoods
52) Indian Seafood Corporation
53) Interfish
54) InterSea Exports Corporation
55) J R K Seafoods Pvt. Ltd.
56) Kaushalya Aqua Marine Product Exports Pvt. Ltd.
57) Keshodwala Foods
58) Key Foods
59) King Fish Industries
60) Konkan Fisheries Pvt. Ltd.
61) Lakshmi Marine Products
62) Lansea Foods Pvt. Ltd.
63) Laxmi Narayan Exports
64) Lotus Sea Farms
65) M K Exports
66) M. R. H. Trading Company
67) Malabar Marine Exports

[5] "Tails" in this context means the tail fan, which includes the telson and the uropods.

68) Mamta Cold Storage
69) Marina Marine Exports
70) Marine Food Packers
71) Miki Exports International
72) Mumbai Kamgar MGSM Ltd.
73) N.C. Das & Company
74) Naik Ice & Cold Storage
75) Nas Fisheries Pvt. Ltd.
76) National Seafoods Company
77) National Steel
78) National Steel & Agro Ind.
79) New Royal Frozen Foods
80) Noble Aqua Pvt. Ltd.
81) Nsil Exports
82) Omsons Marines Ltd.
83) Padmaja Exports
84) Partytime Ice Pvt. Ltd.
85) Philips Foods India Pvt. Ltd.
86) R K Ice & Cold Storage
87) R F. Exports
88) Rahul Foods (GOA)
89) Rahul International
90) Raj International
91) Ramalmgeswara Proteins & Foods Ltd.
92) Rameshwar Cold Storage
93) Ravi Frozen Foods Ltd.
94) Regent Marine Industries
95) Relish Foods
96) Royal Link Exports
97) Rubian Exports
98) Ruby Marine Foods
99) Ruchi Worldwide
100) S K Exports (P) Ltd.
101) SS International
102) Sabri Food Products
103) Salet Seafoods Pvt Ltd.
104) Samrat Middle East Exports (P) Ltd.
105) Sarveshwari Ice & Cold Storage P Ltd.
106) Satyam Marine Exports
107) Sea Rose Marines (P) Ltd.
108) Sealand Fisheries Ltd.
109) Seaperl Industries
110) Sharat Industries Ltd.
111) Shimpo Exports
112) Shipper Exporter National Steel
113) Siddiq Seafoods
114) Skyfish
115) SLS Exports Pvt. Ltd.
116) Sonia Fisheries
117) Sourab
118) Sreevas Export Enterprises
119) Sri Sidhi Freezers & Exporters Pvt. Ltd.
120) Star Fish Exports
121) Supreme Exports
122) The Canning Industries (Cochin) Ltd.
123) Torry Harris Seafoods Pvt. Ltd.
124) Tri Marine Foods Pvt. Ltd.
125) Trinity Exports
126) Tri–Tee Seafood Company
127) Ulka Seafoods (P) Ltd.
128) Upasana Exports
129) V Marine Exports
130) Varnita Cold Storage
131) Vijayalaxmi Seafoods
132) Winner Seafoods
133) Z A Food Products

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review if a party that requested a review withdraws the request within 90 days of the date of publication of the notice of initiation. The petitioner's requests for administrative review were timely withdrawn for all 133 companies listed above, in accordance with 19 CFR 351.213 (d)(1). Therefore, because no other interested party requested a review for these companies, in accordance with 19 CFR 351.213(d)(1), the Department is rescinding this review on 133 of the companies for which the request for administrative review was withdrawn.[6]

**Notice of Intent to Rescind Review in Part**

Furthermore, in accordance with 19 CFR 351.213(d)(3), we preliminarily intend to rescind the review in part with respect to the following 35 companies because these companies[7] certified that they had no shipments or sales of subject merchandise during the POR:
1) Abad Fisheries
2) Allanna Frozen Foods Pvt. Ltd.
3) Allansons Ltd.
4) Amulya Sea Foods
5) Anjaneya Seafoods
6) Baby Marine (Eastern) Exports
7) Baby Marine Exports
8) Baby Marine International
9) Baby Marine Products
10) Baby Marine Sarass
11) Baraka Overseas Traders
12) Blue Water Foods & Exports P. Ltd.
13) BMR Exports
14) Coreline Exports
15) Frigerio Conserva Allana Ltd.
16) G A Randerian Ltd.
17) G.K S Business Associates Pvt. Ltd.
18) Hiravata Ice & Cold Storage
19) Hiravati Exports Pvt. Ltd.
20) Hiravati International Pvt. Ltd. (located at Jawar Naka, Porbandar, Gujarat, 360 575, India)
21) Indian Aquatic Products
22) Innovative Foods Limited
23) Interseas
24) K R M Marine Exports Ltd.
25) K V Marine Exports
26) Kalyanee Marine
27) L. G Seafoods
28) Lewis Natural Foods Ltd.
29) Libran Cold Storages (P) Ltd.
30) Lourde Exports
31) Sanchita Marine Products P Ltd
32) Silver Seafood
33) Sterling Foods
34) Veejay Impex
35) Veraval Marines & Chemicals P Ltd.

We reviewed CBP data and confirmed that there were no entries of subject merchandise exported by any of these companies. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we preliminarily intend to rescind our review for the 35 companies listed above. *See e.g., Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Preliminary Results, Preliminary Partial Rescission and Request for Revocation, In Part, of the Third Administrative Review*, 74 FR 10009, 10011 (Mar. 9, 2009), unchanged in C*ertain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47191 (Sept. 15, 2009); *see also Certain Frozen Warmwater Shrimp from India: Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 77610 (Dec. 19, 2008).

Additionally, the Department initiated separate administrative reviews for the following companies with the same name but different addresses: 1) Devi Fisheries Limited; 2) Premier Marine Products; 3) Ram's Assorted Cold Storage Ltd.; 4) Satya Sea Foods Pvt. Limited; and 5) Usha Sea Foods. Specifically, these are companies for which we initiated multiple administrative reviews because the petitioner and/or the respondent listed separate addresses for the same company in their review requests. *See Initiation Notice*, 74 FR at 15700–15704. The Department sent letters asking for clarification of the multiple addresses and same company names. We received

[6] In addition to the 133 companies noted above, the petitioner also withdrew its request for administrative review for the following 11 companies: 1) Baby Marine (Eastern) Exports, 2) Baby Marine Exports, 3) Baby Marine Products, 4) Baraka Overseas Traders, 5) Gajula Exim P. Ltd., 6) Kadalkanny Frozen Foods, 7) Premier Exports International, 8) Premier Marine Foods, 9) Sagar Samrat Seafoods, 10) Uniroyal Marine Exports Ltd., and 11) Vaibhav Sea Foods. However, there are outstanding review requests from other interested parties for each of these companies. Therefore, the review cannot be rescinded with respect to these companies based on the petitioner's withdrawal of its request for review. Nonetheless, pursuant to 19 CFR 351.213(d)(3), we are preliminarily rescinding the review for the first five companies listed above because they reported that they had no shipments of subject merchandise during the POR. *See* below for further discussion.

[7] The Department also received statements of no shipment form the following three companies: Diamond Seafood Exports, Edhayam Frozen Foods Pvt. Ltd., and Theva & Company. However, the Department collapsed the members of the Kadalkanny Group, which consists of these three companies and Kadalkanny Frozen Foods. *See Certain Frozen Warmwater Shrimp from India: Partial rescission of Ntidumping Duty Administrative Review*, 73 FR 6125, 6126 (Feb. 1, 2008) (*AR2 Rescission Notice*). Therefore, because there remains an outstanding request for review for Kadalkanny Frozen Foods, we are not rescinding the review for the Kadalkanny Group collectively, or these three companies individually.

responses from the companies listed above verifying the correct addresses and indicating that the company names have been duplicated. Therefore, the Department is also preliminarily rescinding the review with respect to these duplicate company names (*i.e.*, these companies will be included in the current administrative review only once).

Finally, the Department also initiated separate administrative reviews for Calcutta Seafoods and Calcutta Seafoods Pvt. Ltd., two companies with the same address but different names. Subsequently, we received information from Calcutta Seafoods Pvt. Ltd. demonstrating that Calcutta Seafoods no longer exists, and that this entity is currently doing business as Calcutta Seafoods Pvt. Ltd. Consequently, we are also preliminarily rescinding our review with respect to Calcutta Seafoods, in accordance with our practice. *See AR2 Rescission Notice*, 73 FR at 6127.

**Notice of Intent To Revoke Order, in Part**

As noted above, on February 27, 2009, Devi requested revocation of the antidumping duty order with respect to its sales of subject merchandise, pursuant to 19 CFR 352.672(e). This request was accompanied by certifications, pursuant to 19 CFR 352.672(e)(1) that: 1) Devi has sold the subject merchandise at not less than NV during the current POR and that it will not sell the merchandise at less than NV in the future; and 2) Devi sold subject merchandise to the United States in commercial quantities for a period of at least three consecutive years. Devi also agreed to immediate reinstatement of the antidumping duty order, as long as any exporter or producer is subject to the order, if the Department concludes that, subsequent to its revocation, it sold the subject merchandise at less than NV.

Pursuant to section 751(d) of the Act, the Department "may revoke, in whole or in part" an antidumping duty order upon completion of a review under section 751(a) of the Act. In determining whether to revoke an antidumping duty order in part, the Department considers: 1) whether the company in question has sold subject merchandise at not less than NV for a period of at least three consecutive years; 2) whether the company has agreed in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the company, subsequent to revocation, sold the subject merchandise at less than NV; and 3) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping. *See* 19 CFR 352.672(b)(2)(i); *see also Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination To Revoke in Part*, 72 FR 62630, 62631 (Nov. 6, 2007). If, based on these criteria, the Department determines that the antidumping order as to that company is no longer warranted, pursuant to section 751(d) of the Act and 19 CFR 352.672(b)(2)(ii), the Department will revoke the order as it applies to that company.

We have preliminarily determined that the request from Devi meets all of the criteria under 19 CFR 352.672(e)(1). Our preliminary margin calculation confirms that Devi sold shrimp at not less than NV during the current review period. *See* the "Preliminary Results of the Review" section below. In addition, we have confirmed that Devi sold shrimp at not less than NV in the two previous administrative reviews in which it was individually examined (*i.e.*, its dumping margins were *de minimis*). *See Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 33409, 33411 (July 13, 2009) (2007–2008 Final Results); *see also Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492, 40495 (July 15, 2008) (*2006–2007 Final Results*).

Based on our examination of the sales data submitted by Devi, we preliminarily determine that it sold the subject merchandise in the United States in commercial quantities in each of the consecutive years cited by Devi to support its request for revocation. See the Memorandum to the File, from Henry Almond, Analyst, Office 2, AD/CVD Operations, entitled, "Analysis of Commercial Quantities for Devi Sea Foods Limited's Request for Revocation," dated March 8, 2010. Thus, we preliminarily find that Devi had *de minimis* dumping margins for its last three administrative reviews and sold subject merchandise in commercial quantities in each of these years. Also, we preliminarily determine, pursuant to section 751(d) of the Act and 19 CFR 351.222(b)(2), that the application of the antidumping duty order with respect to Devi is no longer warranted for the following reasons: 1) the company had a zero or *de minimis* margin for a period of at least three consecutive years; 2) the company has agreed to immediate reinstatement of the order if the Department finds that it has resumed making sales at less than NV; and, 3) the continued application of the order is not otherwise necessary to offset dumping. Therefore, we preliminarily determine that subject merchandise produced and exported by Devi qualifies for revocation from the antidumping duty order on frozen warmwater shrimp from India and that the order with respect to such merchandise should be revoked. If these preliminary findings are affirmed in our final results, we will revoke this order, in part, with respect to shrimp produced and exported by Devi and, in accordance with 19 CFR 351.222(f)(3), terminate the suspension of liquidation for any of the merchandise in question that is entered, or withdrawn from warehouse, for consumption on or after February 1, 2009, and instruct CBP to release any cash deposits for such entries.

**Duty Absorption**

On April 21, 2009, and May 7, 2009, the petitioner and the Domestic Processors, respectively, requested that the Department determine whether antidumping duties had been absorbed during the POR. Section 751(a)(4) of the Act directs the Department, if requested, to determine during an administrative review initiated two or four years after the publication of the order, whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. In the current review, only one of the three respondents, Devi, sold to the United States through an importer that is affiliated within the meaning of section 751 (a)(4) of the Act.

Section 351.213(j)(1) of the Department's regulations provides that during any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping order, the Department will conduct a duty absorption review, if requested by a domestic interested party. The current administrative review was initiated four years after the publication of the Shrimp Order and the request was timely submitted to the Department by domestic interested parties. Accordingly, we are able to make a duty absorption determination in this segment of the proceeding.

In determining whether the antidumping duties have been absorbed by the respondents during the POR, we examine the antidumping duties calculated in the administrative review in which the absorbtion inquiry is requested. *See* 19 CFR 351.213(j)(3). The Department presumes that the duties

will be absorbed for those sales that have been made at less than NV. This presumption can be rebutted with evidence (*e.g.*, an enforceable agreement between the affiliated importer and unaffiliated purchaser) that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise. *See, e.g., Certain Stainless Steel Butt–Weld Pipe Fittings from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind*, 70 FR 39735, 39737 (July 11, 2005).

On September 24, 2009, we issued a letter to Devi requesting proof that the company's unaffiliated purchasers would ultimately pay the antidumping duties to be assessed on entries during the POR. On October 9, 2009, Devi submitted a letter to the Department stating that it had zero antidumping duties in the previous two administrative reviews and it anticipated that the Department will determine it had a zero or *de minimis* antidumping duty margin during the current POR, and therefore, there will be no antidumping duties to absorb.

Our preliminary margin calculation shows that Devi sold shrimp at not less than NV during the current POR. *See* the "Preliminary Results of the Review" section below. Therefore, consistent with the Department's finding in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Reviews*, 65 FR 7492, 7494 (Feb. 15, 2000), we preliminarily find that there is no duty absorption applicable to Devi's U.S. sales because we have preliminarily determined that there is no dumping margin with respect to Devi's U.S. sales during the current administrative review.

**Comparisons to Normal Value**

To determine whether sales of shrimp from India to the United States were made at less than NV, we compared the export price (EP) or constructed export price (CEP) to the NV, as described in the "Constructed Export Price/Export Price" and "Normal Value" sections of this notice.

Pursuant to sections 773(a)(1)(B)(i) and 777A(d)(2) of the Act, for Devi, Falcon, and the Liberty Group, we compared the EPs or CEPs of individual U.S. transactions, as applicable, to the weighted–average NV of the foreign like product in the appropriate corresponding calendar month where there were sales made in the ordinary course of trade, as discussed in the "Cost of Production Analysis" section below.

**Product Comparisons**

In accordance with section 771(16)(A) of the Act, we considered all products produced by Devi, Falcon, and the Liberty Group covered by the description in the "Scope of the Order" section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared U.S. sales of non–broken shrimp to sales of non–broken shrimp made in the third country market within the contemporaneous window period, which extends from three months prior to the month of the first U.S. sale until two months after the month of the last U.S. sale. Where a respondent reported sales of broken shrimp in only its comparison market, we disregarded these sales because we found they were not comparable to products sold in the United States.

Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, according to section 771(16)(B) of the Act, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. In making the product comparisons, we matched foreign like products based on the physical characteristics reported by Devi, Falcon, and the Liberty Group in the following order: cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative. Where there were no sales of identical or similar merchandise, we made product comparisons using constructed value (CV), as discussed in the "Calculation of Normal Value Based on Constructed Value" section below. *See* section 773(a)(4) of the Act.

**Constructed Export Price/Export Price**

For all U.S. sales made by Falcon and the Liberty Group, and for certain U.S. sales made by Devi, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold by the producer/exporter outside of the United States directly to the first unaffiliated purchaser in the United States prior to importation and CEP methodology was not otherwise warranted based on the facts of record.

For the remaining U.S. sales made by Devi, we calculated CEP in accordance with section 772(b) of the Act because the subject merchandise was sold for the account of this company by its subsidiary in the United States to unaffiliated purchasers. We revised the data reported by Devi to take into account minor corrections found at verification.

*A. Devi*

We based EP on packed prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price for discounts in accordance with 19 CFR 351.401(c). We also made deductions from the starting price for foreign inland freight expenses, export inspection agency (EIA) fees, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges, international freight expenses, terminal handling charges, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. brokerage and handling expenses, U.S. warehousing expenses, and U.S. inland freight expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the merchandise was first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter. We based CEP on the packed delivered prices to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for discounts in accordance with 19 CFR 351.401(c). We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, EIA fees, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges, international freight expenses, terminal handling charges, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. brokerage and handling expenses, U.S. inland freight expenses (including both freight from port to warehouse and freight from warehouse to the customer), and U.S. warehousing expenses.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*i.e.*, imputed credit expenses, repacking

expenses, and other direct selling expenses), sales and marketing allowance expenditures, and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by Devi and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

*B. Falcon*

We based EP on packed prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price for discounts in accordance with 19 CFR 351.401(c). We also made deductions from the starting price for cold storage expenses, loading and unloading expenses, trailer hire expenses, foreign inland freight expenses, port charges, export survey charges, terminal handling charges, other miscellaneous shipment charges, foreign brokerage and handling expenses, international freight expenses, marine insurance expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. brokerage and handling expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

*C. Liberty Group*

We based EP on packed prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price for discounts in accordance with 19 CFR 351.401(c). We made deductions from the starting price for cold storage charges, inland freight expenses, other shipment and movement expenses, foreign brokerage and handling expenses, international freight expenses, terminal handling charges, U.S. customs duties, and U.S. brokerage and handling expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

**Normal Value**

*A. Home Market Viability and Selection of Comparison Markets*

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

We determined that the aggregate volume of home market sales of the foreign like product for each of the respondents was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. For Devi, we used Canada as the comparison market because this was Devi's only viable comparison market during the POR. For Falcon and the Liberty Group, we selected Japan as the comparison market because, among other things, these companies' sales of foreign like product in Japan were the most similar to the subject merchandise. For further discussion, see the Third Country Market Memo. Therefore, as the basis for comparison market sales, we used sales to Canada for Devi, and sales to Japan for Falcon and the Liberty Group, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

*B. Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *Id; see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (Nov. 19, 1997) (*Plate from South Africa*). In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.,* the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.,* NV based on either home market or third country prices),[8] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314–16 (Fed. Cir. 2001).

When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it possible, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment was possible), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See, e.g., Plate from South Africa*, 62 FR at 61732–33.

In this administrative review, we obtained information from each respondent regarding the marketing stages involved in making the reported foreign market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company–specific LOT findings are summarized below.

*1. Devi*

Devi reported that it made sales through two channels of distribution in the United States (*i.e.*, EP sales made directly to unaffiliated customers and CEP sales via an affiliated reseller); however, it stated that the selling activities it performed and the relative level of intensity of each selling activity did not vary by channel of distribution. Devi reported performing the following selling functions for its U.S. sales: sales planning, personnel training, sales promotion, packing, inventory maintenance in India, handling of sales inquiries, order processing, freight and delivery services (including pre–shipment inspection, foreign transportation, and export customs clearance), extension of credit to U.S. customers, providing discounts and rebates, and providing post–sale warranties and guarantees. These selling activities can be generally grouped into four selling function categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and, 4) warranty and technical support. Accordingly, based on the selling function categories, we find that Devi performed sales and marketing, freight and delivery services, inventory maintenance and warehousing, and

[8] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (G&A) expenses, and profit for CV, where possible.

warranty and technical support for all U.S. sales. Because Devi's selling activities did not vary by distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to Canada, Devi reported that it made sales through a single channel of distribution (*i.e.*, sales made directly to unaffiliated customers) and that all selling functions were performed at the same levels of intensity as in the U.S. market. We examined the selling activities performed for third country sales and found that Devi performed the following selling functions: sales planning, personnel training, sales promotion, packing, inventory maintenance in India, handling of sales inquiries, order processing, freight and delivery services (including pre–shipment inspection and foreign transportation), extension of credit to Canadian customers, and providing post–sale warranties and guarantees. Accordingly, based on these selling functions noted above, we find that Devi performed sales and marketing, freight and delivery services, inventory maintenance and warehousing, and warranty and technical services for third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Devi's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Devi.

Finally, we compared the U.S. LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Devi performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment or CEP offset is warranted.

*2. Falcon*

Falcon reported that it made EP sales in the U.S. market to trading companies and distributors. We examined the selling activities performed for U.S. sales and found that Falcon performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/ brokerage services (in India and the United States); cold storage and inventory maintenance; quality–assurance-related activities; and banking–related activities. These selling activities can be generally grouped into four selling function categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Accordingly, based on the selling function categories, we find that Falcon performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales. Because all sales in the United States are made through a single distribution channel (i.e., direct sales to unaffiliated customers) and the selling activities to Falcon's customers did not vary within this channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the third country market, Falcon reported that it made sales to trading companies and that all selling functions were performed at the same levels of intensity as in the U.S. market. We examined the selling activities performed for third country sales, and found that Falcon performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/ brokerage services (in India); cold storage and inventory maintenance; quality–assurance-related activities; and banking–related activities. Accordingly, based on these selling functions noted above, we find that Falcon performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for all third country sales. Because all third country sales are made through a single distribution channel and the selling activities to Falcon's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for Falcon.

Finally, we compared the EP LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ, as Falcon performed the same selling functions at the same relative level of intensity in both markets. Therefore, we determine that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment is warranted.

*3. Liberty Group*

The Liberty Group reported that it made EP sales in the U.S. market to trading companies. We examined the selling activities performed for this channel and found that the Liberty Group performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/ brokerage services; cold storage and inventory maintenance; quality assurance related activities; and banking–related activities. These selling activities can be generally grouped into four selling function categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Accordingly, based on the selling function categories noted above, we find that the Liberty Group performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales. Because all U.S. sales are made through a single distribution channel and the selling activities to the Liberty Group's customers did not vary within this channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the third country market, the Liberty Group reported that it made sales to trading companies. We examined the selling activities performed for third country sales, and found that the Liberty Group performed the following selling functions: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/ brokerage services; cold storage and inventory maintenance; quality assurance related activities; and banking–related activities. Accordingly, based on these selling functions noted above, we find that the Liberty Group performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for third country sales. Because all third country sales are made through a single distribution channel and the selling activities to the Liberty Group's customers did not vary within this channel, we preliminarily determine that there is one LOT in the third country market for the Liberty Group.

Finally, we compared the EP LOT to the third country market LOT and found that the selling functions performed for U.S. and third country market customers do not differ. Therefore, we determined that sales to the U.S. and third country markets during the POR were made at the same LOT, and as a result, no LOT adjustment was warranted.

*C. Cost of Production Analysis*

We found that Devi, Falcon, and the Liberty Group made sales in the same comparison markets below the COP in the most recently completed segment of this proceeding, as of the date of initiation of this review, in which each respondent was examined, and such sales were disregarded. *See 2006–2007 Final Results*, 73 FR at 40495 (finding

that Devi and Falcon made below–cost sales); *see also Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52055, 52058 (Sept. 12, 2007) (finding that the Liberty Group made below–cost sales). Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that Devi, Falcon, and the Liberty Group made sales in the third country market at prices below the cost of producing the merchandise in the current review period.

*1. Calculation of Cost of Production*

In accordance with section 773(b)(3) of the Act, we calculated the respondents' COPs based on the sum of their costs of materials and conversion for the foreign like product, plus amounts for G&A expenses and interest expenses (*see* "Test of Comparison Market Sales Prices" section, below, for treatment of third country selling expenses).

The Department relied on the COP data submitted by each respondent in its most recently submitted cost database for the COP calculation, except for the following instances:

*a. Devi:*

i. We adjusted Devi's reported G&A expenses to include a gain on the sale of assets and income from sales of shrimp waste; and
ii. Devi reported a negative financial expense rate. In accordance with the Department's practice, we have adjusted Devi's reported financial expense rate to set it to zero. *See Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 20911, 20913 (May 6, 2009), unchanged in *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 45611 (Sept. 3, 2009).

For further discussion of these adjustments, see the memorandum from Frederick W. Mines, Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - Devi Sea Foods Limited," dated March 8, 2010.

*b. Liberty Group:*

Because the Liberty Group failed to report cost data for one product, the Department has preliminary determined to apply facts available for this COP, pursuant to section 776(a)(2)(A) and (B) of the Act. As partial facts available, we have used the cost of the next most similar product produced during the POR as a surrogate for the missing COP information. *See* Memorandum to the File, from Holly Phelps, Analyst, Office 2, AD/CVD Operations, entitled, "Calculation Adjustments for Devi Marine Food Exports Private Limited, Kader Exports Private Limited, Kader Investment and Trading Company Private Limited, Liberty Frozen Foods Private Limited, Liberty Oil Mills Ltd., Premier Marine Products, and Universal Cold Storage (Collectively, "the Liberty Group") for the Preliminary Results in the 2008–2009 Administrative Review of Certain Frozen Warmwater Shrimp from India," dated March 8, 2010 (Liberty Group Sales Calculation Memo).

*2. Test of Comparison Market Sales Prices*

On a product–specific basis, we compared the adjusted weighted–average COP to the comparison market sales prices of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices (inclusive of billing adjustments, where appropriate) were exclusive of any applicable movement charges, discounts, direct and indirect selling expenses and packing expenses.

*3. Results of the COP Test*

In determining whether to disregard third country sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act: 1) whether, within an extended period of time, such sales were made in substantial quantities; and 2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with section 773(b)(2)(C)(i) of the Act, where less than 20 percent of the respondent's third country sales of a given product are at prices less than the COP, we do not disregard any below–cost sales of that product because we determine that in such instances the below–cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below–cost sales when: 1) they were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act; and 2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain products, more than 20 percent of Devi's, Falcon's, and the Liberty Group's third country sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. We therefore excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no third country sales in the ordinary course of trade, we compared CEPs or EPs, as appropriate, to CV in accordance with section 773(a)(4) of the Act. *See* "Calculation of Normal Value Based on Constructed Value" section below.

*D. Calculation of Normal Value Based on Comparison Market Prices*

*1. Devi*

For Devi, we calculated NV based on delivered prices to unaffiliated customers in Canada. We made adjustments to the starting price, where appropriate, for discounts in accordance with 19 CFR 351.401(c). We also made deductions for foreign inland freight expenses, foreign brokerage and handling expenses, various foreign miscellaneous shipment charges and international freight expenses (including terminal handling charges) under section 773(a)(6)(B) of the Act.

For comparisons to EP sales, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for direct selling expenses (including bank charges, Export Credit Guarantee Corporation (ECGC) fees, EIA fees, imputed credit expenses, and other direct selling expenses), and commissions. Because commissions were paid only in the comparison market, we made an upward adjustment to NV for the lesser of: 1) the amount of commission paid in the comparison market; or 2) the amount of indirect selling expenses incurred in the U.S. market. *See* 19 CFR 351.410(e).

For comparisons to CEP sales, in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, we deducted from NV direct selling expenses (*i.e.*, imputed credit expenses and other direct selling expenses), commissions, sales and marketing allowance expenditures, and indirect

selling expenses (including inventory carrying costs and other indirect selling expenses). Because commissions were paid only in the comparison market, we made an upward adjustment to NV for the lesser of: 1) the amount of commission paid in the comparison market; or 2) the amount of indirect selling expenses incurred in the U.S. market. *See* 19 CFR 351.410(e).

For all price–to-price comparisons, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

*2. Falcon*

We based NV for Falcon on prices to unaffiliated customers in Japan. We made adjustments, where appropriate, to the starting price for discounts in accordance with 19 CFR 351.401(c). We also made deductions, where appropriate, from the starting price for cold storage expenses, loading and unloading expenses, trailer hire expenses, foreign inland freight expenses, port charges, export survey charges, terminal and handling charges, foreign miscellaneous shipment charges, foreign brokerage and handling expenses, and international freight expenses, under section 773(a)(6)(B)(ii) of the Act.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for commissions, imputed credit expenses, bank fees, EIA fees, ECGC premiums, outside inspection/lab expenses, letter of credit amendment charges, and other miscellaneous selling expenses. For Falcon's U.S. sales for which it had not yet received payment, we recalculated U.S. credit expenses using the date February 25, 2010, as the date of payment because this was the date of Falcon's last submission on the record that contained payment date information. We also recalculated Falcon's third country and U.S. credit expenses to use the simple average of the POR U.S. Federal Reserve interest rates, as well as to base the expense on gross unit price net of discounts. For further discussion, see the Memorandum to the File, from Blaine Wiltse, Analyst, Office 2, AD/CVD Operations, entitled, "Calculation Adjustments for Falcon Marine Exports Limited for the Preliminary Results," dated March 8, 2010. Finally, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses (including inventory carrying costs) incurred in the comparison market. *See* 19 CFR 351.410(e). If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology. *Id.*

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

*3. Liberty Group*

We based NV for the Liberty Group on prices to unaffiliated customers in Japan. We made deductions, where appropriate, from the starting price for inland freight expenses from the plant to the port, other shipment and movement expenses, clearing and forwarding agency charges, shipment–related expenses, cold storage charges, international freight expenses, and terminal handling charges, under section 773(a)(6)(B)(ii) of the Act.

In addition, we made adjustments under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410 for differences in circumstances of sale for commissions, credit expenses, bank fees, EIA inspection fees, and outside inspection/lab expenses. We recalculated the Liberty Group's third country and U.S. credit expenses to use the simple average of the POR U.S. Federal Reserve interest rates. For further discussion, see the Liberty Group Sales Calculation Memo. Finally, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses (including inventory carrying costs) incurred in the comparison market. *See* 19 CFR 351.410(e). If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology. *Id.* We recalculated indirect selling expenses to include a sales write-off recognized in the company's financial statements. For further discussion, see the Liberty Group Sales Calculation Memo.

We made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We also deducted third country packing costs and added U.S. packing costs, in accordance with section 773(a)(6)(A) and (B) of the Act.

*E. Calculation of Normal Value Based on Constructed Value*

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison market sales, NV may be based on CV. Accordingly, for those shrimp products for which we could not determine the NV based on comparison market sales because all sales of the comparable products failed the COP test, we based NV on CV.

Section 773(e) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for selling, general, and administrative (SG&A) expenses, profit, and U.S. packing costs. For each respondent, we calculated the cost of materials and fabrication based on the methodology described in the "Cost of Production Analysis" section, above. We based SG&A and profit for each respondent on the actual amounts incurred and realized by it in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

We made adjustments to CV for differences in circumstances of sale in accordance with section 773(a)(6)(iii) and (a)(8) of the Act and 19 CFR 351.410. For comparisons to EP, we made circumstance–of-sale adjustments by deducting direct selling expenses incurred on comparison market sales from, and adding U.S. direct selling expenses to, CV. *See* 19 CFR 351.410(c). For comparisons to Devi's CEP, we deducted comparison market direct selling expenses from CV. Id. We also made adjustments for Falcon and the Liberty Group, when applicable, for comparison market indirect selling expenses to offset U.S. commissions in EP comparisons. *See* 19 CFR 351.410(e).

**Currency Conversion**

We made currency conversions into U.S. dollars for all spot transactions by Devi, Falcon, and the Liberty Group in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank. In addition, both Devi and Falcon reported that they purchased forward exchange contracts which were used to convert their sales prices into

home market currency. Under 19 CFR 351.415(b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department is directed to use the exchange rate specified with respect to such currency in the forward sale agreement to convert the foreign currency. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (Dec. 23, 2004) and accompanying Issues and Decision Memorandum at Comment 6; *see also Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 9991, 9998 (Mar. 9, 2009), unchanged in 2007–2008 Final Results. Therefore, for Devi and Falcon we used the reported forward exchange rates for currency conversions where applicable.

**Preliminary Results of the Review**

We preliminarily determine that weighted–average dumping margins exist for the respondents for the period February 1, 2008, through January 31, 2009, as follows:

| Manufacturer/Exporter | Percent Margin |
|---|---|
| Devi Sea Foods Limited | 0.38 (de minimis) |
| Falcon Marine Exports Limited/KR Enterprises | 0.89 |
| Liberty Group (Devi Marine Food Exports Private Limited/ Kader Exports Private Limited/Kader Investment and Trading. Company Private Limited/Liberty Frozen Foods Pvt. Ltd./. Liberty Oil Mills Ltd./Premier Marine Products/Universal Cold. Storage Private Limited). | 4.44 |

Review–Specific Average Rate Applicable to the Following Companies:[9]

| Manufacturer/Exporter | Percent Margin |
|---|---|
| Accelerated Freeze–Drying Co. | 2.67 |
| AMI Enterprises | 2.67 |
| Anand Aqua Exports | 2.67 |
| Ananda Aqua Exports (P) Ltd./Ananda Foods/ Ananda Aqua Applications. | 2.67 |
| Andaman Seafoods Pvt. Ltd. | 2.67 |
| Angelique Intl | 2.67 |
| Apex Exports | 2.67 |
| Asvini Exports | 2.67 |
| Asvini Fisheries Private Limited | 2.67 |
| Avanti Feeds Limited | 2.67 |
| Ayshwarya Seafood Private Limited | 2.67 |
| Bhatsons Aquatic Products | 2.67 |
| Bhavani Seafoods | 2.67 |
| Bijaya Marine Products | 2.67 |
| Bluefin Enterprises | 2.67 |
| Bluepark Seafoods Pvt. Ltd. | 2.67 |
| Britto Exports | 2.67 |
| C P Aquaculture (India) Ltd. | 2.67 |
| Calcutta Seafoods Pvt. Ltd. | 2.67 |
| Capithan Exporting Co. | 2.67 |
| Castlerock Fisheries Ltd. | 2.67 |
| Chemmeens (Regd) | 2.67 |
| Choice Canning Company | 2.67 |
| Choice Trading Corporation Private Limited | 2.67 |
| Coastal Corporation Ltd. | 2.67 |
| Cochin Frozen Food Exports Pvt. Ltd. | 2.67 |
| Corlim Marine Exports Pvt. Ltd. | 2.67 |
| Devi Fisheries Limited | 2.67 |
| Digha Seafood Exports | 2.67 |
| Esmario Export Enterprises | 2.67 |
| Exporter Coreline Exports | 2.67 |
| Five Star Marine Exports Private Limited | 2.67 |
| Forstar Frozen Foods Pvt. Ltd. | 2.67 |
| Frontline Exports Pvt. Ltd. | 2.67 |
| Gadre Marine Exports | 2.67 |
| Galaxy Maritech Exports P. Ltd. | 2.67 |
| Gayatri Seafoods | 2.67 |
| Geo Aquatic Products (P) Ltd. | 2.67 |
| Geo Seafoods | 2.67 |
| Goodwill Enterprises | 2.67 |

[9] This rate is based on the simple average of the margins calculation for those companies selected for individual review, excluding de minimis margins or margins based entirely on adverse facts available (AFA).

| Manufacturer/Exporter | Percent Margin |
|---|---|
| Grandtrust Overseas (P) Ltd. | 2.67 |
| GVR Exports Pvt. Ltd. | 2.67 |
| Haripriya Marine Export Pvt. Ltd. | 2.67 |
| HIC ABF Special Foods Pvt. Ltd. | 2.67 |
| Hindustan Lever, Ltd. | 2.67 |
| IFB Agro Industries Limited | 2.67 |
| Indo Aquatics | 2.67 |
| International Freezefish Exports | 2.67 |
| ITC Limited, International Business | 2.67 |
| ITC Ltd. | 2.67 |
| Jagadeesh Marine Exports | 2.67 |
| Jaya Satya Marine Exports | 2.67 |
| Jaya Satya Marine Exports Pvt. Ltd. | 2.67 |
| Jayalakshmi Sea Foods Private Limited | 2.67 |
| Jinny Marine Traders | 2.67 |
| Jiya Packagings | 2.67 |
| Kanch Ghar. | 2.67 |
| Kay Kay Exports | 2.67 |
| Kings Marine Products | 2.67 |
| Koluthara Exports Ltd. | 2.67 |
| Konark Aquatics & Exports Pvt. Ltd. | 2.67 |
| Magnum Estate Private Limited | 2.67 |
| Magnum Export | 2.67 |
| Magnum Sea Foods Pvt. Ltd. | 2.67 |
| Malabar Arabian Fisheries | 2.67 |
| Malnad Exports Pvt. Ltd. | 2.67 |
| Mangala Marine Exim India Private Ltd. | 2.67 |
| Mangala Sea Products | 2.67 |
| Meenaxi Fisheries Pvt. Ltd. | 2.67 |
| MSC Marine Exporters | 2.67 |
| MTR Foods | 2.67 |
| Naga Hanuman Fish Packers | 2.67 |
| Naik Frozen Foods | 2.67 |
| Naik Seafoods Ltd. | 2.67 |
| Navayuga Exports | 2.67 |
| Navayuga Exports Ltd. | 2.67 |
| Nekkanti Sea Foods Limited | 2.67 |
| NGR Aqua International | 2.67 |
| Nila Sea Foods Pvt. Ltd. | 2.67 |
| Overseas Marine Export | 2.67 |
| Paragon Sea Foods Pvt. Ltd. | 2.67 |
| Penver Products (P) Ltd. | 2.67 |
| Pijikay International Exports P Ltd. | 2.67 |
| Pisces Seafood International | 2.67 |
| Premier Exports International | 2.67 |
| Premier Marine Foods | 2.67 |
| Premier Seafoods Exim (P) Ltd. | 2.67 |
| Raa Systems Pvt. Ltd. | 2.67 |
| Raju Exports | 2.67 |
| Ram's Assorted Cold Storage Ltd. | 2.67 |
| Raunaq Ice & Cold Storage | 2.67 |
| Raysons Aquatics Pvt. Ltd. | 2.67 |
| Razban Seafoods Ltd. | 2.67 |
| RBT Exports | 2.67 |
| Riviera Exports Pvt. Ltd. | 2.67 |
| Rohi Marine Private Ltd. | 2.67 |
| RVR Marine Products Private Limited | 2.67 |
| S A Exports | 2.67 |
| S Chanchala Combines | 2.67 |
| S & S Seafoods | 2.67 |
| Safa Enterprises | 2.67 |
| Sagar Foods | 2.67 |
| Sagar Grandhi Exports Pvt. Ltd. | 2.67 |
| Sagar Samrat Seafoods | 2.67 |
| Sagarvihar Fisheries Pvt. Ltd. | 2.67 |
| Sai Marine Exports Pvt. Ltd. | 2.67 |
| Sai Sea Foods | 2.67 |
| Sandhya Aqua Exports | 2.67 |
| Sandhya Aqua Exports Pvt. Ltd. | 2.67 |
| Sandhya Marines Limited | 2.67 |
| Santhi Fisheries & Exports Ltd. | 2.67 |
| Satya Seafoods Private Limited | 2.67 |
| Sawant Food Products | 2.67 |
| Seagold Overseas Pvt. Ltd. | 2.67 |

| Manufacturer/Exporter | Percent Margin |
|---|---|
| Selvam Exports Private Limited | 2.67 |
| Shippers Exports | 2.67 |
| Shroff Processed Food & Cold ZStorage P Ltd. | 2.67 |
| Sita Marine Exports | 2.67 |
| Sprint Exports Pvt. Ltd. | 2.67 |
| Sri Chandrakantha Marine Exports, Ltd. | 2.67 |
| Sri Sakkthi Cold Storage | 2.67 |
| Sri Sakthi Marine Products P Ltd. | 2.67 |
| Sri Satya Marine Exports | 2.67 |
| Sri Venkata Padmavathi Marine Foods Pvt. Ltd. | 2.67 |
| SSF Ltd. | 2.67 |
| Star Agro Marine Exports Private Limited | 2.67 |
| Sun Bio–Technology Ltd. | 2.67 |
| Suryamitra Exim (P) Ltd. | 2.67 |
| Suvarna Rekha Exports Private Limited | 2.67 |
| Suvarna Rekha Marines P Ltd. | 2.67 |
| TBR Exports Pvt Ltd. | 2.67 |
| Teekay Marine P. Ltd | 2.67 |
| Tejaswani Enterprises | 2.67 |
| The Kadalkanny Group (Kadalkanny Frozen Foods, Edhayam Frozen Foods Pvt. Ltd., Diamond Seafoods Exports, and Theva & Company). | 2.67 |
| The Waterbase Limited | 2.67 |
| Triveni Fisheries P Ltd. | 2.67 |
| Uniroyal Marine Exports Ltd. | 2.67 |
| Usha Seafoods | 2.67 |
| V.S Exim Pvt Ltd. | 2.67 |
| Vaibhav Sea Foods | 2.67 |
| Victoria Marine & Agro Exports Ltd. | 2.67 |
| Vinner Marine | 2.67 |
| Vishal Exports | 2.67 |
| Wellcome Fisheries Limited | 2.67 |

**Disclosure and Public Hearing**

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 352.674(b). Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than the later of 30 days after the date of publication of this notice, or one week after the issuance of the cost verification report for Devi. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. *See* 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities. *See* 19 CFR 351.309(c)(2) and (d)(2).

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: 1) the party's name, address and telephone number; 2) the number of participants; and 3) a list of issues to be discussed. *Id.* Issues raised in the hearing will be limited to those raised in the respective case briefs. *Id.* The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

**Assessment Rates**

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212(b)(1). The Department will issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

For Devi, Falcon, and the Liberty Group, we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the sales. *See* 19 CFR 351.212(b)(1). For the companies which were not selected for individual review, we will calculate an assessment rate based on the simple average of the cash deposit rates calculated for the companies selected for individual review, excluding any which are de minimis or determined entirely on AFA.

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 review is above *de minimis*. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis*. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable. *See* 751(a)(2)(C) of the Act.

The Department clarified its "automatic assessment" regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to

liquidate unreviewed entries at the all–others rate if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: 1) the cash deposit rate for each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; 2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will continue to be the company–specific rate published for the most recent period; 3) if the exporter is not a firm covered in this review, or the original less–than-fair–value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 4) the cash deposit rate for all other manufacturers or exporters will continue to be 10.17 percent, the all–others rate made effective by the LTFV investigation. *See Shrimp Order*, 70 FR at 5148. These deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 352.671(b)(4).

Dated: March 8, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–5590 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–549–822]**

### Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Final Results of Partial Rescission of Antidumping Duty Administrative Review

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

**SUMMARY:** The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp from Thailand with respect to 165 companies.[1] The three respondents which the Department selected for individual examination are Marine Gold Products Limited (MRG); Pakfood Public Company Limited and its affiliates[2]; and the Rubicon Group.[3] The respondents which were not selected for individual examination are listed in the "Preliminary Results of Review" section of this notice. This is the fourth administrative review of this order. The review covers the period February 1, 2008, through January 31, 2009.[4]

We preliminarily determine that sales were made by MRG, Pakfood and the Rubicon Group below normal value (NV). In addition, based on the preliminary results for the respondents selected for individual examination, we have preliminarily determined a weighted–average margin for those companies that were not individually examined.

If the preliminary results are adopted in our final results of administrative review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. Interested parties are invited to comment on the preliminary results.

**FOR FURTHER INFORMATION CONTACT:** Kate Johnson or David Goldberger, AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone (202) 482–4929 and (202) 482–4136, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

In February 2005, the Department published in the **Federal Register** an antidumping duty order on certain frozen warmwater shrimp from Thailand. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 FR 5145 (February 1, 2005). On February 4, 2009, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order of certain frozen warmwater shrimp from Thailand for the period February 1, 2008, through January 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 74 FR 6013 (February 4, 2009). In response to timely requests from interested parties, pursuant to 19 CFR 351.213(b)(1) and (2), to conduct an administrative review of the sales of shrimp made by numerous companies during the POR, the Department initiated an administrative review for 185 companies. These companies are listed in the Department's notice of initiation. *See Certain Frozen Warmwater Shrimp from Brazil, India, and Thailand: Notice*

[1] This figure excludes twenty companies for which we are rescinding the review due to the fact that they made no shipments of the subject merchandise during the period of review (POR). *See* "Partial Rescission of Review" section, below.

[2] Asia Pacific (Thailand) Company Limited, Chaophraya Cold Storage Company Limited, Okeanos Company Limited, Okeanos Food Company Limited, and Takzin Samut Company Limited (collectively, Pakfood).

[3] Andaman Seafood Co., Ltd. (Andaman), Wales & Co. Universe Limited (Wales), Chanthaburi Frozen Food Co., Ltd. (CFF), Chanthaburi Seafoods Co., Ltd. (CSF), Intersia Foods Co., Ltd. (formerly Y2K Frozen Foods Co., Ltd.), Phatthana Seafood Co., Ltd. (PTN), Phatthana Frozen Food Co., Ltd. (PFF), Thailand Fishery Cold Storage Public (collectively, the Rubicon Grou Co., Ltd. (TFC), Thai International Seafood Co., Ltd. (TIS), S.C.C. Frozen Seafood Co., Ltd. (SCC), and Sea Wealth Frozen Food Co., Ltd. (Sea Wealth) (collectively, the Rubicon Group).

[4] Because of the partial revocation of the antidumping duty order, effective January 16, 2009, the POR is February 1, 2008, through January 15, 2009, for Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei) and the Rubicon Group. *See Implementation of the Findings of the WTO Panel in United States-Antidumping Measure on Shrimp from Thailand: Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Partial Revocation of the Antidumping Duty Order on Frozen Warmwater Shrimp from Thailand*, 74 FR 5638, 5639 (January 30, 2009) (*Section 129 Determination*); *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Notice of Revocation in Part*, 74 FR 52452 (October 13, 2009).

*of Initiation of Administrative Reviews*, 74 FR 15699 (April 7, 2009).

Between March and May 2009, the Department received submissions from certain companies that indicated they had no shipments of subject merchandise to the United States during the POR.

On April 21, 2009, the Ad Hoc Shrimp Trade Action Committee (hereafter, Domestic Producers) requested that the Department determine whether antidumping duties had been absorbed during the POR. *See* the "Duty Absorption" section, below, for further discussion.

Based upon the resources available to the Department, we determined that it was not practicable to examine all exporters/producers of subject merchandise for which a review was requested. As a result, on May 13, 2009, we preliminarily selected the three largest producers/exporters of shrimp from Thailand during the POR, MRG, Pakfood and the Rubicon Group, for individual examination in this segment of the proceeding. *See* the May 13, 2009, memorandum entitled "Selection of Respondents for Individual Review." On May 18, 2009, we issued the antidumping duty questionnaire to the three mandatory respondents.

On July 7, 2009, in accordance with 19 CFR 351.213(d)(1), the Domestic Producers withdrew their request for review for the following eighteen companies: Anglo–Siam Seafoods Co., Ltd.; Applied DB Ind; Chonburi LC; Gallant Ocean (Thailand) Co., Ltd. (Gallant Ocean); Haitai Seafood Co., Ltd.; High Way International Co., Ltd.; Li–Thai Frozen Foods Co., Ltd.; Merkur Co., Ltd.; Ming Chao Ind Thailand; Nongmon SMJ Products; Queen Marine Food Co., Ltd.; SCT Co., Ltd.; Search & Serve; Smile Heart Foods Co., Ltd.; Shianlin Bangkok Co., Ltd.; Star Frozen Foods Co., Ltd.; Thai World Imports & Exports; and Wann Fisheries Co., Ltd.

In July and August 2009, we received responses to sections A (*i.e.*, the section covering general information about the company), B (*i.e.*, the section covering comparison–market sales), and C (*i.e.*, the section covering U.S. sales) of the antidumping duty questionnaire from each of the respondents. We also received responses to section D (the section covering cost of production (COP) and constructed value (CV)) of the questionnaire from Pakfood and the Rubicon Group.

On August 6, 2009, the Domestic Producers requested that the Department initiate a sales–below-cost investigation of MRG. On September 10, 2009, we initiated this investigation. *See* September 10, 2009, memorandum entitled "The Domestic Producers' Allegation of Sales Below the Cost of Production for Marine Gold Products Ltd." As a result, we instructed MRG to respond to section D of the Department's questionnaire, which it submitted on October 22, 2009.

During the period September 2009 through January 2009, we issued to the three mandatory respondents supplemental questionnaires regarding sections A, B, C, and D of the original questionnaire. We received responses to these questionnaires during the period October 2009 through February 2010.

On September 25, 2009, the Department issued a memorandum indicating that it intended to rescind the administrative review with respect to 37 respondent companies, and invited comments on this action from interested parties. *See* the September 25, 2009, memorandum entitled "Intent to Rescind in Part the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand" (Intent to Rescind Memorandum). No party commented on the Intent to Rescind Memorandum.

On October 20, 2009, the Department postponed the preliminary results in this review until no later than March 1, 2009. *See Certain Frozen Warmwater Shrimp From India and Thailand: Notice of Extension of Time Limits for the Preliminary Results of the Fourth Administrative Reviews*, 74 FR 53700 (October 20, 2009).

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary results of this review is now March 8, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

On November 17, 2009, we issued a letter to all interested parties in this review inviting comments on a proposal made by MRG requesting that the Department modify the reporting of one of the product matching characteristics, cooked form. We received comments on December 1, 2009, from the Rubicon Group, the Domestic Producers, the American Shrimp Processors Association (ASPA) (hereafter, Domestic Processors), and the Louisiana Shrimp Association (LSA). MRG submitted rebuttal comments on December 11, 2009. Our determination with respect to MRG's proposal is discussed in the "Product Comparisons" section below.

We conducted verifications of MRG's sales and cost responses in December 2009 and February 2010, respectively.

**Scope of the Order**

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild–caught (ocean harvested) or farm–raised (produced by aquaculture), head–on or head–off, shell–on or peeled, tail–on or tail–off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size. The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the Penaeidae family. Some examples of the farmed and wild–caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (Penaeus occidentalis), and Indian white prawn (Penaeus indicus).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: 1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); 2) shrimp and prawns generally classified in the Pandalidae family and commonly referred to as coldwater shrimp, in any state of processing; 3) fresh shrimp and prawns whether shell–on or peeled

[5] "Tails" in this context means the tail fan, which includes the telson and the uropods.

(HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); 4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); 5) dried shrimp and prawns; 6) canned warmwater shrimp and prawns (HTSUS subheading 1605.20.10.40); 7) certain dusted shrimp; and 8) certain battered shrimp. Dusted shrimp is a shrimp–based product: 1) that is produced from fresh (or thawed–from-frozen) and peeled shrimp; 2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; 3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; 4) with the non–shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and 5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp–based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par–fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24, 0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

**Partial Rescission of Review**

As stated above, on September 25, 2009, the Department issued a memorandum indicating that it intended to rescind the administrative review with respect to 37 respondent companies, including the 18 companies listed in the Domestic Producers' July 7, 2009, submission wherein the Domestic Producers withdrew their request for review of these companies. However, because the Domestic Processors did not withdraw their review request for any of the companies listed in the Domestic Producers' July 7, 2009, submission and, therefore, there remains an outstanding review request for each of these companies, we are not rescinding the review with respect to these companies, except Wann Fisheries Co., Ltd.[6]

[6] Wann Fisheries Co., Ltd. submitted a no-shipment statement on May 6, 2009. Accordingly, we are rescinding the review with respect to this company based on our confirmation of its statement, as discussed below.

In accordance with 19 CFR 351.213(d)(3), we are rescinding the review with respect to the following 19 companies that submitted letters indicating that they had no shipments of subject merchandise during the POR: 1) American Commercial Transport, Inc. ; 2) Ampai Frozen Food Co., Ltd.; 3) F.A.I.T. Corporation Limited; 4) Far East Cold Storage, Ltd.; 5) Grobest Frozen Foods Co., Ltd.; 6) Inter–Oceanic Resources Co., Ltd.; 7) Leo Transport Corporation, Ltd.; 8) Lucky Unions Foods Co., Ltd.; 9) MKF Interfood (2004) Co., Ltd.; 10) Siam Canadian Foods Co., Ltd.; 11) Siam Ocean Frozen Foods Co., Ltd.; 12) Sky Fresh Co., Ltd.; 13) Songkla Canning (PCL); 14) Suree Interfoods Co., Ltd.; 15) Thai Excel Foods Co., Ltd.; 16) Thai Union Manufacturing Co., Ltd.; 17) Thai Yoo Ltd., Part.; 18) V. Thai Food Product Co., Ltd.; and 19) Wann Fisheries Co., Ltd. We reviewed CBP data and confirmed that there were no entries of subject merchandise during the POR from any of these companies. Consequently, in accordance with 19 CFR 351.213(d)(3) and consistent with our practice, we are rescinding our review of the companies listed above. *See*, *e.g.*, *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082, 65083 (November 7, 2006).

In addition, we are rescinding the review with respect to Euro–Asian International Seafoods Co., Ltd. because it is not a producer and/or exporter of the subject merchandise and the CBP data confirm that there were no entries of subject merchandise during the POR from this company. *See* Intent to Rescind Memorandum.

**Period of Review**

The POR is February 1, 2008, through January 31, 2009. *See* Footnote 2.

**Duty Absorption**

On April 21, 2009, the Domestic Producers requested that the Department determine whether antidumping duties had been absorbed during the POR. Section 751(a)(4) of the Tariff Act of 1930, as amended (the Act), provides for the Department, if requested, to determine during an administrative review initiated two or four years after the publication of the order, whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. This review was initiated four years after the publication of the order.

In determining whether the antidumping duties have been absorbed by the respondents during the POR, we presume the duties will be absorbed for those sales that have been made at less than NV. This presumption can be rebutted with evidence (*e.g.*, an agreement between the affiliated importer and unaffiliated purchaser) that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise. *See*, *e.g.*, *Certain Stainless Steel Butt–Weld Pipe Fittings from Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind*, 70 FR 39735, 39737 (July 11, 2005); unchanged in *Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt–Weld Pipe Fittings From Taiwan*, 70 FR 73727 (December 13, 2005). On May 18, 2009, we requested proof that the Rubicon Group's unaffiliated purchasers would ultimately pay the antidumping duties to be assessed on entries during the POR. The Rubicon Group did not provide any such evidence. Because the Rubicon Group did not rebut the duty–absorption presumption with evidence that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise, we preliminarily find that antidumping duties have been absorbed by the Rubicon Group on all U.S. sales made through its affiliated importer of record. For the percentage of such sales, see the March 8, 2010, memorandum entitled "Rubicon Preliminary Results Margin Calculation" at Attachment 2.

With respect to MRG and Pakfood, neither respondent sold subject merchandise in the United States through an affiliated importer. Therefore, it is not appropriate to make a duty–absorption determination in this segment of the proceeding within the meaning of section 751(a)(4) of the Act. *See Agro Dutch Industries Ltd. v. United States*, 508 F.3d 1024, 1033 (Fed. Cir. 2007).

**Comparisons to Normal Value**

To determine whether sales of shrimp from Thailand to the United States were made at less than NV, we compared the export price (EP) or constructed export price (CEP) to the NV, as described in the "Constructed Export Price/Export Price" and "Normal Value" sections of this notice, below.

Pursuant to section 777A(d)(2) of the Act, for MRG, Pakfood and the Rubicon Group we compared the EPs or CEPs of individual U.S. transactions to the weighted–average NV of the foreign like product where there were sales made in

the ordinary course of trade, as discussed in the "Cost of Production Analysis" section, below.

**Product Comparisons**

In accordance with section 771(16) of the Act, we considered all products produced by MRG, Pakfood and the Rubicon Group covered by the description in the "Scope of the Order" section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Pursuant to 19 CFR 351.414(e)(2), we compared U.S. sales of shrimp to sales of shrimp made in the comparison market for MRG and Pakfood (home market) and the Rubicon Group (Canada) within the contemporaneous window period, which extends from three months prior to the month of the U.S. sale until two months after the sale. Where there were no sales of identical merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales of shrimp to sales of the most similar foreign like product made in the ordinary course of trade. For MRG, Pakfood and the Rubicon Group, where there were no sales of identical or similar merchandise in the comparison market made in the ordinary course of trade to compare to U.S. sales, we made product comparisons using CV.

With respect to sales comparisons involving broken shrimp, we compared Pakfood's and the Rubicon Group's sales of broken shrimp in the United States to sales of comparable quality shrimp in the comparison market. Where there were no sales of identical broken shrimp in the comparison market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales of broken shrimp to sales of the most similar broken shrimp made in the ordinary course of trade. Where there were no sales of identical or similar broken shrimp, we made product comparisons using CV. MRG did not make sales of broken shrimp to the United States during the POR.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by MRG, Pakfood and the Rubicon Group in the following order: cooked form, head status, count size, organic certification, shell status, vein status, tail status, other shrimp preparation, frozen form, flavoring, container weight, presentation, species, and preservative.

As noted above, on November 17, 2009, we issued a letter to all interested parties in this review inviting comments on MRG's request that the Department modify the reporting requirements for one of the product matching characteristics, "cooked form." The proposed revision would allow a distinction to be made between shrimp cooked before peeling and shrimp cooked after peeling.

In comments submitted on December 1, 2009, the Domestic Producers maintained that the Department's consideration of MRG's request should be consistent with the "compelling reasons" standard, and that any change in reporting requirements should apply across all shrimp reviews.[7] The Domestic Producers argued that, based on the record of these reviews, there is no compelling reason for the proposed modification, as no other party to these proceedings has supported it, and there is very little independent market–based support for distinguishing between shrimp cooked before and after peeling.

Also on December 1, 2009, we received comments from the Domestic Processors, the LSA, and the Rubicon Group opposing MRG's proposed alteration to the reporting requirements for "cooked form." The Domestic Processors and LSA argued that the differences in cooking process identified by MRG appear to overlap almost completely with the preservative characteristic already accounted for in the model–match methodology. They claimed that the physical differences that MRG attributes to the different cooking processes are in fact largely the result of differences in preservative use; therefore, the cooking process is not commercially significant, while preservative use is. Furthermore, the Rubicon Group stated that it could not comply with MRG's proposed change, because it does not distinguish products that are cooked before peeling from those that are cooked after peeling in its records. Moreover, the Rubicon Group argued, MRG has not demonstrated that the differences in price noted by MRG in its proposal resulted from cooking at different stages of production, as opposed to other factors, such as selling at different times during the POR. The Rubicon Group added that cooking before or after peeling has no bearing on its own pricing.

In its December 11, 2009, rebuttal comments, MRG explained that cooking before peeling results in a brighter–colored cooked shrimp that customers prefer. MRG stated that it charges a price premium for such products to account for the higher processing costs incurred by partially–peeling the shrimp to an "EZ peel" form and deveining it prior to cooking, and then fully peeling the shrimp after cooking. MRG argued that the Domestic Producers' comments failed to address these additional costs. Without accounting for these factors, MRG stated, the Department would fail to make an accurate determination of dumping, as required by law. In response to APSA's and LSA's arguments, MRG stated that the difference in preservative does not account for the difference in processing costs and sale price premiums that cooking before peeling generates. MRG added that its own pricing data refutes the Rubicon Group's contention that cooking before, versus after, peeling bears no relationship to price.

While MRG's questionnaire response appears to support its contention that it charges somewhat higher prices for shrimp cooked before peeling and incurs some additional costs for such shrimp, we note that cooking process is not a physical characteristic of the merchandise under consideration. Whether the shrimp is cooked before or after peeling does not change the fact that the shrimp is cooked. What MRG seeks to distinguish in its argument is that shrimp cooked before peeling is of a different appearance – brighter color – than shrimp cooked after peeling. Thus, it is the difference in appearance that MRG attempts to distinguish through the cooked form physical characteristic.

Normally, when considering whether to revise the model–match methodology established in a less–than-fair–value (LTFV) investigation, the Department "will not modify that methodology in subsequent proceedings unless there are compelling reasons' to do so . A party seeking to modify an existing model–match methodology has alternative means to demonstrate that "compelling reasons" exist to do so. {The Department} will find that "compelling reasons" exist if a party proves by "compelling and convincing evidence" that the existing model–match criteria "are not reflective of the merchandise in question," that there have been changes in the relevant industry, or that "there is some other compelling reason present, which requires a change." *See Fagersta Stainless AB v.United States*, 577 F. Supp. 2d 1270 (CIT 2008).

Under this standard, MRG has failed to demonstrate that compelling and convincing evidence exists to alter the model–match methodology to account for the perceived difference in the color of the shrimp. MRG has not provided evidence that there have been changes in the shrimp industry to warrant a new product characteristic based on shrimp

[7] The Department is currently conducting administrative reviews of the antidumping duty orders on Certain Frozen Warmwater Shrimp from India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam.

color intensity. Moreover, MRG has not provided evidence that other factors such as preservative differences do not account for the perceived differences in shrimp color. With respect to the differences in price and cost cited by MRG, we note that it is not unusual for products falling within the same product code to have some price and cost differences. Finally, we find no other compelling reason to modify the model–match criteria to account for the intensity of the shrimp color. Accordingly, we are not accepting MRG's proposal to revise the cooked form physical characteristic reporting in order to reflect perceived differences in shrimp color.

**Constructed Export Price/Export Price**

For all U.S. sales made by MRG, and certain U.S. sales made by Pakfood and the Rubicon Group, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States before the date of importation by the producer or exporter of the subject merchandise outside the United States, and CEP methodology was not otherwise warranted based on the facts of record.

For certain U.S. sales made by Pakfood and the Rubicon Group, we calculated CEP in accordance with section 772(b) of the Act because the subject merchandise was first sold (or agreed to be sold) in the United States after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

*A. MRG*

We based EP on C&F or DDP (delivered, duty paid) prices to the first unaffiliated purchaser in the United States. Where appropriate, we made adjustments to the starting price for billing adjustments and rebates. We made deductions, where appropriate, for foreign inland freight expenses, warehousing expenses, foreign brokerage and handling expenses (including survey fees, gate charges, and other fees), ocean freight expenses, marine insurance expenses, U.S. brokerage and handling expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. pre–sale warehousing expenses in accordance with section 772(c)(2)(A) of the Act.

MRG reported payments to one U.S. customer as reimbursements for marine insurance expenses. At verification, we were unable to confirm that these payments to the customer were associated with marine insurance premium reimbursements. *See* Memorandum to the File entitled "Verification of the Sales Response of Marine Gold Products Co., Ltd." dated January 21, 2010, at pages 14–15. Accordingly, we have reclassified these payments as rebates to the customer.

*B. Pakfood*

We based EP on C&F or DDP prices to the first unaffiliated purchaser in the United States. Where appropriate, we made adjustments to the starting price for discounts. We made deductions, where appropriate, for foreign inland freight expenses, pre–sale warehousing expenses, survey fees, foreign brokerage and handling expenses, ocean freight expenses, marine insurance expenses, U.S. brokerage and handling expenses, and U.S. customs duties (including harbor maintenance fees and merchandise processing fees) in accordance with section 772(c)(2)(A) of the Act.

We based CEP on DDP prices to unaffiliated purchasers in the United States. We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign warehousing expenses, foreign inland insurance expenses, foreign brokerage and handling expenses, ocean freight expenses, marine insurance expenses, U.S. brokerage and handling expenses, and U.S. customs duties (including harbor maintenance fees and merchandise processing fees). In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*e.g.*, bank charges, express mail fees, and imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by Pakfood on its sales of the subject merchandise in the United States and the profit associated with those sales.

*C. The Rubicon Group*

We based EP on the price to the first unaffiliated purchaser in the United States. Where appropriate, we made adjustments to the starting price for billing adjustments and discounts. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, gate charges, foreign warehousing expenses, foreign inland insurance expenses, foreign brokerage and handling expenses, ocean freight expenses (offset by freight refunds, where appropriate), marine insurance expenses, U.S. brokerage and handling expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), and U.S. inland freight expenses (*i.e.*, freight from port to warehouse).

We based CEP on prices to unaffiliated purchasers in the United States. Where appropriate, we made adjustments for billing adjustments, discounts and rebates. We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight expenses, gate charges, foreign warehousing expenses, foreign inland insurance expenses, foreign brokerage and handling expenses, ocean freight expenses (offset by freight refunds, where appropriate), marine insurance expenses, U.S. brokerage and handling expenses, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. inland insurance expenses, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), and U.S. warehousing expenses.

In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (*e.g.*, bank charges, commissions, and imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by the Rubicon Group and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

**Normal Value**

*A. Home Market Viability and Selection of Comparison Markets*

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the

volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act. Based on this comparison, we determined that MRG and Pakfood had viable home markets during the POR. Consequently, we based NV on home market sales for MRG and Pakfood.

Regarding the Rubicon Group, we determined that this respondent's aggregate volume of home market sales of the foreign like product was insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Therefore, we used the Rubicon Group's sales to Canada as the basis for comparison–market sales in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

*B. Affiliated–Party Transactions and Arm's–Length Test*

During the POR, Pakfood sold the foreign like product to affiliated customers in the comparison market. To test whether these sales were made at arm's–length prices, we compared, on a product–specific basis, the starting prices of sales to affiliated and unaffiliated customers, net of all discounts and rebates, movement charges, direct selling expenses, and packing expenses. Pursuant to 19 CFR 351.403(c) and in accordance with the Department's practice, where the price to the affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to unaffiliated parties, we determined that sales made to the affiliated party were at arm's length. *See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69187 (Nov. 15, 2002) (establishing that the overall ratio calculated for an affiliate must be between 98 percent and 102 percent in order for sales to be considered in the ordinary course of trade and used in the NV calculation). Sales to affiliated customers in the comparison market that were not made at arm's–length prices were excluded from our analysis because we considered these sales to be outside the ordinary course of trade. *See* 19 CFR 351.102(b).

*C. Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade (LOT) as the EP or CEP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. *See Id.*; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997) (*Plate from South Africa*). In order to determine whether the comparison–market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the chain of distribution), including selling functions, class of customer (customer category), and the level of selling expenses for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison–market sales (*i.e.*, where NV is based on either home market or third country prices),[8] we consider the starting prices before any adjustments. For CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. *See Micron Technology, Inc. v. United States*, 243 F. 3d 1301, 1314 (Fed. Cir. 2001). When the Department is unable to match U.S. sales of the foreign like product in the comparison market at the same LOT as the EP or CEP, the Department may compare the U.S. sales to sales at a different LOT in the comparison market. In comparing EP or CEP sales at a different LOT in the comparison market, where available data make it practicable, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP and there is no basis for determining whether the difference in LOTs between NV and CEP affects price comparability (*i.e.*, no LOT adjustment was practicable), the Department shall grant a CEP offset, as provided in section 773(a)(7)(B) of the Act. *See Plate from South Africa*, 62 FR at 61732–33.

In this administrative review, we obtained information from each respondent regarding the marketing stages involved in making the reported foreign market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Company–specific LOT findings are summarized below.

[8] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative (G&A) expenses, and profit for CV, where possible.

*1. MRG*

MRG reported that it made EP sales in the U.S. market through a single channel of distribution (*i.e.*, direct sales to unaffiliated distributors). We examined the selling activities performed for this channel and found that MRG performed the following selling functions: sales forecasting/market research, sales promotion/trade shows/advertising, visits/calls and correspondence with customers, order processing/sales documentation, inventory maintenance, delivery services, warranty services, and packing. These selling activities can be generally grouped into three selling function categories for analysis: 1) sales and marketing; 2) freight and delivery services; and, 3) warranty and technical support. Accordingly, we find that MRG performed sales and marketing, freight and delivery services, and warranty and technical support at the same relative level of intensity for all U.S. sales. Because all sales in the United States are made through a single distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the home market, MRG made sales to processors, trading companies, distributors, and restaurants. MRG stated that its home market sales were made through two channels of distribution: 1) sales to one customer which purchases shrimp for processing into non–subject merchandise; and 2) sales to all other customers. We examined the selling activities performed for these channels, and found that MRG performed the following selling functions for both channels: sales forecasting/market research, visits/calls and correspondence with customers, order processing/sales documentation, inventory maintenance, limited delivery services, warranty services, and packing. These selling activities can be generally grouped into three selling function categories for analysis: 1) sales and marketing; 2) freight and delivery services; and, 3) warranty and technical support. Accordingly, we find that MRG performed sales and marketing, freight and delivery services, and warranty and technical support at the same relative level of intensity for all customers in the home market, except for sales forecasting/market research and inventory maintenance, which were performed at a low–to-medium level of intensity for one home market channel, and not performed for the other home market channel. After analyzing the selling functions performed for each sales channel in the home market, we find that the distinctions in selling

functions are not material. Therefore, based on our overall analysis, we preliminarily determine that there is one LOT in the home market.

Finally, we compared the EP LOT to the home market LOT and found that the selling functions performed for U.S. and home market customers are essentially the same. Therefore, we preliminarily determine that sales to the U.S. and home markets during the POR were made at the same LOT, and as a result, no LOT adjustment is warranted.

*2. Pakfood*

Pakfood reported that it made EP and CEP sales through a single channel of distribution (*i.e.*, direct sales to distributors), and performed the following selling functions for sales to U.S. customers: sales forecasting/market research, sales promotion/advertising, procurement/sourcing services, order processing, direct sales personnel, provision of cash discounts, payment of commissions, freight and delivery services, and packing. These selling activities can be generally grouped into two selling function categories for analysis: 1) sales and marketing; and 2) freight and delivery services. Accordingly, we find that Pakfood performed sales and marketing, and freight and delivery services at the same relative level of intensity for all U.S. customers. Because all sales in the United States are made through a single distribution channel, we preliminarily determine that there is one LOT in the U.S. market.

With respect to the home market, Pakfood made sales to processors, distributors, retailers, and end–users. Pakfood stated that its home market sales were made through a single channel of distribution, direct from factory to customer, and that it performed the following selling functions for sales to home market customers: sales forecasting/market research, sales promotion/advertising, procurement/sourcing services, order processing, direct sales personnel, provision of cash discounts, freight and delivery services, and packing. These selling activities can be generally grouped into two selling function categories for analysis: 1) sales and marketing; and 2) freight and delivery services. Accordingly, we find that Pakfood performed sales and marketing, and freight and delivery services at the same relative level of intensity for all customers in the home market. Because all sales in the home market are made through a single distribution channel, we preliminarily determine that there is one LOT in the home market.

Finally, we compared the U.S. LOT to the home market LOT and found that the selling functions performed for U.S. and home market customers are virtually identical, with the exception of commission payments made for U.S. sales which is not a sufficient basis to determine that the U.S. LOT is different from the home market LOT. Moreover, although there are some differences in the level of intensity at which some of the selling functions were performed in the two markets, we find that these differences are not material. Therefore, based on our overall analysis, we preliminarily determine that sales to the U.S. and home markets during the POR were made at the same LOT, and as a result, no LOT adjustment was warranted.

*3. The Rubicon Group*

The Rubicon Group reported that it made both EP and CEP sales in the U.S. market to distributors/wholesalers, retailers, and food service industry customers. For EP sales, the Rubicon Group reported sales through one channel of distribution (*i.e.*, direct from the Thai exporters to unaffiliated U.S. customers). For CEP sales, the Rubicon Group reported that its U.S. affiliate made sales through two channels of distribution: 1) from a warehouse; and 2) direct shipments to customers ("drop shipments").

We examined the selling activities performed for each channel. For direct EP sales, the Rubicon Group reported the following selling functions: sales forecasting/market research, sales promotion/trade shows, inventory maintenance, order input/processing, freight and delivery arrangements, visits, calls and correspondence to customers, development of new packaging (with customer), packing and after–sales services. These selling activities can be generally grouped into four categories for analysis: 1) sales and marketing; 2) freight and delivery services; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Accordingly, we found that the Rubicon Group performed selling functions related to sales and marketing, freight and delivery, inventory maintenance and warehousing, and warranty and technical support at the same relative level of intensity for EP sales. As there was only one channel of distribution for EP sales, we found that there was one LOT for EP sales.

For both warehoused and drop–shipment CEP sales, the Rubicon Group reported the following selling functions: inventory maintenance, order input/processing, freight and delivery arrangements, and packing. As the selling functions performed for both warehoused and drop- shipment sales were identical, we found that there was one LOT for CEP sales.

With respect to the Canadian market, the Rubicon Group reported sales to distributors/wholesalers, retailers, and end users. The Rubicon Group stated that its Canadian sales were made through two channels of distribution: 1) direct to Canadian customers; and 2) through its U.S. affiliate from a Canadian warehouse. We examined the reported selling activities and found that the Rubicon Group performed the following selling functions for direct sales to Canada: sales forecasting; market research; sales promotion; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging (with customer); packing; and after–sales services. For warehoused sales to Canada, we found that the Rubicon Group (including the Thai packers[9], Rubicon Resources and Wales, an affiliate of the Thai packers) performed the following selling functions: sales forecasting; market research; sales promotion; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); packing; and after–sales services. These selling activities can be generally grouped into four selling function categories: 1) sales and marketing; 2) freight and delivery services; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Accordingly, we found that the Rubicon Group performed selling functions related to sales and marketing, freight and delivery, inventory maintenance and warehousing, and warranty and technical support at the same relative level of intensity for all customers in the comparison market. Therefore, we found that all of the Rubicon Group's sales in the Canadian market constituted one LOT.

In comparing the EP LOT to the Canadian market LOT we found that the selling functions performed for U.S. and Canadian customers were the same. Therefore, we determined that the LOT for Canadian sales was the same as the LOT for EP sales. Consequently, we

[9] The following companies in the Rubicon Group produced subject merchandise during the POR and are collectively referred to as the "Thai packers": Andaman, CSF, CFF, PTN, PFF, TFC, TIS, SCC, and Sea Wealth.

matched EP sales to comparison–market sales at the same LOT and no LOT adjustment was warranted.

In comparing the Canadian LOT to the CEP LOT, we found that the selling activities performed by the Thai packers for CEP sales were significantly fewer than the selling activities that were performed for the Canadian sales. The Thai packers performed the following selling functions for Canadian sales: sales forecasting; market research; sales promotion; advertising; trade shows; inventory maintenance; order input/processing; freight and delivery arrangements; visits, calls and correspondence to customers; development of new packaging and new markets (with customer); packing; and after–sales services. The only selling functions that the Thai packers provided for CEP sales were inventory maintenance, order input/processing, freight and delivery arrangements, and packing. Therefore, the Thai packers provided many more selling functions for Canadian sales than they provided for CEP sales, thus making the Canadian market LOT more advanced than the CEP LOT.

Based on the above analysis, we considered the CEP LOT to be different from the Canadian market LOT and to be at a less advanced stage of distribution than the Canadian market LOT. Accordingly, we could not match CEP sales to sales at the same LOT for Canadian sales, nor could we determine a LOT adjustment based on the Rubicon Group's Canadian sales because there was only one LOT in Canada. Therefore, it was not possible to determine if there was a pattern of consistent price differences between the sales on which NV is based and Canadian sales at the LOT of the export transaction. *See* section 773(a)(7)(A) of the Act. Furthermore, we have no other information that provides an appropriate basis for determining a LOT adjustment. Consequently, because the data available did not form an appropriate basis for making a LOT adjustment but the Canadian market LOT was at a more advanced stage of distribution than the CEP LOT, we made a CEP offset to NV in accordance with section 773(a)(7)(B) of the Act. The CEP offset was calculated as the lesser of: (1) the indirect selling expenses incurred on the third–country sales, or (2) the indirect selling expenses deducted from the starting price in calculating CEP.

*D. Cost of Production Analysis*

Based on our analysis of the Domestic Producers' allegation, we found that there were reasonable grounds to believe or suspect that MRG's sales of shrimp in the home market were made at prices below its COP. Accordingly, pursuant to section 773(b) of the Act, we initiated a sales–below-cost investigation to determine whether MRG's sales were made at prices below its COP. *See* September 10, 2009, memorandum entitled "The Domestic Producers' Allegation of Sales Below the Cost of Production for Marine Gold Products Ltd."

We found that Pakfood and the Rubicon Group made sales below the COP in the 2006–2007 administrative review, the most recently completed segment of this proceeding as of the date of the initiation of this administrative review, and such sales were disregarded. *See Certain Frozen Warmwater Shrimp from Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 73 FR E8–4418 (March 6, 2008); unchanged in *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 50933 (August 29, 2008). Thus, in accordance with section 773(b)(2)(A)(ii) of the Act, there are reasonable grounds to believe or suspect that Pakfood and the Rubicon Group made sales in their respective comparison markets at prices below the cost of producing the merchandise in the current review period.

*1. Calculation of Cost of Production*

In accordance with section 773(b)(3) of the Act, we calculated the respondents' COPs based on the sum of their costs of materials and conversion for the foreign like product, plus amounts for G&A expenses and interest expenses (*see* "Test of Comparison–Market Sales Prices" section below for treatment of comparison–market selling expenses and packing costs).

The Department relied on the COP data submitted by MRG, Pakfood, and the Rubicon Group in their most recent supplemental responses to section D of the questionnaire for the COP calculations.

*2. Test of Comparison–Market Sales Prices*

On a product–specific basis, we compared the weighted–average COP to the prices of home market sales (for MRG and Pakfood) or third–country sales (for the Rubicon Group) of the foreign like product, as required under section 773(b) of the Act, in order to determine whether the sale prices were below the COP. For purposes of this comparison, we used COP exclusive of selling and packing expenses. The prices, adjusted for any applicable billing adjustments, were exclusive of any applicable movement charges, rebates, discounts, and direct and indirect selling expenses, and packing expenses.

*3. Results of the COP Test*

In determining whether to disregard comparison–market sales made at prices below the COP, we examine, in accordance with sections 773(b)(1)(A) and (B) of the Act: 1) whether, within an extended period of time, such sales were made in substantial quantities; and 2) whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. Where less than 20 percent of the respondent's comparison–market sales of a given product are at prices less than the COP, we do not disregard any below–cost sales of that product because we determine that in such instances the below–cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of a respondent's sales of a given product are at prices less than the COP, we disregard the below–cost sales because: 1) they were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act, and 2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain specific products, more than 20 percent of MRG's, Pakfood's and the Rubicon Group's comparison–market sales were at prices less than the COP and, in addition, such sales did not provide for the recovery of costs within a reasonable period of time. Therefore, we excluded these sales and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

For those U.S. sales of subject merchandise for which there were no useable comparison–market sales in the ordinary course of trade, we compared EPs or CEPs to the CV in accordance with section 773(a)(4) of the Act. *See* "Calculation of Normal Value Based on Constructed Value" section below.

*E. Calculation of Normal Value Based on Comparison–Market Prices*

*1. MRG*

We based NV for MRG on ex–factory or delivered prices to unaffiliated customers in the home market. We

made deductions, where appropriate, from the starting price for inland freight expenses, under section 773(a)(6)(B)(ii) of the Act.

We made adjustments under section 773(a)(6)(C) of the Act for differences in circumstances–of-sale for imputed credit expenses and bank fees, where appropriate. We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

We also deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6)(A) and (B) of the Act.

*2. Pakfood*

We based NV for Pakfood on ex–factory or delivered prices to unaffiliated customers in the home market, or prices to affiliated customers in the home market that were determined to be at arm's length. Where appropriate, we made adjustments for billing adjustments. We made deductions, where appropriate, from the starting price for inland freight and pre–sale warehousing expenses, under section 773(a)(6)(B)(ii) of the Act.

For NV–to-EP comparisons, we made circumstance–of-sale adjustments for differences in credit expenses and bank charges, pursuant to section 773(a)(6)(C) of the Act. We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market.

For NV–to-CEP comparisons, we made deductions for home market credit expenses and bank charges, pursuant to 773(a)(6)(C) of the Act.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

We also deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(6)(A) and (B) of the Act.

*3. The Rubicon Group*

For the Rubicon Group, we calculated NV based on prices to unaffiliated customers. Where appropriate, we made adjustments for billing adjustments and rebates. We also made deductions for movement expenses, including inland freight, pre–sale warehousing, inland insurance, marine insurance, brokerage and handling, gate charges, inspection charges, customs duties, and ocean freight (offset by freight refunds, where appropriate), under section 773(a)(6)(B)(ii) of the Act.

For NV–to-EP comparisons, we made circumstance–of-sale adjustments for differences in credit expenses, bank charges, and commissions, pursuant to section 773(a)(6)(C) of the Act.

For NV–to-CEP comparisons, we made deductions for third–country credit expenses, bank charges, commissions, and repacking expenses, pursuant to 773(a)(6)(C) of the Act. In addition, we made a CEP offset in accordance with section 773(a)(7)(B) of the Act, as discussed above in the "Level of Trade" section.

We also made adjustments in accordance with 19 CFR 351.410(e) for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted on sales in one market but not the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of: 1) the amount of commission paid in the U.S. market; or 2) the amount of indirect selling expenses incurred in the comparison market. If the commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV for the lesser of: 1) the amount of commission paid in the comparison market; or 2) the amount of indirect selling expenses incurred in the U.S. market.

Furthermore, we made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.

We also deducted third–country packing costs and added U.S. packing costs in accordance with sections 773(a)(6)(A) and (B) of the Act.

*F. Calculation of Normal Value Based on Constructed Value*

Section 773(a)(4) of the Act provides that where NV cannot be based on comparison–market sales, NV may be based on CV. Accordingly, for those shrimp products sold by MRG, Pakfood and the Rubicon Group in the United States for which we could not determine the NV based on comparison–market sales, either because there were no useable sales of a comparable product or all sales of comparable products failed the COP test, we based NV on CV.

Section 773(e) of the Act provides that CV shall be based on the sum of the cost of materials and fabrication for the imported merchandise, plus amounts for selling, general and administrative (SG&A) expenses, profit, and U.S. packing costs. For the Rubicon Group, Pakfood, and Marine Gold, we calculated the cost of materials and fabrication based on the methodology described in the "Cost of Production Analysis" section, above, and we based SG&A and profit for each respondent on the actual amounts incurred and realized by it in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the comparison market, in accordance with section 773(e)(2)(A) of the Act.

For comparisons to EP, we made circumstances–of-sale adjustments by deducting direct selling expenses incurred on comparison–market sales from, and adding U.S. direct selling expenses to, CV, in accordance with section 773(a)(8) of the Act and 19 CFR 351.410. For comparisons to CEP, we made circumstance–of-sale adjustments by deducting comparison- market direct selling expenses from CV. We also made adjustments, when applicable, for indirect selling expenses incurred on comparison–market or U.S. sales where commissions were granted in one market but not the other. *See* 19 CFR 351.410(e).

**Currency Conversion**

We made currency conversions into U.S. dollars for all spot transactions by MRG, Pakfood, and the Rubicon Group in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank. In addition, both MRG and Pakfood reported that they purchased forward exchange contracts which were used to convert the currency in which certain sales transactions were made into home

market currency. Under 19 CFR 351.415(b), if a currency transaction on forward markets is directly linked to an export sale under consideration, the Department is directed to use the exchange rate specified with respect to such foreign currency in the forward sale agreement to convert the foreign currency. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 6; *see also Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 12103, 12113 (March 6, 2008), unchanged in *Certain Frozen Warmwater Shrimp form India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 15, 2008). Therefore, for MRG and Pakfood we used the reported forward exchange rates for currency conversions where applicable.

**Preliminary Results of the Review**

We preliminarily determine that weighted–average dumping margins exist for the respondents for the period February 1, 2008, through January 31, 2009[10], as follows:

| Manufacturer/Exporter | Percent Margin |
|---|---|
| Marine Gold Products Limited | 2.03 |
| Pakfood Public Company Limited / Asia Pacific (Thailand) Company Limited / Chaophraya Cold Storage Company Limited/ Okeanos Company Limited/ Okeanos Food Company Limited/ Takzin Samut Company Limited (collectively, Pakfood) | 1.11 |
| Andaman Seafood Co., Ltd. / Chanthaburi Frozen Food Co., Ltd. / Chanthaburi Seafoods Co., Ltd. / Intersia Foods Co., Ltd. (formerly Y2K Frozen Foods Co., Ltd.)/Phatthana Frozen Food Co., Ltd. / Phatthana Seafood Co., Ltd./Sea Wealth Frozen Food Co. Ltd. /Thailand Fishery Cold Storage Public Co., Ltd. /Thai International Seafoods Co., Ltd. /S.C.C. Frozen Seafood Co., Ltd./ Wales & Co. Universe Limited (collectively, the Rubicon Group) | 5.55 |

The review–specific average rate applicable to the following companies is 3.19 percent:[11]

Manufacturer/Exporter

A. Wattanachai Frozen Products Co., Ltd.
A.S. Intermarine Foods Co., Ltd.
ACU Transport Co., Ltd.
Anglo–Siam Seafoods Co., Ltd.
Apex Maritime (Thailand) Co., Ltd.
Apitoon Enterprise Industry Co., Ltd.
Applied DB Ind
Asian Seafood Coldstorage (Sriracha)
Asian Seafoods Coldstorage Public Co., Ltd.
Asian Seafoods Coldstorage (Suratthani) Co., Limited
Asian Seafoods Coldstorage (Suratthani) Co.
Assoc. Commercial Systems
B.S.A. Food Products Co., Ltd.
Bangkok Dehydrated Marine Product Co., Ltd.
Bright Sea Co., Ltd.
C.P. Merchandising Co., Ltd.
C P Mdse
C P Retailing and Marketing Co., Ltd.
C Y Frozen Food Co., Ltd.
Chaivaree Marine Products Co., Ltd.
Chaiwarut Co., Ltd.
Charoen Pokphand Foods Public Co., Ltd.
Chonburi L C
Chue Eie Mong Eak Ltd. Part.
Core Seafood Processing Co., Ltd.
Crystal Frozen Foods Co., Ltd. and/or Crystal Seafood
Daedong (Thailand) Co. Ltd.
Daiei Taigen (Thailand) Co., Ltd.
Daiho (Thailand) Co., Ltd.
Dynamic Intertransport Co., Ltd.
Earth Food Manufacturing Co., Ltd.
Findus (Thailand) Ltd.
Fortune Frozen Foods (Thailand) Co., Ltd.
Frozen Marine Products Co., Ltd.
GSE Lining Technology Co., Ltd.
Gallant Ocean (Thailand) Co., Ltd.
Gallant Seafoods Corporation
Global Maharaja Co., Ltd.
Golden Sea Frozen Foods
Golden Sea Frozen Foods Co., Ltd.
Good Fortune Cold Storage Co., Ltd.
Good Luck Product Co., Ltd.
Gulf Coast Crab Intl
H.A.M. International Co., Ltd.
Haitai Seafood Co., Ltd.
Handy International (Thailand) Co., Ltd.
Heng Seafood Limited Partnership
Heritrade Co., Ltd.
HIC (Thailand) Co., Ltd.
High Way International Co., Ltd.
I.T. Foods Industries Co., Ltd.
Inter–Pacific Marine Products Co., Ltd.
K Fresh
K. D. Trading Co., Ltd.
KF Foods
K.L. Cold Storage Co., Ltd.
K & U Enterprise Co., Ltd.
Kiang Huat Sea Gull Trading Frozen Food Public Co., Ltd.
Kingfisher Holdings Ltd.
Kibun Trdg
Klang Co., Ltd.
Kitchens of the Ocean (Thailand) Ltd.
Kongphop Frozen Foods Co., Ltd.
Kosamut Frozen Foods Co., Ltd.
Lee Heng Seafood Co., Ltd.
Li–Thai Frozen Foods Co., Ltd.
Maersk Line
Magnate & Syndicate Co., Ltd.
Mahachai Food Processing Co., Ltd.
May Ao Co., Ltd.
May Ao Foods Co., Ltd.
Merit Asia Foodstuff Co., Ltd.
Merkur Co., Ltd.
Ming Chao Ind Thailand
N&N Foods Co., Ltd.
Namprik Maesri Ltd. Part.
Narong Seafood Co., Ltd.
Nongmon SMJ Products
NR Instant Produce Co., Ltd.
Ongkorn Cold Storage Co., Ltd.
Pacific Queen Co., Ltd.
Penta Impex Co., Ltd.
Pinwood Nineteen Ninety Nine
Piti Seafoods Co., Ltd.
Premier Frozen Products Co., Ltd.
Preserved Food Specialty Co., Ltd.
Queen Marine Food Co., Ltd.
Rayong Coldstorage (1987) Co., Ltd.
S&D Marine Products Co., Ltd.
S&P Aquarium
S&P Syndicate Public Company Ltd.
S. Chaivaree Cold Storage Co., Ltd.
SCT Co., Ltd.
S. Khonkaen Food Industry Public Co., Ltd. and/or S. Khonkaen Food Ind Public
SMP Food Product Co., Ltd.
Samui Foods Company Limited
Sea Bonanza Food Co., Ltd.
SEA NT'L CO., LTD.
Seafoods Enterprise Co., Ltd.
Seafresh Fisheries
Seafresh Industry Public Co., Ltd.

[10] See Footnote 2 regarding the POR for the Rubicon Group and Thai I-Mei.

[11] This rate is based on the weighted average of the margins calculated for those companies selected for individual examination, excluding *de minimis* margins or margins based entirely on facts available.

Search & Serve
Shianlin Bangkok Co., Ltd.
Siam Food Supply Co., Ltd.
Siam Intersea Co., Ltd.
Siam Marine Products Co. Ltd.
Siam Union Frozen Foods
Siamchai International Food Co., Ltd.
Smile Heart Foods Co. Ltd.
Southport Seafood
Star Frozen Foods Co., Ltd.
STC Foodpak Ltd.
Suntechthai Intertrading Co., Ltd.
Surapon Nichirei Foods Co., Ltd.
Surapon Seafoods Public Co., Ltd. / Surapon Foods Public Co., Ltd.
Surapon Seafood
Surat Seafoods Co., Ltd.
Suratthani Marine Products Co., Ltd.
T.S.F. Seafood Co., Ltd.
Tanaya International Co., Ltd.
Tanaya Intl.
Teppitak Seafood Co., Ltd.
Tey Seng Cold Storage Co., Ltd.
Tep Kinsho Foods Co., Ltd.
Thai–Ger Marine Co., Ltd.
Thai Agri Foods Public Co., Ltd.
Thai I–Mei Frozen Foods Co., Ltd.
Thai Mahachai Seafood Products Co., Ltd.
Thai Ocean Venture Co., Ltd.
Thai Patana Frozen
Thai Prawn Culture Center Co., Ltd.
Thai Royal Frozen Food Co. Ltd.
Thai Spring Fish Co., Ltd.
Thai Union Frozen Products Public Co., Ltd.
Thai Union Seafood Co., Ltd.
Thai World Imports & Exports
The Siam Union Frozen Foods Co., Ltd.
The Union Frozen Products Co., Ltd.
Trang Seafood Products Public Co., Ltd.
Transamut Food Co., Ltd.
Tung Lieng Trdg
United Cold Storage Co., Ltd.
Xian–Ning Seafood Co., Ltd.
Yeenin Frozen Foods Co., Ltd.
YHS Singapore Pte
ZAFCO TRDG

**Disclosure and Public Hearing**

The Department will disclose to parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice. *See* 19 CFR 351.224(b). Pursuant to 19 CFR 351.309, interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs. Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: 1) a statement of the issue; 2) a brief summary of the argument; and 3) a table of authorities.

Interested parties who wish to request a hearing or to participate if one is requested must submit a written request to the Assistant Secretary for Import Administration, Room 1870, within 30 days of the date of publication of this notice. Requests should contain: 1) the party's name, address and telephone number; 2) the number of participants; and 3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in the respective case briefs.

The Department will issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

**Assessment Rates**

Upon completion of the administrative review, the Department shall determine, and CBP shall assess, antidumping duties on all appropriate entries, in accordance with 19 CFR 351.212. The Department intends to issue appropriate appraisement instructions for the companies subject to this review directly to CBP 15 days after the date of publication of the final results of this review.

Where the respondents reported entered value for their U.S. sales, we will calculate importer–specific *ad valorem* duty assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer.

Where the respondents did not report entered value for their U.S. sales, we will calculate importer–specific per–unit duty assessment rates by aggregating the total amount of antidumping duties calculated for the examined sales and dividing this amount by the total quantity of those sales. With respect to sales of shrimp with sauce, for which no entered value was reported, we will include the total quantity of the merchandise with sauce in the denominator of the calculation of the importer–specific rate because CBP will apply the per–unit duty rate to the total quantity of merchandise entered, including the sauce weight. To determine whether the duty assessment rates are *de minimis*, in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we will calculate importer–specific *ad valorem* ratios based on the estimated entered value.

For the companies which were not selected for individual examination, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual examination excluding any which are *de minimis* or determined entirely on facts available.

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 review is above *de minimis* (*i.e.*, at or above 0.50 percent). Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis* (*i.e.*, less than 0.50 percent). The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

The Department clarified its "automatic assessment" regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.*, a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate effective during the POR if there is no rate for the intermediary involved in the transaction. *See Assessment Policy Notice* for a full discussion of this clarification.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: 1) the cash deposit rate for each specific company listed above[12] will be that established in the final results of this review, except if the rate is less than 0.50 percent and, therefore, *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; 2) for previously reviewed or investigated companies not participating in this review, the cash deposit rate will

[12] Effective January 16, 2009, there is no longer a cash deposit requirement for the Rubicon Group or Thai I-Mei in accordance with the *Section 129 Determination.*

continue to be the company–specific rate published for the most recent period; 3) if the exporter is not a firm covered in this review, a previous review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and 4) the cash deposit rate for all other manufacturers or exporters will be 5.34 percent, the all–others rate made effective by the *Section 129 Determination*. These requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221.

Dated: March 8, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–5588 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–533–810]**

### Stainless Steel Bar from India: Preliminary Results of Antidumping Duty Administrative Review

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

**SUMMARY:** The Department of Commerce is conducting an administrative review of the antidumping duty order on stainless steel bar from India. The period of review is February 1, 2008, through January 31, 2009. This review covers imports of stainless steel bar from two producers/exporters: Ambica Steels Limited and Venus Wire Industries Pvt. Ltd. We preliminarily find that sales of the subject merchandise have been made below normal value. If these preliminary results are adopted in our final results, we will instruct U.S. Customs and Border Protection to assess antidumping duties on appropriate entries. Interested parties are invited to comment on these preliminary results. We will issue the final results no later than 120 days from the date of publication of this notice.

**EFFECTIVE DATE:** March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Scott Holland, Seth Isenberg, or Austin Redington, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482–1279, (202) 482–0588, or (202) 482–1664, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

On February 21, 1995, the Department of Commerce ("Department") published in the **Federal Register** the antidumping duty order on stainless steel bar ("SSB") from India. *See Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan*, 60 FR 9661 (February 21, 1995). On February 4, 2009, the Department published a notice in the **Federal Register** providing an opportunity for interested parties to request an administrative review of the antidumping duty order on SSB from India for the period of review ("POR") February 1, 2008, through January 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 74 FR 6013 (February 4, 2009).

On February 19, 2009, the Department received a timely request for review from Ambica Steels Limited ("Ambica"). On February 27, 2009, we received a timely request for review from Venus Wire Industries Pvt. Ltd. ("Venus Wire"). Also, on February 27, 2009, we received a timely request from domestic interested parties Carpenter Technology Corp.; Crucible Specialty Metals, a division of Crucible Materials Corp.; Electralloy Co., a G.O. Carlson, Inc. company; and Valbruna Slater Stainless, Inc. (collectively, "Petitioners"), for a review of Venus Wire and its affiliates. On March 24, 2009, in accordance with section 751(a) of the Tariff Act of 1930, as amended ("the Act"), we initiated an administrative review on Ambica and Venus Wire. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 74 FR 12310 (March 24, 2009).

On April 10, 2009, the Department issued antidumping duty questionnaires to Ambica and Venus Wire. Ambica submitted its responses to the antidumping questionnaire in May and June 2009. Venus Wire submitted its responses to the antidumping questionnaire in May, June, and July 2009. After analyzing these responses, we issued supplemental questionnaires to Ambica and Venus Wire to clarify or correct information contained in the initial questionnaire responses. We received responses to these supplemental questionnaires from Ambica in September, November, and December, 2009, and January and February, 2010. We received responses to these supplemental questionnaires from Venus Wire in September, November, and December, 2009, and January and March, 2010.

On February 17, 2010, the Department determined that the January 25, 2010, Section D cost reconciliation submitted by Sieves Manufacturing (India) Pvt. Ltd. ("Sieves") (an affiliated company collapsed with Venus Wire, *see* "Affiliation" section below) was filed after the established deadline and, in accordance with 19 CFR 351.302(d)(i), the Department returned the submission to Sieves. *See* Letter from Susan Kuhbach to Sieves "Rejection of Sieves' Section D supplemental response" dated February 17, 2010. The Department later determined that it had previously granted a separate extension until January 25, 2010, for submission of Sieves' cost reconciliation. *See* Memorandum from Austin Redington, International Trade Compliance Analyst to the File entitled, "Extension Request from Sieves," dated January 15, 2010. Thus, because it was timely filed, the Department requested that Sieves re–submit the Section D cost responses that the Department had previously returned. *See* Letter from Brandon Farlander, Program Manager to Sieves entitled "Resubmission of Sieves' Section D supplemental response," dated February 24, 2010.

On October 29, 2009, we extended the time limit for completing the preliminary results of this review to no later than March 1, 2010, in accordance with section 751(a)(3)(A) of the Act. *See Stainless Steel Bar From India: Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Review*, 74 FR 55814 (October 29, 2009).

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by

seven days. The revised deadline for the preliminary results of this review is now March 8, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

**Period of Review**

The POR is February 1, 2008, through January 31, 2009.

**Notice of Intent Not To Revoke Order In Part**

On February 27, 2009, pursuant to 19 CFR 351.222(b)(2), Venus Wire requested that the Department revoke it from the antidumping duty order on SSB from India at the conclusion of this administrative review. A request for revocation of an order in part must be accompanied by three elements: (1) the company's certification that it sold subject merchandise at not less than normal value ("NV") during the POR, and that in the future it would not sell such merchandise at less than NV; (2) the company's certification that it has sold the subject merchandise to the United States in commercial quantities during each of the past three years, and (3) the company's agreement to immediate reinstatement of the antidumping duty order, if the Department concludes that the company, subsequent to revocation, sold the subject merchandise at less than NV. *See* 19 CFR 351.222(e).

Venus Wire's February 27, 2009, request for revocation was not in accordance with 19 CFR 351.222(e) because it was not accompanied by a certification that (1) Venus Wire had not sold the subject merchandise at less than NV for a three-year period, and would not do so in the future and (2) Venus Wire had sold the subject merchandise to the United States in commercial quantities during each of the past three years. The company provided a certification regarding commercial quantities on November 6, 2009. However, this submission was not filed with the Department within the anniversary month of the proceeding as required by 19 CFR 351.222(e). Venus Wire did not, at any point, provide a certification stating that it had sold the subject merchandise at not less than NV during the current review period and that it would not do so in the future.

Because Venus Wire's request for revocation was incomplete, the Department notified Venus Wire that it was not being considered for revocation in the course of this administrative review. *See* Letter from Susan Kuhbach to Venus Wire Pvt. Ltd. "Request for Revocation," dated February 16, 2010.

**Bona Fide Analysis**

In their letter of May 29, 2009, Petitioners alleged that the U.S. transaction reported by Ambica during the POR was not a *bona fide* sale.

We analyzed the transaction, comparing it to other sales of subject merchandise using data obtained from U.S. Customs and Border Protection ("CBP") to determine whether it was a *bona fide* transaction. In terms of price and quantity, we found Ambica's U.S. sale to be within the range of sales of all imports of the subject merchandise, as well as within the range of sales of product in the same Harmonized Tariff Schedule ("HTS") code measured over the entire POR. We also found Ambica's U.S. sale to be within the price range of sales for the same HTS code in the same quarter of the sale. We included this quarterly analysis because we are using quarterly costs. For our complete analysis of these and other relevant factors, see Memorandum from Seth Isenberg, International Trade Compliance Analyst to the File entitled, "Bona Fide Nature of Ambica Steels Limited's Sales in the Period of Review for Stainless Steel Bar from India," dated March 8, 2010, ("*Bona Fide* Memo") on file in the Central Records Unit in room 1117 of the main Department building ("CRU"). Based on our analysis, we preliminarily determine that Ambica's U.S. sale was a *bona fide* transaction.

**Scope of the Order**

Imports covered by the order are shipments of SSB. SSB means articles of stainless steel in straight lengths that have been either hot–rolled, forged, turned, cold–drawn, cold–rolled or otherwise cold–finished, or ground, having a uniform solid cross section along their whole length in the shape of circles, segments of circles, ovals, rectangles (including squares), triangles, hexagons, octagons, or other convex polygons. SSB includes cold–finished SSBs that are turned or ground in straight lengths, whether produced from hot–rolled bar or from straightened and cut rod or wire, and reinforcing bars that have indentations, ribs, grooves, or other deformations produced during the rolling process.

Except as specified above, the term does not include stainless steel semi–finished products, cut–to-length flat–rolled products (*i.e.*, cut–to-length rolled products which if less than 4.75 mm in thickness have a width measuring at least 10 times the thickness, or if 4.75 mm or more in thickness having a width which exceeds 150 mm and measures at least twice the thickness), wire (*i.e.*, cold–formed products in coils, of any uniform solid cross section along their whole length, which do not conform to the definition of flat–rolled products), and angles, shapes, and sections.

The SSB subject to this review is currently classifiable under subheadings 7222.11.00.05, 7222.11.00.50, 7222.19.00.05, 7222.19.00.50, 7222.20.00.05, 7222.20.00.45, 7222.20.00.75, and 7222.30.00.00 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

On May 23, 2005, the Department issued a final scope ruling that SSB manufactured in the United Arab Emirates out of stainless steel wire rod from India is not subject to the scope of the order. See Memorandum from Team to Barbara E. Tillman, "Antidumping Duty Orders on Stainless Steel Bar from India and Stainless Steel Wire Rod from India: Final Scope Ruling," dated May 23, 2005, which is on file in the CRU. *See also Notice of Scope Rulings*, 70 FR 55110 (September 20, 2005).

**Affiliation**

*Precision Metals*

In the 2005–2006 antidumping duty administrative review of SSB from India, the Department determined that Venus Wire and Precision Metals were affiliated within the meaning of section 771(33) of the Act, and also that the two companies should be treated as a single entity for the purposes of that administrative review. *See Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 72 FR 51595, 51596 (September 10, 2007). In the 2007–2008 antidumping administrative review of SSB from India, the Department again determined that these two companies should be treated as a single entity. *See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 74 FR 47198 (September 15, 2009).

During the current, 2008–2009 administrative review, the Department again examined Venus Wire's relationship with Precision Metals. Based on Venus Wire's representations that its corporate affiliation relationship with Precision Metals remained the same during the POR as during the 2005–2006, and 2007–2008 administrative reviews (*see* Venus Wire's May 19, 2009, Section A

questionnaire response ("AQR") at A–2, 6–10), the Department hereby continues to treat Venus Wire and Precision Metals as a single entity in the current administrative review. *See* Memorandum from Erika McDonald to the File, "Relationship of Venus Wire Industries Pvt. Ltd. and Precision Metals," dated September 15, 2009, which is on file in the CRU.

*Sieves*

On September 2, 2009, the Department determined that Venus Wire and Sieves are affiliated within the meaning of section 771(33) of the Act, and also that the two companies should be treated as a single entity and collapsed for the purposes of the 2007–2008 administrative review. *See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 74 FR at 47201. *See Stainless Steel Bar From India: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 9787, 9792 (March 6, 2009). Accordingly, we announced our intention to treat Venus Wire and Sieves as a single entity and collapse them for the 2008–2009 administrative review. *See* Memorandum from Erika McDonald to the File, "Relationship of Venus Wire Industries Pvt. Ltd. and Sieves Manufacturers (India) Pvt. Ltd.," dated September 15, 2009, which is on file in the CRU. We gave interested parties two weeks to provide comments on the collapsing of these two entities. No comments were received. Therefore, the Department continues to treat Venus Wire and Sieves as a single entity in the current administrative review.

*Hindustan Inox (formerly Hindustan Stainless)*

Petitioners allege that Hindustan Inox, formerly known as Hindustan Stainless ("Hindustan"), should also be collapsed with Venus Wire. *See* Petitioners' June 12, 2009, and January 29, 2010, filings. Petitioners argue that Hindustan is a producer and exporter of SSB and, as a Venus Wire affiliate, Venus Wire should report Hindustan's sales and costs in its responses. However, Venus Wire and Sieves stated that Hindustan did not produce or export SSB during the POR and that Hindustan only did job works of SSB for Sieves. *See* Venus Wire's November 2, 2009, Section A supplemental questionnaire response ("ASQR") at 5–6, and 8. *See also* Sieves' December 31, 2009, Section A supplemental questionnaire response ("ASQR") at 4, 6. Sieves further reported that while Hindustan is in the process of setting up a facility to manufacture SSB, Hindustan did not start producing SSB until after the POR. *See* Sieves' October 19, 2009, Section A questionnaire response ("AQR") at 8–9. After reviewing record information, we have determined that because Hindustan was not a producer/exporter of SSB during the POR, it should not be collapsed with Venus Wire in the current administrative review.

The collapsed entity of Venus Wire, Precision Metals, and Sieves is hereafter referred to as "Venus."

**Fair Value Comparisons**

To determine whether sales of SSB by Venus and Ambica to the United States were made at less than NV, we compared export price ("EP") to NV. *See* "Export Price" and "Normal Value" sections of this notice. Pursuant to section 777A(d)(2) of the Act, we compared the EPs of individual U.S. transactions to the weighted–average NV of the foreign–like product, where there were sales made in the ordinary course of trade, as discussed in the "Cost of Production Analysis" section, below.

**Product Comparisons**

In accordance with section 771(16) of the Act, we considered all products sold by Ambica and Venus ("respondents") in the comparison market covered by the description in the "Scope of the Order" section, above, to be foreign–like products for purposes of determining appropriate product comparisons to U.S. sales. In accordance with section 773(a)(1)(C)(ii) of the Act, in order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared the respondents' volumes of home market sales of the foreign–like product to the volumes of their U.S. sales of the subject merchandise. *See* the "Normal Value" section, below, for further details.

We compared U.S. sales to monthly weighted–average prices of contemporaneous sales made in the home market based on the following criteria: (1) general type of finish; (2) grade; (3) remelting; (4) type of final finishing operation; (5) shape; and (6) size. This was consistent with our practice in the original investigation. *See Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From India*, 59 FR 39733, 39735 (August 4, 1994); unchanged in the final, *see Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from India*, 59 FR 66915 (December 28, 1994). Where there were no home market sales of the foreign–like product that were identical in these respects to the merchandise sold in the United States, we compared U.S. products with the most similar merchandise sold in the home market based on the characteristics listed above, in that order of priority, made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade in the comparison market, we compared U.S. sales to constructed value ("CV").

**Date of Sale**

Pursuant to 19 CFR 351.401(i), the date of sale is normally the date of invoice, unless satisfactory evidence is presented that the material terms of sale, price, and quantity are established on some other date. Accordingly, since no such evidence was provided in this proceeding, we have relied on the invoice date as date of sale for both the U.S. and home market sales by Ambica and Venus. *See* Ambica's June 8, 2009, section B questionnaire response ("BQR") and Ambica's November 14, 2009, section A, B, and C supplemental questionnaire ("A, B, & C SQR") at 12–13. *See also* Venus Wire's AQR at A–18 and Annexure A–4.

**Export Price**

Section 772(a) of the Act defines EP as the price at which the subject merchandise is first sold before the date of importation by the producer or exporter outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c) of the Act. Section 772(b) of the Act defines constructed export price ("CEP") as the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

Petitioners argue that Venus was affiliated with its U.S. customer, AMS Specialty Steel ("AMS"), during the POR by virtue of a principal–agent relationship. Because of this alleged affiliation, Petitioners contend that Venus should have reported its sales through AMS as CEP sales, rather than as EP sales to AMS. *See* Petitioners' June 12, 2009 filing at 11–15. Petitioners made an identical claim in the previous administrative review. *See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 74 FR at 47199 and accompanying Issues and Decision Memorandum at Comment 2. Venus

denied Petitioners' claims and stated that it did not have a principal–agent relationship with AMS and that its sales should not be reported as CEP, since Venus sold material to AMS as its first unaffiliated customer. Venus also presented further support, which cannot be further described here because of its proprietary nature. *See* Letter from Venus Wire, dated November 4, 2009 and Attachment. After reviewing the information presented by both Petitioners and Venus, we found that there is no evidence to substantiate Petitioners' allegations. Therefore, the Department continues to find that there is no principal–agent relationship between Venus and AMS and will not treat Venus' sales to AMS as CEP sales.

Petitioners argue that Ambica was affiliated with its U.S. customer during the POR by virtue of a principal–agent relationship. *See* Petitioners' May 29, 2009 filing. Petitioners base the allegation on the fact that the customer advertises itself as an exclusive agent for several unnamed international mills on its website and does not advertise on the site the specific type of bar it purchased from Ambica. Because of this alleged affiliation, Petitioners contend that Ambica should have reported its U.S. sale through its customer as a CEP sale, rather than as an EP sale.

In the absence of an agency contract, "the analysis of whether a relationship constitutes an agency is case–specific and can be quite complex; there is no bright line test." *See Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo–Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 FR 24394, 24403 (May 5, 1997). The Department's examination of allegations of an agency relationship has focused on a range of criteria, including (but not limited to) the following: (1) the foreign producer's role in negotiating price and other terms of sale; (2) the extent of the foreign producer's interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; (5) whether the agent/reseller further processes or otherwise adds value to the merchandise; (6) the means of marketing a product by the producer to the U.S. customer in the pre–sale period; and (7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transactions. *See Stainless Steel Sheet and Strip From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 6682 (February 13, 2002) and accompanying Issues and Decision Memorandum, at Comment 23.

As there was no agency contract, the Department examined the above factors. Applying the Department's analytical framework for determining principal–agent relationships, we find no evidence that Ambica has any knowledge of its customer's customers, or has had any involvement with its customers' sales. After reviewing the allegations and Ambica's responses, the Department finds that there is no principal–agent relationship between Ambica and its customer. *See Bona Fide* Memo.

Therefore, for both Ambica and Venus, because the merchandise was sold prior to importation by the exporter or producer outside the United States to the first unaffiliated purchaser in the United States, and because CEP methodology was not otherwise warranted, we have based the U.S. price on EP. For both Ambica and Venus, we based EP on the packed, or delivered duty paid price to unaffiliated purchasers in the United States. We adjusted the reported gross unit price, where applicable, for early payment discounts and other discounts for weight shortages, short payments or quality claims. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act. These deductions included, where appropriate, freight incurred in transporting merchandise to the Indian port, domestic brokerage and handling, international freight, marine insurance, U.S. brokerage and handling, freight incurred in the United States, U.S. customs duties, and other transportation fees. *See* Ambica Preliminary Results Calculation Memorandum (March 8, 2010). *See also* Venus Preliminary Results Calculation Memorandum (March 8, 2010).

**Duty Drawback**

Section 772(c)(1)(B) of the Act provides that EP or CEP shall be increased by among other things, "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." The Department determines that an adjustment to U.S. price for claimed duty drawback is appropriate when a company can demonstrate that: (1) the "import duty and rebate are directly linked to, and dependent upon, one another;" and (2) "the company claiming the adjustment can show that there were sufficient imports of the imported raw materials to account for the drawback received on the exported product." *Rajinder Pipes Ltd. v. United States*, 70 F. Supp. 2d 1350, 1358 (Ct. Int'l Trade 1999). Venus claimed a duty drawback adjustment based on its participation in the Indian government's Duty Entitlement Passbook Program.

The Department finds that Venus has not provided sufficient evidence to establish the necessary link between the import duty and the reported duty drawback. Therefore, because Venus has failed to meet the Department's requirements, we are denying Venus' request for a duty drawback adjustment for the preliminary results. *See* Venus Preliminary Results Calculation Memorandum.

**Normal Value**

*A. Home Market Viability*

Section 773(a)(1) of the Act directs that NV be based on the price at which the foreign–like product is sold in the home market, provided that the merchandise is sold in sufficient quantities (or value, if quantity is inappropriate) and that there is no particular market situation that prevents a proper comparison with the EP. Section 773 (a)(1)(B)(ii)(II) of the Act contemplates that quantities (or values) will normally be considered insufficient if they are less than five percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared each respondent's volume of home market sales of the foreign–like product to its volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

Both Ambica's and Venus' reported home market sales of SSB during the POR were more than five percent of their sales of SSB to the United States. *See* Ambica's AQR at 3–4 and Venus Wire's AQR at A–3. Therefore, Ambica's and Venus' home markets were viable for purposes of calculating NV.

To derive NV for Ambica and Venus, we made the adjustments detailed in the "Calculation of Normal Value Based on Home Market Prices" section below.

*B. Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, the Department will calculate NV based on sales at the same level of trade ("LOT") as the EP. Sales are made at different LOTs if they are made at different marketing stages (or their equivalent). *See* 19 CFR 351.412(c)(2). Substantial

differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing. Id.; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut–to-Length Carbon Steel Plate From South Africa*, 62 FR 61731, 61732 (November 19, 1997).

In order to determine whether the comparison market sales were at different stages in the marketing process than the U.S. sales, we reviewed the distribution system in each market (*i.e.*, the "chain of distribution"),[1] including selling functions,[2] class of customer ("customer category"), and the level of selling expenses for each type of sale. Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs for EP and comparison market sales (*i.e.*, NV based on either comparison market or third country prices),[3] we consider the starting prices before any adjustments. When the Department is unable to match U.S. sales to sales of the foreign–like product in the comparison market at the same LOT as the EP, the Department may compare the U.S. sale to sales at a different LOT in the comparison market. In comparing EP sales at a different LOT in the comparison market, where available data make it practicable, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

Ambica reported that its customer base in the home market consists of end users and trading companies, and in the U.S. market, it consists of a trading company. *See* Ambica's AQR at A–18–19. In addition, Ambica has reported five channels of distribution in the home market and one channel distribution in the U.S. market. *See* Ambica's AQR at A–15–19. In the home market, Ambica made sales: directly to end–users from the factory; directly to traders from the factory; directly to end–users via Ambica's distribution warehouses; directly to traders via Ambica's distribution warehouses; and by a consignment agent to end–users and/or traders. In Ambica's single channel of distribution to the U.S. market, Ambica made sales directly to the trader. Ambica reported that its prices did not vary based on channel of distribution and/or customer category. *See* Ambica's AQR at 22.

Ambica reported a single LOT in both the home market and the U.S. market, and has not requested an LOT adjustment. *See* Ambica's BQR at 21, and Ambica's June 8, 2009, section C questionnaire response ("CQR") at 22; *see also* Ambica's A, B, & C SQR at 27.

We examined the information reported by Ambica regarding the type and level of selling functions performed, and customer categories. Specifically, we considered the extent to which, sales process/marketing support, freight/delivery, inventory maintenance, and quality assurance/warranty service varied with respect to the different customer categories and channels of distribution (*i.e.*, distributors and processors) across the markets.

We preliminary find the LOTs for the home market channels of distribution similar with regard to sales and marketing, inventory maintenance, and quality assurance/warranty service. Further, freight and delivery services were identical in all channels in the home market. Therefore, we consider the home market to constitute a single LOT. We compared the U.S. LOT to the LOT reported for sales in the home market. We found the LOT in the United States to be similar to the LOT in the home market. Thus, we preliminarily have compared U.S. sales to home market sales at the same LOT.

Our LOT findings with regard to Venus are summarized below. Because Venus Wire and Sieves have reported their LOT information in separate responses, we have examined each response separately. However, our final LOT determination for the collapsed entity of Venus is a consolidated LOT determination of the collapsed entity of Venus Wire and Sieves.

Venus reported one channel of distribution and a single LOT in both the home market and the U.S. market.

Venus reported that it sells to trading companies, distributors, and end users at the same LOT in the home market. Also, Venus reported that it sells to distributors, trading companies, and end users at the same LOT in the U.S. market. *See* Venus Wire's CQR at 28 and December 15, 2009, section B & C supplemental questionnaire ("B & C SQR") at 16. Venus reported that its prices did not vary based on channel of distribution and/or customer category. *See* Venus Wire's AQR at A–16.

We examined the information reported by Venus regarding its sales processes for its home market and U.S. market sales, including customer categories and the type and level of selling activities performed. *See* Venus Wire's AQR at A–17–19. Specifically, we considered the extent to which sales process/marketing support, freight/delivery, inventory maintenance, and quality assurance/warranty service varied with respect to the different customer categories and channels of distribution across the markets. Because there was only one channel of distribution and because the selling functions were identical for all home market sales, we found that the home market channel of distribution comprises one LOT. Because there was only one channel of distribution and because the selling functions were identical for U.S. sales, we evaluated the U.S. channel of distribution and found that it also comprises one LOT. Next, we compared the U.S. LOT to the home market LOT. *See id.* Venus reported similar levels of freight/delivery in both the home market and U.S. market. *See id.* Further, Venus reported no inventory maintenance in either the home market or the U.S. market, and reported that it provided no warranty services in any of its channels of distribution. *See id.* The only minor difference that Venus reported was in relation to sales process/marketing support, where Venus indicated that it advertises and promotes its U.S. market sales, but not the home market sales. *See id.* Based on our examination of the selling functions performed in the single channel of distribution in the U.S. market, we find that Venus' U.S. sales were at a single LOT.

Based on the foregoing, we preliminarily find that Venus' sales in the home market and the United States were made at the same LOT. Thus, we were able to match EP sales to sales at the same LOT in the home market and no LOT adjustment was necessary.

*C. Cost Averaging Methodology*

The Department's normal practice is to calculate an annual weighted–average cost for the entire POR. *See, e.g., Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000), and accompanying Issues and Decision Memorandum at Comment 18, and *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006), and accompanying

[1] The marketing process in the United States and comparison market begins with the producer and extends to the sale to the final user or customer. The chain of distribution between the two may have many or few links, and each respondent's sales occur somewhere along this chain. In performing this evaluation, we considered the respondent's narrative response to properly determine where in the chain of distribution the sale occurs.

[2] Selling functions associated with a particular chain of distribution help us to evaluate the LOT(s) in a particular market. For purposes of these preliminary results, we have organized the common selling functions into four major categories: sales process and marketing support, freight and delivery, inventory and warehousing, and quality assurance/warranty services.

[3] Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling expenses, general and administrative expenses ("G&A") and profit for CV, where possible.

Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted–average cost for the entire period). However, the Department recognizes that possible distortions may result if our normal annual average cost method is used during a period of significant cost changes. In determining whether to deviate from our normal methodology of calculating an annual weighted average cost, the Department evaluates the case–specific record evidence using two primary factors: (1) The change in the cost of manufacturing ("COM") recognized by the respondent during the POR must be deemed significant; and (2) the record evidence must indicate that sales during the shorter averaging periods could be reasonably linked with the cost of production ("COP") or CV during the same shorter averaging periods. *See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398, 75399 (December 11, 2008) ("*SSPC from Belgium*") and accompanying Issues and Decision Memorandum at Comment 4; *see also Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (February 9, 2009) ("*SSSS from Mexico*") and accompanying Issues and Decision Memorandum at Comment 5.

1. Significance of Cost Changes

In prior cases, the Department established 25 percent as the threshold for determining that the changes in COM are significant enough to warrant a departure from our standard annual costing approach. *See SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4; *see also Stainless Steel Sheet and Strip in Coils From Mexico; Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 45708, 45710 (August 6, 2008), unchanged in *SSSS from Mexico* and accompanying Issues and Decision Memorandum at Comment 5. To determine whether the changes in production costs were significant, we analyzed, on a product–specific basis, the extent to which the total COM changed during the POR. We did this by analyzing, on a CONNUM–specific basis, the difference between the lowest quarterly average COM and the highest quarterly average COM, as a percentage of the lowest quarterly average COM. In the instant case, record evidence shows that Ambica and Venus experienced significant changes (*i.e.*, changes that exceeded 25 percent) between the high and low quarterly COMs during the POR and that the change in COM is primarily attributable to the price volatility for stainless scrap and ferro–alloys, major inputs consumed in the production of the merchandise under consideration. *See* "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results Ambica Steels Ltd.," from Stephanie C. Arthur to Neal M. Halper, dated March 8, 2010 ("Ambica Cost Calculation Memorandum") and "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results Venus Wire Industries Pvt. Ltd.," from LaVonne L. Clark to Neal M. Halper, dated March 8, 2010 ("Venus Cost Calculation Memorandum"). In examining company–specific purchase information for these inputs, we found that the prices changed dramatically throughout the POR and consequently directly affected the cost of the material inputs consumed. *See* Ambica Cost Calculation Memorandum and Venus Cost Calculation Memorandum. As a result, we have determined for the preliminary results that the changes in COM are significant enough to warrant a departure from our standard annual costing approach, as these significant cost changes create distortions in the Department's sales–below-cost test as well as the overall margin calculation.

2. Linkage Between Cost and Sales Information

As noted above, the Department preliminarily found cost changes to be significant in this administrative review; thus, the Department subsequently evaluated whether there is evidence of linkage between the cost changes and the sales prices during the POR. The Department's definition of linkage does not require direct traceability between specific sales and their specific production cost, but rather relies on whether there are elements which would indicate a reasonable correlation between the underlying costs and the final sales prices levied by the company. *See SSSS from Mexico* and accompanying Issues and Decision Memorandum at Comment 5; *see also SSPC from Belgium* and accompanying Issues and Decision Memorandum at Comment 4. These correlative elements may be measured and defined in a number of ways depending on the associated industry, and the overall production and sales processes.

To determine whether a reasonable correlation existed between sales prices and their underlying costs during the POR, we compared weighted–average quarterly prices to the corresponding quarterly COM for the five highest–volume home market CONNUMs. For Ambica, our comparison revealed that sales prices and costs trended consistently with each other for all of these five products, thereby establishing a reasonable link between the underlying costs and sales prices. *See* Ambica Cost Calculation Memorandum.

While we were able to use data from Venus to establish the significance of cost changes discussed above, we did not have the necessary information from Venus to establish the linkage between cost and sales information. The Department requested the necessary information from Venus to perform the linkage analysis in supplemental questionnaires dated October 14, 2009; December 30, 2009; and March 1, 2010. Because we have not yet received all of the necessary information from Venus to complete the linkage between sales prices and their underlying costs, we have relied on facts available for purposes of these preliminary results. Section 776(a) of the Act provides that the Department shall apply ''facts otherwise available'' if (1) necessary information is not on the record, or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Here, we lack information necessary to determine whether a linkage between Venus' sales prices and their underlying costs reasonably exists. Therefore, we must rely upon facts available. As facts available, we have relied on the determination that a reasonable linkage exists for Ambica, the other respondent to this proceeding. As noted in the Ambica Cost Calculation Memorandum, the Department determined that Ambica's quarterly–average price and cost changes appear to be reasonably correlated and that Ambica's average quarterly cost trended consistently with the change in the average quarterly sales prices. Therefore, as facts available, we have determined a reasonable linkage also exists between Venus's sales prices and its underlying costs. We plan to analyze this issue when the necessary data have been received from Venus. *See* Venus Cost Calculation Memorandum.

For both Ambica and Venus, we found there to be a significant change (*i.e.*, one that exceeded 25 percent) in COM between the high and low quarters, as well as a reasonable linkage

of sales prices and costs during the shorter cost averaging period. Accordingly, we have preliminarily determined that a quarterly costing approach would lead to more appropriate comparisons in our antidumping duty calculations. Therefore, we preliminarily used quarterly indexed annual–average direct material costs and annual weighted–average conversion costs in the COP and CV calculations for Ambica and Venus. For ferritic and martensitic products manufactured by Ambica, we have continued to use a single weighted–average total COM.

*D. Cost of Production Analysis*

Because we disregarded sales of certain products made at prices below the COP in the most recently completed review of SSB from India (*see Stainless Steel Bar From India: Final Results of Antidumping New Shipper Review*, 72 FR 72671 (December 21, 2007) (Ambica) and *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review*, 74 FR 47198 (September 15, 2009) (Venus)), we had reasonable grounds to believe or suspect that sales of the foreign like product under consideration for the determination of NV in this review for Ambica and Venus may have been made at prices below the COP, as provided by section 773(b)(2)(A)(ii) of the Act. Pursuant to section 773(b)(1) of the Act, we initiated a COP investigation of sales by Ambica and Venus. We relied on home market sales and COP information provided by Ambica and Venus in its questionnaire responses, except where noted below:

**Ambica**

Using Ambica's quarterly cost information from the November 23, 2009 response, for austenitic grades of product, we measured the cost changes, in terms of a percentage, to develop direct material indices for each quarter. We used these indices to calculate an annual weighted–average material cost for the POR and then restate that annual average material cost to each respective quarter on an equivalent basis. *See* Ambica Cost Calculation Memorandum.

**Venus**

We relied on Venus' quarterly cost information from the January 11, 13, and 25, 2010 responses and measured the cost changes, in terms of a percentage, to develop direct material indices for each quarter. We used these indices to calculate an annual weighted–average material cost for the POR and then restate that annual average material cost to each respective quarter on an equivalent basis. We revised Venus' calculation of its quarterly raw materials costs to exclude remelted material inputs because we currently do not have adequate information on the record to determine if these costs are under–stated or double–counted. Further, we revised Venus' financial expenses to exclude an overstatement of net foreign exchange gain. See Venus Cost Calculation Memorandum.

In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether, within an extended period of time, such sales were made in substantial quantities, and whether such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. As noted in section 773(b)(1)(D) of the Act, prices are considered to provide for recovery of costs if such prices are above the weighted average per–unit COP for the period of investigation or review. In the instant case, we have relied on a quarterly costing approach for certain merchandise produced by Ambica and merchandise produced by Venus. This methodology (1) restates the quarterly material costs in terms of the "base period" (i.e., the first quarter), (2) calculates an annual weighted–average cost for the POR, and (3) restates it to each respective quarter. We find that this quarterly costing method meets the requirements of section 773(b)(2)(D) of the Act.

Where less than 20 percent of the respondent's home market sales of a given model were at prices below the COP, we did not disregard any below–cost sales of that model because we determined that the below–cost sales were not made within an extended period of time and in "substantial quantities." Where 20 percent or more of the respondent's home market sales of a given model were at prices less than the COP, we disregarded the below–cost sales because: (1) They were made within an extended period of time in "substantial quantities," in accordance with sections 773(b)(2)(B) and (C) of the Act; and (2) based on our comparison of prices to the weighted–average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

Our cost test revealed that, for home market sales of certain models, less than 20 percent of the sales of those models were at prices below the COP. We therefore retained all such sales in our analysis and used them as the basis for determining NV. Our cost test also indicated that, for home market sales of other models, more than 20 percent were sold at prices below the COP within an extended period of time and were at prices which would not permit the recovery of all costs within a reasonable period of time. Thus, in accordance with section 773(b)(1) of the Act, we excluded these below–cost sales from our analysis and used the remaining above–cost sales as the basis for determining NV.

Based on the additional information we plan to obtain after the preliminary results regarding the linkage between quarterly costs and sales, we plan to provide a post–preliminary analysis of COP for Venus.

*E. Calculation of Normal Value Based on Home Market Prices*

We calculated NV based on ex–factory or delivered prices to unaffiliated customers in the home market. We made adjustments for differences in packing in accordance with sections 773(a)(6)(A) and 773(a)(6)(B)(i) of the Act, and we deducted movement expenses consistent with section 773(a)(6)(B)(ii) of the Act. In addition, where applicable, we made adjustments for differences in cost attributable to differences in physical characteristics of the merchandise pursuant to section 773(a)(6)(C)(ii) of the Act, as well as for differences in circumstances of sale in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. We also made adjustments, in accordance with 19 CFR 351.410(e), for indirect selling expenses incurred on comparison market or U.S. sales where commissions were granted on sales in one market but not in the other. Specifically, where commissions were granted in the U.S. market but not in the comparison market, we made a downward adjustment to NV for the lesser of (1) the amount of the commission paid in the U.S. market, or (2) the amount of indirect selling expenses incurred in the comparison market. If commissions were granted in the comparison market but not in the U.S. market, we made an upward adjustment to NV following the same methodology. We did not make further adjustments to Ambica's or Venus' home market data.

**Currency Conversion**

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as reported by the Federal Reserve Bank.

**Preliminary Results of the Review**

For the firms listed below, we find that the following weighted–average percentage margin exists for the period February 1, 2008, through January 31, 2009:

| Exporter/Manufacturer | Margin |
|---|---|
| Venus Wire Industries Pvt. Ltd. /Precision Metals/Sieves Manufacturing (India) Pvt. Ltd. | 5.54 percent |
| Ambica Steels Limited | 0.00 percent |

**Public Comment**

The Department will disclose the calculations performed within five days of publication of this notice in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.310(c), any interested party may request a hearing within 30 days of publication of this notice. Any hearing, if requested, will be held 42 days after the publication of this notice, or the first workday thereafter. Issues raised in the hearing will be limited to those raised in the case and rebuttal briefs. Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, which must be limited to issues raised in the case briefs, may be filed not later than 35 days after the date of publication of this notice. *See* 19 CFR 351.309(d). Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: 1) a statement of the issue, and 2) a brief summary of the argument with an electronic version included. The Department will publish the final results of this administrative review, including the results of our analysis of issues raised in the briefs, no later than 120 days after publication of these preliminary results.

**Assessment Rates**

If these preliminary results are adopted in the final results, we will instruct CBP to assess antidumping duties on all appropriate entries. The Department will issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of review in the **Federal Register**.

Pursuant to 19 CFR 351.212(b)(1), for all sales made by the respondent for which it has reported the importer of record and the entered value of the U.S. sales, we have calculated importer–specific assessment rates based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales. Where the respondent did not report the entered value for U.S. sales to an importer, we have calculated importer–specific assessment rates for the merchandise in question by aggregating the dumping margins calculated for all U.S. sales to each importer and dividing this amount by the total quantity of those sales.

To determine whether the duty assessment rates were *de minimis (i.e.*, less than 0.50 percent) in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer–specific *ad valore*m rates based on the estimated entered value. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. Pursuant to 19 CFR 351.106(c)(2), we will instruct CBP to liquidate without regard to antidumping duties any entries for which the assessment rate is *de minimis*.

The Department clarified its "automatic assessment" regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see id*.

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon completion of the final results of this administrative review for all shipments of SSB from India entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for the reviewed companies will be the rate established in the final results of this administrative review (except no cash deposit will be required if its weighted–average margin is *de minimis*); (2) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less than fair value ("LTFV") investigation, the cash deposit rate will continue to be the company–specific rate published for the most recent period; and (3) if neither the exporter nor the manufacturer is a firm covered in this or any previous reviews, or the original LTFV investigation, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers and/or exporters of this merchandise, shall be 12.45 percent, the all–others rate established in the LTFV investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from India*, 59 FR 66915 (December 28, 1994). These deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice also 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 review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 8, 2010.

**Ronald K. Lorentzen,**

*Deputy Assistant Secretary for Import Administration.*

[FR Doc. 2010–5602 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–552–802]**

### Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results, Partial Rescission, and Request for Revocation, in Part, of the Fourth Administrative Review

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

**SUMMARY:** The Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on certain frozen warmwater shrimp from the Socialist Republic of Vietnam ("Vietnam"), covering the period of review ("POR") of February 1, 2008, through January 31, 2009. As discussed below, we preliminarily determine that sales have been made below normal value ("NV"). 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*.

**DATES:** *Effective Date:* March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Bobby Wong or Susan Pulongbarit, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–6905 and (202) 482–0413, respectively.

**SUPPLEMENTARY INFORMATION:**

**General Background**

On February 1, 2005, the Department published in the **Federal Register** the antidumping duty order on frozen warmwater shrimp from Vietnam. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam,* 70 FR 5152 (February 1, 2005) ("*Order*"). On February 4, 2009, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on frozen warmwater shrimp from Vietnam for the period February 1, 2008, through January 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 74 FR 6013 (February 4, 2009).

From February 23, 2009, through March 2, 2009, we received requests to conduct administrative reviews from Petitioner,[1] the Louisiana Shrimp Association ("LSA"), and certain Vietnamese companies. *See Notice of Initiation of Administrative Reviews and Requests for Revocation in Part of the Antidumping Duty Orders on Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People's Republic of China,* 74 FR 13178 (March 26, 2009) ("*Initiation Notice*"). Among the requests for review, the Department also received 18 requests for revocation. Subsequently, 13 companies withdrew their requests for revocation, but maintained their request for reviews. *See* Revocation section, below.

On March 26, 2009, the Department initiated an administrative review of 198 producers/exporters of subject merchandise from Vietnam. *See Initiation Notice.* On March 26, 2009, the Department posted the separate rate certification and separate rate application on its Web site for Vietnamese exporters for whom a review was initiated to complete and submit to the Department.

On April 8, 2009, and April 24, 2009, the Department received letters from Binh Anh Seafood ("Binh Anh") and Vinh Hoan Corporation ("Vinh Hoan"), respectively, indicating that they made no shipments of subject merchandise during the POR.

Of the 198 companies/groups upon which we initiated an administrative review, 23 companies submitted separate-rate certifications, nine companies submitted separate-rate applications, and two companies stated that they did not export subject merchandise to the United States during the POR. The Department addresses the review status of each grouping of companies below.

**Respondent Selection**

On March 26, 2009, the Department placed on the record data obtained from CBP with respect to the selection of respondents, inviting comments from interested parties. *See* Letter from the Department to Interested Parties, Regarding: CBP data for Respondent Selection. On April 6, and April 7, 2009, Petitioner and Respondents provided comments on the Department's respondent selection methodology.

On June 11, 2009, the Department issued its respondent selection memorandum. Based upon section 777A(c)(2)(B) of the Tariff Act of 1930 as amended, ("the Act"), the Department selected Minh Phu Seafood Corporation (and its affiliates Minh Qui Seafood Co., Ltd., and Minh Phat Seafood Co., Ltd.) (collectively "The Minh Phu Group"), and Nha Trang Seaproduct Company ("Nha Trang Seafoods") for individual examination (hereinafter "mandatory respondents") because they were the largest exporters, by volume, of subject merchandise during the POR. *See* June 11, 2009, Memorandum to John M. Anderson, through James Doyle, from Scot T. Fullerton and Bobby Wong, regarding: Selection of Respondents for the 2008–2009 Antidumping Duty Administrative Review of Frozen Warmwater Shrimp From the Socialist Republic of Vietnam ("Respondent Selection Memo").

**Questionnaires**

On June 16, 2009, the Department issued its non-market economy questionnaire to the mandatory respondents. From July 10, 2009, through February 26, 2010, the Department received responses from mandatory respondents from the non-market economy questionnaire and subsequent supplemental questionnaires. From July 8, 2009, to August 24, 2009, the Department received voluntary responses to the Department's non-market economy questionnaire from Camau Frozen Seafood Processing Import Export Corporation ("CAMIMEX"), Grobest & I–Mei Industrial (Vietnam) Co., Ltd. ("Grobest"), and Minh Hai Joint-Stock Seafoods Processing Company ("Seaprodex Minh Hai").

**Duty Absorption**

On April 21, and April 24, 2009, Petitioner, the LSA, and the American Shrimp Processors Association, respectively, requested that the Department determine whether the mandatory respondents and numerous separate-rate respondents had absorbed antidumping duties for U.S. sales of frozen warmwater shrimp made during the POR. Section 751(a)(4) of the Act provides for the Department, if requested, to determine during an administrative review initiated two or four years after publication of the order, whether antidumping duties have been absorbed by a foreign producer or exporter, if the subject merchandise is sold in the United States through an affiliated importer. *See also* 19 CFR 351.213(j)(1). On February 2, 2010, the Department requested that the Minh Phu Group and Nha Trang Seafoods, the two mandatory respondents, provide evidence to demonstrate that their unaffiliated U.S. purchasers ultimately paid antidumping duties.

In determining whether the antidumping duties have been absorbed by the mandatory respondents, we presume the duties have been absorbed for all CEP sales that have been made at less than NV. This presumption can be rebutted with evidence (*e.g.,* an agreement between the affiliated importer and unaffiliated purchaser) that the unaffiliated purchaser paid the full duty ultimately assessed on the subject merchandise. *See, e.g., Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent To Rescind in Part,* 70 FR 39735, 39737 (July 11, 2005) (unchanged in final results).

On February 17, 2010, the Minh Phu Group filed a response to the Department's duty absorption questionnaire and provided evidence that its unaffiliated U.S. purchasers ultimately paid the full duty assessed on the subject merchandise. The Minh Phu Group provided invoices, prices paid by the ultimate customers, and financial

[1] The Ad Hoc Shrimp Trade Action Committee is the Petitioner.

statements on the record showing that the unaffiliated customer paid the duties during the POR. We conclude that this information sufficiently demonstrates that the unaffiliated purchasers in the United States ultimately paid the assessed duties. Therefore, we preliminarily find that antidumping duties have not been absorbed by the Minh Phu Group on U.S. sales made through its affiliated importer. *See* Letter from Thompson Hine, to the Secretary of Commerce, regarding Certain Frozen Warmwater Shrimp From Vietnam: Duty Absorption Allegation in Fourth Administrative Review (POR: 02/01/08–01/31/09), dated February 17, 2010.

On February 12, 2010, Nha Trang Seafoods filed a response rebutting the duty absorption presumption. In its response, Nha Trang Seafoods stated that it was not affiliated with any companies to which it shipped during the instant POR and that all reported U.S. sales were export price ("EP") sales. We preliminarily conclude because Nha Trang Seafoods did not sell merchandise in the United States through an affiliated importer, it is not appropriate to make a duty absorption determination in this segment of the proceeding within the meaning of section 751(a)(4) of the Act. *See* Letter from the Minh Phu Group, to the Secretary of Commerce, regarding Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Duty Absorption Allegation in Fourth Administrative Review (POR: 02/01/08–01/31/09), dated February 12, 2010; *see also Agro Dutch Industries Ltd.* v. *United States,* 508 F.3d. 1024, 1033 (Fed. Cir. 2007).

Petitioner also requested that the Department investigate whether separate-rate respondents had absorbed duties. As explained above, because of the large number of companies subject to this review, and given the Department's current resources, the Department selected two companies as mandatory respondents in this administrative review and thus only issued its complete questionnaire to these companies. In determining whether antidumping duties have been absorbed, the Department requires certain specific data (*i.e.,* U.S. sales data) to ascertain whether those sales have been made at less than NV. Since U.S. sales data is only obtained from the complete questionnaire (*i.e.,* only mandatory respondents submit U.S. sales data), and the separate-rate respondents were required only to provide information on their separate-rate status (*i.e.,* not required to provide any U.S. sales data), we do not have the information necessary to assess whether the separate-rate respondents absorbed duties. Accordingly, the separate-rate respondents were not selected as mandatory respondents and, therefore, we cannot make duty absorption determinations with respect to these companies.

**Extension of the Preliminary Results**

On October 27, 2009, the Department extended the deadline for the preliminary results until March 1, 2010. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People's Republic of China: Extension of Preliminary Results of Antidumping Duty Administrative Reviews,* 74 FR 55192, (October 27, 2009).

As explained in the February 12, 2010, memorandum from the Deputy Assistant Secretary for Import Administration, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines as a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary determination of this review is now March 8, 2010.

**Scope of the Order**

The scope of this order includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[2] deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States ("HTSUS"), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this order. In addition, food preparations, which are not "prepared meals," that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this order.

Excluded from the scope are: (1) Breaded shrimp and prawns (HTS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns (HTS subheading 1605.20.10.40); (7) certain dusted shrimp; and (8) certain battered shrimp. Dusted shrimp is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a "dusting" layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. Battered shrimp is a shrimp-based product that, when dusted in accordance with the definition of dusting above, is coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products covered by this order are currently classified under the following HTSUS subheadings: 0306.13.00.03, 0306.13.00.06, 0306.13.00.09, 0306.13.00.12, 0306.13.00.15, 0306.13.00.18, 0306.13.00.21, 0306.13.00.24,

[2] "Tails" in this context means the tail fan, which includes the telson and the uropods.

0306.13.00.27, 0306.13.00.40, 1605.20.10.10, and 1605.20.10.30. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this order is dispositive.

**Preliminary Partial Rescission of Administrative Review**

As stated above, Vinh Hoan and Binh Anh informed the Department that they did not export subject merchandise to the United States during the POR. CBP has not provided any information that contradicts these companies' claims. Therefore, because the record indicates that Vinh Hoan and Binh Anh did not sell subject merchandise to the United States during the POR, we are preliminarily rescinding this administrative review with respect to the two companies. *See* 19 CFR 351.213(d)(3).

**Vietnam-Wide Entity**

Upon initiation of the administrative review, we provided the opportunity for all companies upon which the review was initiated to complete either the separate-rates application or certification. The separate-rate certification and separate-rate applications were available at: *http://ia.ita.doc.gov/nme/nme-sep-rate.html*.

As stated above, 108 [3] additional companies upon which a review was initiated did not certify or apply for a separate rate. Because the Department preliminarily determines that there were exports of subject merchandise under review from Vietnamese producers/exporters that did not demonstrate their eligibility for separate-rate status, the Vietnam-wide entity is now under review.

**Requests for Revocation, in Part**

During the request for review period in the instant review, eighteen respondents [4] requested revocation from the *Order;* however subsequently, twelve of the companies [5] withdrew their revocation requests prior to respondent selection. Additionally, on July 31, 2009, Nha Trang Seafoods withdrew its request for revocation. Five companies have maintained their request for revocation: the Minh Phu Group, CAMIMEX, Grobest, Viet Hai Seafood Co., a/k/a Vietnam Fish One So., Ltd. ("Fish One"), and Seaprodex Minh Hai (collectively "revocation companies"). Of the revocation companies, the Minh Phu Group is a mandatory respondent, and the remaining four are separate rate respondents in this proceeding.

In its request for revocation, the revocation companies argued that each has maintained three consecutive years of sales at not less than normal value. These companies argued that, as a result of its alleged three consecutive years of no dumping, they are eligible for revocation under section 751(d)(1) of the Act and section 351.222(b)(2) of the Department's regulations.

We preliminarily determine not to revoke the *Order* with respect to revocation companies that were not individually selected for review. The Act affords the Department broad discretion to limit the number of respondents selected for individual review when the large number of review requests makes the individual calculation of dumping margins for all companies under review impracticable. Specifically, section 777A(c)(2) of the Act provides that if it is not practicable for the Department to make individual dumping margin determinations because of the large number of exporters or producers involved, the Department may determine margins for a reasonable number of exporters or producers. Although the Department's regulations set out rules and procedures for possible revocation of a dumping order, in whole or in part, based on an absence of dumping, it is silent on the applicability of this regulation when the Department has limited its examination under section 777A(c)(2) of the Act. The Department does not interpret the regulation as requiring it to conduct an individual examination of the non-selected revocation companies, or a verification of the companies' data, where, as here, the Department determined to limit its examination to a reasonable number of exporters in accordance with section 777A(c)(2)(B), and the non-selected revocation companies were not selected under this provision. Nothing in the regulation requires the Department to conduct an individual examination and verification when the Department has limited its review, under section 777A(c)(2). As explained above, the non-selected revocation companies were not selected for individual review because, pursuant to 777A(c)(2)(B) of the Act, the Department selected the two largest exporters, by volume. *See Respondent Selection Memo.* Thus, because we have not selected the non-selected revocation companies for individual examination, we preliminarily determine not to revoke the *Order* with respect to these companies.

However, the non-selected revocation companies filed timely separate-rate certifications, as evidence of each company's continued eligibility for a separate rate. Thus, the Department considers the non-selected revocation companies to be cooperative respondents eligible for a separate rate.

Furthermore, with respect to the Minh Phu Group's request for revocation, a mandatory respondent in the instant review, we preliminarily determine not to revoke the *Order*. In its request for revocation, the Minh Phu Group argued that, with the completion of the instant review, it will have maintained three consecutive years of sales at not less than normal value. The Minh Phu Group argued that, as a result of three consecutive years of sales at not less than normal value, it is eligible for revocation under section 751(d)(1) of the Act and section 351.222(b)(2) of the Department's regulations. However, for these preliminary results, based on sales and production data provided by the Minh Phu Group, the Department has calculated a (non-*de minimis*) positive margin for the Minh Phu Group. Therefore, under 751(d)(1) of the Act and section 351.222(b)(2), we have preliminarily determined not to revoke the *Order* with respect to the Minh Phu Group.

**Verification**

Pursuant to 19 CFR 351.307(b)(iv), between January 11 and January 21, 2009, the Department conducted a verification of the Minh Phu Group's sales and factors of production ("FOP"). *See* Memo to the File through Scot

[3] *See* Attachment for a list of these companies.

[4] Camau Frozen Seafood Processing Import Export Corporation ("CAMIMEX"); Minh Hai Joint-Stock Seafoods Processing Company ("Seaprodex Minh Hai"), Minh Phu Seafood Corporation (and its affiliates Minh Qui Seafood Co., Ltd., and Minh Phat Seafood Co., Ltd.) (collectively the "Minh Phu Group"); Cadovimex Seafood Import-Export and Processing Joint-Stock Company a.k.a. Cai Doi Vam Seafood Import-Export Company ("CADOVIMEX"); Cafatex Fishery Joint Stock Corporation ("Cafatex Corp"); Can Tho Agricultural and Animal Products Import Export Company ("CATACO"); Coastal Fisheries Development Corporation ("COFIDEC"); Investment Commerce Fisheries Corporation ("INCOMFISH"); Minh Hai Export Frozen Seafood Processing Joint-Stock Company ("Minh Hai Jostoco"); Minh Hai Joint-Stock Seafoods Processing Company ("Seaprodex Minh Hai"); Ngoc Singh Private Enterprise ("Ngoc Singh Seafoods"); Nha Trang Seaproduct Company ("Nha Trang Seafoods"); Soc Trang Seafood Joint Stock Company, a.k.a. Soc Trang Aquatic Products and General Import Export Company ("STAPIMEX"); Sao Ta Foods Joint Stock Company ("FIMEX VN"); UTXI Aquatic Products Processing Corporation, a.k.a. UTXI Aquatic Products Processing Company ("UTXICO"); Vinh Loi Import Export Company ("VIMEX"); Viet Hai Seafood Co., Ltd., a.k.a. Vietnam Fish One Co., Ltd. ("Fish One"); Ca Mau Seafood Joint Stock Company ("SEAPRIMEXCO"); and Grobest & I–Mei Industrial (Vietnam) Co., Ltd. ("Grobest").

[5] Cafatex Corp.; SEAPRIMEXCO; CATACO; COFIDEC; INCOMFISH; Minh Hai Jostoco; Ngoc Singh Seafoods; STAPIMEX; FINMEX VN; UTXICO; VIMEX; and CADOVIMEX.

Fullerton, Program Manager, Office 9, Susan Pulongbarit, International Trade Analyst, "*Verification of the CEP Sales and Factors of Production Response of the Minh Phu Group in the 2008–09 Administrative Review of Certain Warmwater Shrimp from the Socialist Republic of Vietnam*" ("MPG CEP Verification Report"), dated March 8, 2010; *see* Memo to the File through Scot Fullerton, Program Manager, Office 9, Susan Pulongbarit, International Trade Analyst, "*Verification of the Sales and Factors of Production Response of the Minh Phu Group in the 2008–09 Administrative Review of Certain Warmwater Shrimp from the Socialist Republic of Vietnam*" ("MPG Verification Report"), dated March 8, 2010.

During the course of verification, in preparing document packages for surprise sales traces requested by the Department, counsel noted several database errors. *See* MPG CEP Verification Report and MGP Verification Report. Additionally, we noted instances in which the reported distances for some FOPs differed from those previously submitted to the Department. *Id.* Subsequent to the preliminary results, the Department intends to request databases with corrections to these errors.

**Non-Market Economy Country Status**

In every case conducted by the Department involving Vietnam, Vietnam has been treated as a non-market economy ("NME") country. 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. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review,* 72 FR 53527 (September 19, 2007) (unchanged in final results). None of the parties to this proceeding have contested such treatment. Accordingly, we calculated the NV in accordance with section 773(c) of the Act, which applies to NME countries.

**Separate Rates Determination**

A designation as an 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 Vietnam 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*").

For this administrative review, the Department received a total of 23 separate-rate certifications.[6] Of those 23 separate-rate certifications, two were submitted by the mandatory respondents, whose eligibility for a separate rate was analyzed within their respective questionnaire responses. The Department analyzed twenty separate-rate certifications for companies upon which the administrative review was initiated, but which were not selected for individual examination.

Lastly, we received an untimely filing of Amanda Foods (Vietnam) Limited ("Amanda Foods"), separate-rate certifications on July 31, 2009, 96 days after the April 27, 2009, deadline, which was announced in the *Initiation Notice.* On August 7, 2009, the Department rejected Amanda Foods' separate rate certification due to untimely filing. *See* Letter from the Department of Commerce, to Amanda Foods (Vietnam) Limited, regarding Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam. On August 4, 2009, Amanda Foods requested that the Department reconsider its rejection and subsequently re-filed its original certification. On August 12, 2009, Amanda Foods submitted a second separate rate certification to the Department. We continue to determine that Amanda Foods' certification is untimely and have rejected the second submission. We note that the *Initiation Notice* stated that separate rate certifications were due 30 days from the publication of the March 26, 2009, **Federal Register** notice, and that Amanda Foods did not request an extension of the deadline to submit its certification. Consequently, as Amanda Foods has not demonstrated in a timely manner its eligibility for separate rate status, we preliminarily determine that Amanda Foods will become a part of the Vietnam-wide entity for the purposes of this review.

*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; and (2) any legislative enactments decentralizing control of companies.

Although the Department has previously assigned a separate rate to the companies eligible for a separate rate in the instant proceeding, it is the Department's policy to evaluate separate rates questionnaire responses each time a respondent makes a separate rates claim, regardless of whether the respondent received a separate rate in the past. *See Manganese Metal from the People's Republic of China, Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 63 FR 12440 (March 13, 1998).

In this review, the Minh Phu Group, and Nha Trang Seafoods submitted complete responses to the separate rates section of the Department's NME questionnaire. Twenty separate rate respondents also submitted timely certifications. The evidence submitted by these companies includes government laws and regulations on corporate ownership, business licenses, and narrative information regarding the companies' operations and selection of management. The evidence provided by these companies supports a finding of a *de jure* absence of government control over their export activities. Additionally, twenty participating separate rate companies/groups submitted timely separate rate certifications and nine companies/groups submitted timely separate rate applications.[7]

[6] For firms previously awarded separate rate status, the Department allows those firms to file a separate-rate certification, provided that the company did not undergo changes in status since the previous granting period. Additionally, firms that did not hold a separate rate in a previous granting period may not use a separate-rate certification, but, instead must submit a separate-rate application for separate rate status.

[7] The non-selected respondents of this administrative review that submitted a timely separate rate certification/separate rate application are: Viet Hai Seafood Co., Ltd., a/k/a Vietnam Fish One Co., Ltd. ("Fish One"), Phuong Nam Co., Ltd., and Western Seafood Processing and Exporting Factory (collectively "Phuong Nam"), Cam Ranh Seafoods Processing Enterprise PTE ("Camranh Seafoods"), Danang Seaproducts Import Export Corporation ("Seaprodex Danang"), Minh Hai Jostoco, Cuu Long Seaproducts Company ("Cuu

We have no information in this proceeding that would cause us to reconsider this determination. 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; and (2) the legal authority on the record decentralizing control over the respondents.[8]

*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 their questionnaire responses, the mandatory respondents and separate rate respondents submitted evidence indicating an absence of *de facto* government control over their export activities. Specifically, this evidence indicates that: (1) Each company sets its own export prices independent of the government and without the approval of a government authority; (2) each company retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) each 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 companies use of export revenues. Therefore, the Department preliminarily finds that the Minh Phu Group and Nha Trang Seafoods, and the separate rate companies have established *prima facie* that they qualify for separate rates under the criteria established by *Silicon Carbide* and *Sparklers.*

**Rate for Non-Selected Companies**

Based on timely requests from individual exporters and Petitioner, the Department originally initiated this review with respect to 198 companies/groups. In accordance with section 777A(c)(2)(B) of the Act, the Department employed a limited examination methodology, as it did not have the resources to examine all companies for which a review request was made. As stated previously, the Department selected two exporters, the Minh Phu Group and Nha Trang Seafoods, as mandatory respondents in this review. Twenty-nine additional companies submitted timely separate rate applications and separate rate certifications as requested by the Department and remain subject to review as cooperative separate rate respondents.

We note that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to look to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance. Consequently, the Department generally weight-averages the rates calculated for the mandatory respondents, excluding zero and *de minimis* rates and rates based entirely on facts available ("FA"), and applies that resulting weighted-average margin to non-selected cooperative separate-rate respondents. *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review,* 73 FR 8273 (February 13, 2008) (unchanged in final results). Consequently, because the Department has calculated positive margins for both mandatory respondents in these preliminary results, and consistent with our practice, we have preliminarily established a margin for the separate-rate respondents based on a simple average[9] of the rates we calculated for the two mandatory respondents, excluding any rates that are zero, *de minimis,* or based entirely on FA. For the Vietnam-wide entity, we have assigned the entity's current rate and only rate ever determined for the entity in this proceeding.

**Surrogate Country**

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base 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 sources of the surrogate factor values are discussed under the "Normal Value" section below and in *Memorandum to the File through Scot Fullerton, Program Manager, Office 9 from Bobby Wong, Senior International Trade Analyst, Office 9; 2008–2009 Antidumping Duty Administrative Reviews of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results,* dated March 8, 2010 ("*Surrogate Value Memorandum*").

On May 18, 2009, the Department sent interested parties a letter requesting comments on surrogate country selection and information pertaining to valuing factors of production. On August 17, 2009, the Minh Phu Group, Nha Trang Seafoods, CAMIMEX, and Grobest submitted surrogate country comments suggesting that the Department select Bangladesh as the surrogate country. On August 17, 2009,

Long Seapro"), Cadovimex Seafood Import-Export and Processing Joint Stock Company ("CADOVIMEX–VIETNAM"), Can Tho Import Export Fishery Limited Company ("CAFISH"), Thuan Phuoc Seafoods and Trading Corporation, Viet Foods Co., Ltd., Coastal Fisheries Development Corporation ("COFIDEC"), Sao Ta Foods Joint Stock Company ("FIMEX VN"), CAMIMEX, INCOMFISH, Cafatex Fishery Joint Stock Corporation ("Cafatex Corporation"), Seaprodex Minh Hai, CATACO, Ca Mau Seafood Joint Stock Company ("Seaprimexco Vietnam"), Nha Trang Fisheries Joint Stock Company ("Nha Trang Fisco"), Bac Lieu Fisheries Joint Stock Company (formerly known as Bac Lieu Fisheries Limited Company) ("Bac Lieu"), Grobest, Gallant Ocean (Vietnam) Co., Ltd. ("Gallant Ocean Vietnam"), UTXI Aquatic Products Processing Corporation ("UTXI"), STAPIMEX, C.P. Vietnam Livestock Company Limited (Currently C.P. Vietnam Livestock Corporation) ("C. Vietnam"), Kim Anh Company Limited ("Kim Anh"), VIMEX, Ngoc Sinh Private Enterprise ("Ngoc Sinh"), Phu Cuong Seafood Processing and Import-Export Co., Ltd.

[8] This preliminary finding applies to the two mandatory respondents of this administrative review: The Minh Phu Group and Nha Trang Seafoods, and the non-selected respondents eligible for a separate rate listed in the preceding footnote.

[9] Because there are only two respondents for which a company-specific margin was calculated in this review, the Department has calculated a simple average margin to ensure that the total import quantity and value for each company is not inadvertently revealed.

Petitioner filed surrogate country comments suggesting that the Department select India as the surrogate country.

On September 18, 2009, Petitioner, the Minh Phu Group, Nha Trang Seafoods, CAMIMEX, and Grobest submitted surrogate value data. For a detailed account of the Department's surrogate country selection, please *see* the "Surrogate Country" section below.

Pursuant to its practice, the Department received a list of potential surrogate countries from the Office of Policy ("OP").[10] The OP determined that Bangladesh, Pakistan, India, Sri Lanka, the Philippines, and Indonesia were at a comparable level of economic development to Vietnam. *See Surrogate Country List.* The Department considers the six countries identified by the OP in its *Surrogate Country List* as "equally comparable in terms of economic development." *Id.* Thus, we find that Bangladesh, Pakistan, India, Sri Lanka, the Philippines, and Indonesia are all at an economic level of development equally comparable to that of Vietnam.

Also, consistent with the Department's third administrative review findings and based on publicly available data published by the Food and Agricultural Organization ("FAO") of the United Nations' FishStat Database ("FishStat"), we obtained world production data of frozen warmwater shrimp. Specifically, the Department has reviewed the data from FishStat which shows that Bangladesh, Indonesia, India, Pakistan, and Sri Lanka all produce the identical merchandise. *See* Memorandum to the File from Susan Pulongbarit, International Trade Analyst, Re: 2008–2009 Administrative Review of Certain Warmwater Shrimp from Vietnam: Fishstat Data, dated March 8, 2010. Therefore, all countries are being considered as an appropriate surrogate country for Vietnam because each country produces the identical merchandise. Moreover, according to FishStat, in 2005, the most recent year for which FishStat export statistics are available, Bangladesh, Indonesia, and India, are all significant producers of comparable merchandise. *See id.* Though both Pakistan and Sri Lanka export frozen shrimp, the quantities they export do not qualify them as significant producers of the subject merchandise. As Bangladesh, Indonesia, and India are all significant producers of comparable merchandise, the Department must look to data considerations when choosing the most appropriate surrogate country from among these countries.

With regard to India and Indonesia, the record contains publicly available surrogate factor value information for some factors. The Minh Phu Group, Nha Trang Seafoods, Grobest, and CAMIMEX provided data for both Indonesia and Bangladesh from a study conducted by the Network of Aquaculture Centres in Asia-Pacific ("NACA"), an intergovernmental organization affiliated with the UN's FAO. However, unlike the Bangladeshi data within the NACA study, the Indonesian shrimp data is limited and does not satisfy as many factors of the Department's data selection criteria (*e.g.,* broad-market average). Thus, Indonesia is not the most appropriate surrogate country for purposes of this review. With respect to India, the only shrimp value on the record is ranged data obtained from one Indian respondent's data in the current administrative review of warmwater shrimp from India, which also does not satisfy as many factors of the Department's data selection criteria (*e.g.,* public availability, broad-market average).

The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties.[11] As a general matter, the Department prefers to use publicly available data representing a broad market average to value surrogate values. *See id.* The Department notes that the value of the main input, head-on, shell-on ("HOSO") shrimp, is a critical factor of production in the dumping calculation as it accounts for a significant percentage of normal value. Moreover, the ability to value shrimp on a count size basis is a significant consideration with respect to the data available on the record.

The Department notes that the mandatory respondents and Petitioner submitted count-size specific shrimp data and equally comparable surrogate company financial statements from shrimp processors. Therefore, availability of count-size specific data on this record is not the determining factor in selecting a surrogate country for this review.

However, the Bangladeshi shrimp values within the NACA study are compiled by the UN's FAO from actual pricing records kept by Bangladeshi farmers, traders, depots, agents, and processors. *See Surrogate Value Memorandum.* The Bangladeshi shrimp values within the NACA study represent a broad-market average and are publicly available, unlike those of the single Indian processor. Therefore, with respect to the data considerations, because the record contains shrimp values for Bangladesh that better meet our selection criteria than the India source, we are selecting Bangladesh as the surrogate country.

In this regard, given the above-cited facts, we find that the information on the record shows that Bangladesh is an appropriate surrogate country because Bangladesh 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 for surrogate valuation purposes.

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.[12]

**U.S. Price**

*A. Export Price*

In accordance with section 772(a) of the Act, we calculated the export price ("EP") for sales to the United States for both the Minh Phu Group and Nha Trang Seafoods based on the price to unaffiliated purchasers in the United States, and for Nha Trang Seafoods the use of constructed export price ("CEP")

[10] *See Memorandum from Kelly Parkhill, Acting Director, Office of Policy, to Scot T. Fullerton, Program Manager, AD/CVD Operationst, Office 9: Request for a List of Surrogate Countries for a Antidumping Duty Administrative Review of the Antidumping Duty Order on Frozen Warmwater Shrimp from the Socialist Republic of Vietnam,* dated May 15, 2009 ("*Surrogate Country List*") from the OP.

[11] *See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews,* 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 2A.

[12] In accordance with 19 CFR 351.301(c)(1), for the final results of this administrative review, 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. *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.

was not otherwise warranted. 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. Each of these services was either provided by an NME vendor or paid for using an NME currency. Thus, we based the deduction of these movement charges on surrogate values. Additionally, for international freight provided by a market economy provider and paid in U.S. dollars, we used the actual cost per kilogram of the freight. *See Surrogate Value Memorandum* for details regarding the surrogate values for movement expenses.

*B. Constructed Export Price*

For the majority of the Minh Phu Group's sales, we based U.S. price on CEP in accordance with section 772(b) of the Act, because sales were made on behalf of the Vietnam-based company by its U.S. affiliate to unaffiliated purchasers in the United States. For these sales, we based CEP on prices to the first unaffiliated purchaser in the United States. Where appropriate, we made deductions from the starting price (gross unit price) for foreign movement expenses, international movement expenses, U.S. movement expenses, and appropriate selling adjustments, in accordance with section 772(c)(2)(A) of the Act.

In accordance with section 772(d)(1) of the Act, we also deducted those selling expenses associated with economic activities occurring in the United States. We deducted, where appropriate, commissions, inventory carrying costs, credit expenses, and indirect selling expenses. Where foreign movement expenses, international movement expenses, or U.S. movement expenses were provided by Vietnam service providers or paid for in Vietnamese Dong, we valued these services using surrogate values (*see* "Factors of Production" section below for further discussion). For those expenses that were provided by a market-economy provider and paid for in market-economy currency, we used the reported expense. Due to the proprietary nature of certain adjustments to U.S. price, for a detailed description of all adjustments made to U.S. price for both mandatory respondents, *see* Memorandum to the File, through Scot Fullerton, Program Manager, Office 9, from Bobby Wong, Senior International Trade Analyst, Office 9, 2008–2009 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: MPG Program Analysis for the Preliminary Determination, dated March 8, 2010 ("MPG Analysis Memo"); Memorandum to the File, through Scot Fullerton, Program Manager, Office 9, from Susan Pulongbarit, International Trade Analyst, Office 9, 2008–2009 Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Nha Trang Seafoods Program Analysis for the Preliminary Determination, dated March 8, 2010 ("Nha Trang Seafoods Analysis Memo").

**Normal Value**

*1. Methodology*

Section 773(c)(1)(B) of the Act provides that the Department shall determine the NV using a FOP methodology if the merchandise is exported from an NME 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 respondents for the POR, except as noted above. To calculate NV, we multiplied the reported per-unit factor-consumption rates by publicly available Bangladeshi 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 Bangladeshi 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 Bangladeshi Import Statistics, we calculated freight based on the reported distance from the supplier to the factory.

In instances where we relied on import data to value inputs, in accordance with the Department's practice, we excluded imports from both NME countries and countries deemed to maintain broadly available, non-industry-specific subsidies which may benefit all exporters to all export markets (*i.e.,* Armenia, Azerbaijan, Belarus, China, Georgia, India, Indonesia, Kyrgyz Republic, Moldova, South Korea, Tajikistan, Thailand, Turkmenistan, Uzbekistan, and Vietnam.) from our surrogate value calculations. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1999–2000 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part,* 66 FR 57420 (November 15, 2001) and accompanying Issues and Decision Memorandum at Comment 1. *See* "Memorandum to the File: Factors of Production Valuation Memorandum for the Preliminary Results of Antidumping Duty Administrative Review of Floor-standing, Metal-top Ironing Tables and Certain Parts Thereof (Ironing Tables) from the People's Republic of China (PRC)," dated August 31, 2006 (Factor Valuation Memo), for a complete discussion of the import data that we excluded from our calculation of surrogate values. This memorandum is on file in the Central Records Unit ("CRU").

With regard to surrogate values and the market-economy input values, we have disregarded prices that we have reason to believe or suspect may be subsidized. We have reason to believe or suspect that prices of inputs from Indonesia, South Korea, Thailand, and India may have been subsidized. We have found in other proceedings that these countries maintain broadly available, non-industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from these countries may be subsidized. *See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China,* 69 FR 20594 (April 16, 2004) ("*CTVs from the PRC*"), and accompanying Issues and Decision Memorandum at Comment 7; *see also Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 70 FR 12651 (March 15, 2005), and accompanying Issues and Decision Memorandum at Comment 4. The

legislative history of the Act provides that in making its determination as to whether input values may be subsidized, the Department is not required to conduct a formal investigation, rather, Congress directed the Department to base its decision on information that is available to it at the time it makes its determination. *See Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompanying, H.R. Rep. 100–576 at 590* (1988).

Therefore, based on the information currently available, we have not used prices from these countries either in calculating the Bangladeshi import-based surrogate values or in calculating market-economy input values. In instances where a market-economy input was obtained solely from suppliers located in these countries, we used Bangladeshi import-based surrogate values to value the input.

**Raw Shrimp Value**

The Department notes that Petitioner submitted Indian shrimp values and the mandatory respondents submitted Bangladeshi shrimp values with which to value the main input, raw shrimp. Petitioner submitted Indian shrimp values obtained from a single process, Devi Sea Foods Ltd., and an article from the September 2009 edition of *Business Standard.* As stated above, the Minh Phu Group, Nha Trang Seafoods, Grobest, and CAMIMEX submitted data contained in the NACA study compiled by the UN's FAO.

As stated above, the Department's practice when selecting the best available information for valuing FOPs is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available, contemporaneous with the POR and exclusive of taxes and duties. Petitioner's submitted shrimp values from Devi Sea Foods Ltd., although publicly available, are from a single Bangladeshi shrimp producer of comparable merchandise, thus does not represent a broad market average of prices. The Department prefers using data that is representative of a broad market average with which to value the FOPs. Therefore, to value the main input, head-on, shell-on shrimp, the Department used data contained in the NACA study.[13]

The Department used United Nations ComTrade Statistics, provided by the United Nations Department of Economic and Social Affairs' Statistics Division, as its primary source of Bangladeshi surrogate value data.[14] The data represents cumulative values for the calendar year 2007, for inputs classified by the Harmonized Commodity Description and Coding System number. For each input value, we used the average value per unit for that input imported into Bangladesh from all countries that the Department has not previously determined to be NME countries. Import statistics from countries that the Department has determined to be countries which subsidized exports (*i.e.,* Indonesia, Korea, Thailand, and India) and imports from unspecified countries also were excluded in the calculation of the average value. *See CTVs from the PRC,* 69 FR 20594 (April 16, 2004).

It is the Department's practice to calculate price index adjustors to inflate or deflate, as appropriate, surrogate values that are not contemporaneous with the POR using the wholesale price index ("WPI") for the subject country. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Hand Trucks and Certain Parts Thereof from the People's Republic of China,* 69 FR 29509 (May 24, 2004). However, in this case, a WPI was not available for Bangladesh. Therefore, where publicly available information contemporaneous with the POR with which to value factors could not be obtained, surrogate values were adjusted using the Consumer Price Index ("CPI") rate for Bangladesh, or the WPI for India or Indonesia (for certain surrogate values where Bangladeshi data could not be obtained), as published in the International Financial Statistics of the International Monetary Fund. We made currency conversions, where necessary, pursuant to 19 CFR 351.415, to U.S. dollars using the daily exchange rate corresponding to the reported date of each sale. We relied on the daily exchange rates posted on the Import Administration Web site (*http://www.trade.gov/ia/*). *See* Surrogate Value Memorandum.

We valued the non-shrimp FOPs as follows:

The Department used UN ComTrade to value the raw material and packing material inputs that the Minh Phu Group and Nha Trang Seafoods used to produce the merchandise under review during the POR, except where listed below. For a detailed description of all surrogate values for respondents, *see* Surrogate Value Memorandum.

We valued electricity using data from the Bangladesh Ministry of Power, Energy, & Mineral Resources. This information was published on their Power Division's Web site. *See* Surrogate Value Memorandum.

Consistent with the third administrative review, we valued water using 2001 data from the Asian Development Bank. *See* Memorandum to the File through Catherine Bertrand, Program Manager, Office 9, Import Administration, from Irene Gorelick, Senior Analyst, regarding *Antidumping Duty Administrative of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Surrogate Values for the Preliminary Results* ("3rd Administrative Review SV Memo") at Exhibit 1. We inflated the value using the POR average CPI rate. *See* Surrogate Value Memorandum.

We valued diesel using data published by the World Bank in "Bangladesh: Transport at a Glance," published in June 2006. We inflated the value using the POR average CPI rate. *Id.*

To value truck freight and river freight, we used data published in *2007 Statistical Yearbook of Bangladesh* published by the Bangladesh Bureau of Statistics. We inflated the value using the POR average CPI rate. *Id.*

To value marine insurance, the Department used rates from RJG consultants. These rates are for sea freight from the Far East Region. *Id.*

We valued warehouse/cold storage rates published in an article on tropical-seeds.com in July 1997. We inflated the value using the POR average CPI rate. *Id.*

Consistent with the third administrative review, we valued containerization using information previously available on the Import Administration Web site. *See* 3rd Administrative Review SV Memo at Exhibit 1. We inflated the value using the POR average WPI rate. *See* Surrogate Value Memorandum.

Consistent with the third administrative review, the Department valued terminal lift charges using data from the Web site *http://www.srinternational.com/standard_containers.htm. See* 3rd Administrative Review SV Memo at Exhibit 1. We inflated the value using the POR average WPI rate. *See* Surrogate Value Memorandum.

To value brokerage and handling ("B&H"), the Department used a simple average of the B&H expenses from Essar Steel Ltd., Himalaya International Ltd., and Navneet Publications (India) Ltd. *Id.*

[13] For a detailed explanation of the Department's valuation of shrimp, *see Surrogate Value Memorandum.*

[14] This can be accessed online at: *http://www.unstats.un.org/unsd/comtrade/.*

We valued the by-product using shell scrap values from the Memorandum to Barbara E. Tillman, Director, Office of AD/CVD Enforcement VII, through Maureen Flannery, Program Manager, Office of AD/CVD Enforcement VII, from Christian Hughes and Adina Teodorescu, Case Analysts, subject: Surrogate Valuation of Shell Scrap: Freshwater Crawfish tail Meat from the People's Republic of China (PRC), Administrative Review 9/1/00–8/31/00 and New Shipper Reviews 9/1/00–8/31/01 and 9/1/00–10/15/01. We inflated the value using the POR average WPI rate. *Id.*

To value factory overhead, Selling, General, & Administrative expenses, and profit, we used the simple average of the 2007–2008 financial statement of Apex Foods Limited and the 2007–2008 financial statement of Gemini Seafood Limited, both of which are Bangladeshi shrimp processors. *See* Surrogate Value Memorandum, at Exhibit 8.

**Preliminary Results of the Review**

The Department has determined that the following preliminary dumping margins exist for the period February 1, 2007, through January 31, 2008:

CERTAIN FROZEN WARMWATER SHRIMP FROM VIETNAM

| Manufacturer/Exporter | Weighted-average margin (percent) |
|---|---|
| Minh Phu Group: | |
| Minh Phat Seafood Co., Ltd., aka Minh Phat Seafood aka Minh Phu Seafood Export Import Corporation (and affiliates Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.) aka Minh Phu Seafood Corp. aka Minh Phu Seafood Corporation aka Minh Qui Seafood aka Minh Qui Seafood Co., Ltd. | 3.27% |
| Nha Trang Seaproduct Company ("Nha Trang Seafoods") | 2.50% |
| Bac Lieu Fisheries Company Limited, aka Bac Lieu Fisheries Company Limited ("Bac Lieu") | 2.89% |
| C.P. Vietnam Livestock Company Limited ("C.P. Vietnam") | 2.89% |
| Cadovimex Seafood Import-Export and Processing Joint Stock Company ("CADOVIMEX–VIETNAM") aka Cai Doi Vam Seafood Import-Export Company ("Cadovimex") | 2.89% |
| Cafatex Fishery Joint Stock Corporation ("Cafatex Corp.") aka Cantho Animal Fisheries Product Processing Export Enterprise (Cafatex), aka Cafatex, aka Cafatex Vietnam, aka Xi Nghiep Che Bien Thuy Suc San Xuat Khau Can Tho, aka Cas, aka Cas Branch, aka Cafatex Saigon, aka Cafatex Fishery Joint Stock Corporation, aka Cafatex Corporation, aka Taydo Seafood Enterprise | 2.89% |
| Cam Ranh Seafoods Processing Enterprise Company ("Camranh Seafoods") aka Camranh Seafoods | 2.89% |
| Camau Frozen Seafood Processing Import Export Corporation ("CAMIMEX"), aka Camimex, aka Camau Seafood Factory No. 4, aka Camau Seafood Factory No. 5 | 2.89% |
| Can Tho Agricultural and Animal Product Import Export Company ("CATACO") aka Can Tho Agricultural Products aka CATACO | 2.89% |
| Can Tho Import Export Fishery Limited Company ("CAFISH") | 2.89% |
| Coastal Fishery Development aka Coastal Fisheries Development Corporation ("Cofidec") aka Coastal Fisheries Development Corporation ("Cofidec") | 2.89% |
| Cuulong Seaproducts Company ("Cuu Long Seapro") aka Cuu Long Seaproducts Limited ("Cuulong Seapro") aka Cuulong Seapro, aka Cuulong Seaproducts Company ("Cuulong Seapro") ("Cuu Long Seapro") | 2.89% |
| Danang Seaproducts Import Export Corporation ("Seaprodex Danang") aka Tho Quang Seafood Processing & Export Company, aka Seaprodex Danang, aka Tho Quang Seafood Processing And Export Company, aka Tho Quang, aka Tho Quang Co. | 2.89% |
| Gallant Ocean (Vietnam) Co., Ltd. ("Gallant Ocean Vietnam") | 2.89% |
| Grobest & I-Mei Industry Vietnam, aka Grobest, aka Grobest & I-Mei Industry (Vietnam) Co., Ltd. | 2.89% |
| Investment Commerce Fisheries Corporation ("Incomfish") | 2.89% |
| Kim Anh Company Limited ("Kim Anh") | 2.89% |
| Minh Hai Export Frozen Seafood Processing Joint Stock Company, aka Minh Hai Jostoco, aka Minh Hai Export Frozen Seafood Processing Joint-Stock Company ("Minh Hai Jostoco"), aka Minh Hai Export Frozen Seafood Processing Joint-Stock Company, aka Minh Hai Joint Stock Seafood Processing Joint-Stock Company, aka Minh Hai Export Frozen Seafood Processing Joint-Stock Co.[15] | 2.89% |
| Minh Hai Joint-Stock Seafoods Processing Company ("Seaprodex Minh Hai") aka Sea Minh Hai, aka Minh Hai Joint-Stock Seafoods Processing Company | 2.89% |
| Minh Hai Sea Products Import Export Company ("Seaprimex Co") , aka Ca Mau Seafood Joint Stock Company ("SEAPRIMEXCO") aka Seaprimexco Vietnam, aka Seaprimexco Ca Mau Seafood Joint Stock Company ("Seaprimexco") | 2.89% |
| Ngoc Sinh Private Enterprise, aka Ngoc Sinh Seafoods, aka Ngoc Sinh Seafoods Processing and Trading Enterprise | 2.89% |
| Nha Trang Fisheries Joint Stock Company ("Nha Trang Fisco") | 2.89% |
| Phu Cuong Seafood Processing and Import-Export Co., Ltd. | 2.89% |
| Phuong Nam Co., Ltd.. | |
| Western Seafood Processing and Exporting Factory. | |
| Sao Ta Foods Joint Stock Company ("Fimex VN") | 2.89% |
| Soc Trang Aquatic Products and General Import Export Company ("Stapimex") | 2.89% |
| Thuan Phuoc Seafoods and Trading Corporation. | |
| UTXI Aquatic Products Processing Company, aka UT XI Aquatic Products Processing Company, aka UT–XI Aquatic Products Processing Company, aka UTXI, aka UTXI Co. Ltd., aka Khanh Loi Seafood Factory, aka Hoang Phuong Seafood Factory | 2.89% |
| Viet Foods Co., Ltd. ("Viet Foods") | 2.89% |
| Viet Hai Seafood Co., Ltd. aka Vietnam Fish One Co., Ltd. ("Fish One") | 2.89% |
| Vinh Loi Import Export Company ("Vimexco"), aka Vinh Loi Import Export Company ("VIMEX"), aka VIMEXCO, aka VIMEX | 2.89% |
| Vietnam-Wide Rate[16] | 25.76% |

[16] The Vietnam-wide entity preliminarily includes Amanda Foods.

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

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 review. *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 37 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(d).

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 will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

**Assessment Rates**

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by these reviews. We will instruct CBP to liquidate entries containing merchandise from the Vietnam-wide entity at the Vietnam-wide rate we determine in the final results of review. We intend to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. In accordance with 19 CFR 351.212(b)(1), for CAMIMEX, the Minh Phu Group, and Phuong Nam Co., Ltd., and Western Seafood Processing and Exporting Factory (collectively "Phuong Nam"), we calculated an exporter/importer (or customer)-specific assessment rate for the merchandise subject to this review. Where the respondent has reported reliable entered values, we calculated importer (or customer)-specific *ad valorem* rates by aggregating the dumping margins calculated for all U.S. sales to each importer (or customer) and dividing this amount by the total entered value of the sales to each importer (or customer). *See* 19 CFR 351.212(b)(1). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis,* we will apply the assessment rate to the entered value of the importer's/customer's entries during the review period. *See* 19 CFR 351.212(b)(1).

Where we do not have entered values for all U.S. sales, we calculated a per-unit assessment rate by aggregating the antidumping duties due for all U.S. sales to each importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer). *See* 19 CFR 351.212(b)(1). To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* ratios based on the estimated entered value. Where an importer (or customer)-specific *ad valorem* rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For the companies receiving a separate rate that were not selected for individual review, we will calculate an assessment rate based on the weighted average of the cash deposit rates calculated for the companies selected for individual review pursuant to section 735(c)(5) of the Act. Where the weighted-average *ad valorem* rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties. *See* 19 CFR 351.106(c)(2).

For Vinh Hoan and Binh Anh, companies for which this review is preliminarily rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(2).

**Cash Deposit Requirements**

The following cash deposit requirements will be effective upon publication of the final results of the administrative review for all shipments of warmwater shrimp from Vietnam entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Act: (1) For the exporters listed above, the cash-deposit rate will be that established in the final results of review (except, if the rate is zero or *de minimis,* no cash deposit will be required); (2) for previously reviewed or investigated companies not listed above that have separate rates, the cash-deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all other Vietnamese exporters of subject merchandise, which have not been found to be entitled to a separate rate, the cash-deposit rate will be the Vietnam-wide rate of 25.76 percent; and (4) for all non-Vietnamese exporters of subject merchandise which have not received their own rate, the cash-deposit rate will be the rate applicable to the Vietnamese exporter that supplied that exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

**Notification to Importers**

This notice also 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 review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and this notice are in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.213 and 351.221(b)(4).

Dated: March 8, 2010.

**Ronald K. Lorentzen,**

*DeputyAssistant Secretary for Import Administration.*

**Attachment**

AAAS Logistics
Agrimex
Amerasian Shipping Logistics Corp.; American Container Line
An Giang Fisheries Import and Export Joint Stock Company (Agifish)
An Xuyen
Angiang Agricultural Technology Service
Aquatic Products Trading Company
Bentre Aquaproduct Imports & Exports
Bentre Forestry and Aquaproduct Import-Export Company ("FAQUIMEX")
Bentre Frozen Aquaproduct Exports; Bentre Seafood Joint Stock and/or Beseaco
Beseaco; Binh Dinh Fishery Joint Stock
C.P. Vietnam Livestock Co., Ltd.
C.P. Vietnam Livestock Co., Ltd.
Ca Mau Seaproducts Exploitation and Service Corporation ("SES")
Cai Doi Vam Seafood Import-Export Company ("Cadovimex")
Camau Seafood Fty
Can Tho Agricultural Products
Can Tho Seafood Exports
Cantho Animal Fisheries Product Processing Export Enterprise ("Cafatex")
Cantho Imp & Exp Seafood Join, a.k.a. Caseamex; Cautre Enterprises

Cautre Export Goods Processing Joint Stock Company
Chun Cheng Da Nang Co., Ltd.
Co Hieu; Cong Ty D Hop Viet Cuong
D & N Foods Processing Danang
Da Van Manh
Dong Phuc Huynh
Dragon Waves Frozen Food Fty.
Duyen Hai Bac Lieu Company ("T.K. Co.")
Duyen Hai Foodstuffs Processing Factory ("COSEAFEX")
Four Season Food
Frozen Fty
Frozen Seafoods Factory No. 32
Frozen Seafoods Factory No. 32 and/or Frozen Seafoods FTy
Frozen Seafoods Fty
General Imports & Exports
Hacota; Hai Ha Private Enterprise
Hai Thuan Export Seaproduct Processing Co., Ltd.
Hai Viet
Hai Viet Corporation ("HAVICO")
Hanoi Seaproducts Import Export Corporation ("Seaprodex Hanoi")
Hatrang Frozen Seaproduct Fty; Hoa Nam Marine Agricultural
Hoan An Fishery
Hoan Vu Marine Product Co., Ltd.
Hua Heong Food Ind Vietnam
Khanh Loi Trading
Kien Gang Sea Products Import-Export Company ("Kisimex")
Kien Gang Seaproduct Import and Export Company ("KISIMEX")
Kien Long Seafoods
Konoike Vinatrans Logistics
Lamson Import-Export Foodstuffs Corporation
Long An Food Processing Export Joint Stock Company ("LAFOOCO")
Lucky Shing; Minh Hai Sea Products Import Export Company ("Seaprimex Co")
Minh Phu Seafood Export Import Corporation (and affiliates Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.)
Nam Hai
Ngoc Sinh Seafoods
Nha Trang Company Limited
Nha Trang Fisheries Co., Ltd.
Pataya Food Industry (Vietnam) Ltd.
Phat Loc Seafood
Phung Hung Private Business
Phuong Nam Seafood Co., Ltd.
Quoc Viet Seaproducts Processing Trading Import and Export Co., Ltd.
Saigon Orchide
Sao Ta Seafood Factory
Sea Product
Sea Products Imports & Exports
Seafood Company Zone II ("Thusaco2")
Seafood Processing Joint Stock Company No. 9 (previously Seafood Processing Imports Exports)
Seafoods and Foodstuff Factory
Seaprimexco Vietnam
Seaprodex and/or Seaprodex Hanoi
Seaprodex Min Hai; Seaprodex Quang Tri; Sonacos
Song Huong ASC Import-Export Company Ltd.
Song Huong ASC Import-Export Company Ltd. and/or Song Huong ASC Joint Stock Company Song Huong ASC Joint Stock Company
Special Aquatic Products Joint Stock Company ("Seaspimex")
SSC
T & T Co., Ltd.
Tacvan Frozen Seafoods Processing Export
Taydo Seafood Enterprises
Thami Shipping & Airfreight
Thang Long
Thanh Doan Seaproducts Import
Thanh Long
Thien Ma Seafood
Tho Quang Seafood Processing & Export Company Da Nang Fisheries Service Industrial
Tourism Material and Equipment Company (Matourimex Hochiminh City Branch)
Truc An Company
Trung Duc Fisheries Private Enterprise
V N Seafoods; Vien Thang Private Enterprise
Viet Nhan Company
Vietfracht Can Tho
Vietnam Fish-One Co., Ltd.
Vietnam Northern Viking Technologie Co.
Vietnam Northern Viking Technology Co., Ltd.
Vietnam Tomec Co., Ltd.
Vilfood Co.
Western Seafood Processing and Exporting Factory.

[FR Doc. 2010–5596 Filed 3–12–10; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF DEFENSE

### Department of the Army; Corps of Engineers

### Notice of Availability for Comments Regarding the Planned Environmental Assessment Interim Report IIIa Fish Deterrent Barriers, Illinois and Chicago Area Waterways

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

**ACTION:** Notice of Availability.

**SUMMARY:** The U.S. Army Corps of Engineers, Chicago District is requesting public comments for a planned Environmental Assessment. The Corps is directed to conduct a study of technologies that may enhance the efficacy of the Chicago Sanitary and Ship Canal Dispersal Barriers System. The study is structured as a series of interim reports. Interim Report IIIa, limited to the impacts of implementing additional in-stream barrier/deterrent technologies at key locations in the Illinois and Chicago Area Waterways is the focus of this planned EA. The specific technologies under consideration include acoustic deterrents, air bubble curtains, and strobe lights used both individually and in combination. Comments are requested to assist in determining the level of analysis and impacts to be considered for implementing these in-stream barrier/deterrent technologies. Any comments received by the Corps on the proposed EA will be considered fully for the Federal action associated with the Project.

**FOR FURTHER INFORMATION CONTACT:** Comments concerning the level of analysis or impacts to be considered in the draft Environmental Assessment should be provided by March 19, 2010, to Peter Bullock at the Chicago District at *peter.y.bullock@usace.army.mil.*

**SUPPLEMENTARY INFORMATION:** None.

**Susanne J. Davis,**

*Chief, Planning Branch, Chicago District.*

[FR Doc. 2010–5619 Filed 3–12–10; 8:45 am]

**BILLING CODE 3720–58–P**

## DEPARTMENT OF EDUCATION

### Federal Perkins Loan, Federal Work-Study, and Federal Supplemental Educational Opportunity Grant programs

**ACTION:** Notice of the 2010–2011 award year deadline dates for the campus-based programs.

**SUMMARY:** The Secretary announces the 2010–2011 award year deadline dates for the submission of requests and documents from postsecondary institutions for the campus-based programs.

**SUPPLEMENTARY INFORMATION:** The Federal Perkins Loan, Federal Work-Study (FWS), and Federal Supplemental Educational Opportunity Grant (FSEOG) programs are collectively known as the campus-based programs.

The Federal Perkins Loan Program encourages institutions to make low-interest, long-term loans to needy undergraduate and graduate students to help pay for their education.

The FWS Program encourages the part-time employment of needy undergraduate and graduate students to help pay for their education and to involve the students in community service activities.

The FSEOG Program encourages institutions to provide grants to exceptionally needy undergraduate students to help pay for their cost of education.

The Federal Perkins Loan, FWS, and FSEOG programs are authorized by parts E and C, and part A, subpart 3, respectively, of title IV of the Higher Education Act of 1965, as amended.

Throughout the year, in its "Electronic Announcements," the Department will continue to provide additional information for the individual deadline dates listed in the table under the Deadline Dates section of this notice, via

the Information for Financial Aid Professionals (IFAP) Web site at: *http://www.ifap.ed.gov.*

*Deadline Dates:* The following table provides the 2010–2011 award year deadline dates for the submission of applications, reports, waiver requests, and other documents for the campus-based programs. Institutions must meet the established deadline dates to ensure consideration for funding or a waiver, as appropriate.

2010–2011 AWARD YEAR DEADLINE DATES

| What does an institution submit? | How is it submitted? | What is the deadline for submission? |
|---|---|---|
| 1. The Campus-Based Reallocation Form designated for the return of 2009–2010 funds and the request of supplemental FWS funds for the 2010–2011 award year. | The Reallocation Form must be submitted electronically via the Internet and is located in the "Setup" section of the FISAP on the Web at: *http://www.cbfisap.ed.gov.* | August 20, 2010. |
| 2. The 2009–2010 Fiscal Operations Report and 2011–2012 Application to Participate (FISAP). | The FISAP is located on the Internet at the following Web site: *http://www.cbfisap.ed.gov.*<br>The FISAP must be submitted electronically via the Internet, and the FISAP's signature page must be mailed to: FISAP Administrator, 2020 Company, LLC, 3110 Fairview Park Drive, Suite 950, Falls Church, VA 22042. | October 1, 2010. |
| 3. The Work Colleges Program Report of 2009–2010 award year expenditures. | The Work Colleges Program Report can be found in the "Setup" section of the FISAP on the Web at: *http://www.cbfisap.ed.gov.*<br>The report must be submitted electronically via the Internet, and a printed copy with an original signature must be submitted by one of the following methods:<br>Hand deliver to: United States Department of Education Federal Student Aid Grants & Campus-Based Division, 830 First Street, NE., Room 62E3, *Attn:* Work Colleges Coordinator, Washington, DC 20002 or<br>*Mail to:* The address listed above for hand delivery. However, please use ZIP Code 20202–5453. | October 1, 2010. |
| 4. The 2009–2010 FISAP Edit Corrections and Perkins Cash on Hand Update. | The FISAP is located on the Internet at the following Web site: *http://www.cbfisap.ed.gov.*<br>The FISAP Edit Corrections and Perkins Cash on Hand Update must be submitted electronically via the Internet. | December 15, 2010. |
| 5. A request for a waiver of the 2011–2012 award year penalty for the underuse of 2009–2010 award year funds. | The request for a waiver can be found in Part II, Section C of the FISAP on the Web at: *http://www.cbfisap.ed.gov.*<br>The request and justification must be submitted electronically via the Internet. | February 11, 2011. |
| 6. The Institutional Application and Agreement for Participation in the Work Colleges Program for the 2011–2012 award year. | The Institutional Application and Agreement for Participation in the Work Colleges Program can be found in the "Setup" section of the FISAP on the Web at: *http://www.cbfisap.ed.gov.*<br>The application and agreement must be submitted electronically via the Internet, and a printed copy with original signature must be submitted by one of the following methods:<br>Hand deliver to: United States Department of Education, Federal Student Aid, Grants & Campus-Based Division, 830 First Street, NE., Room 62E3, *Attn:* Work Colleges Coordinator, Washington, DC 20002 or<br>*Mail to:* The address listed above for hand delivery. However, please use ZIP Code 20202–5453. | March 11, 2011. |
| 7. A request for a waiver of the FWS Community Service Expenditure Requirement for the 2011–2012 award year. | The FWS Community Service waiver request can be found in the "Setup" section of the FISAP on the Web at: *http://www.cbfisap.ed.gov.*<br>The request and justification must be submitted electronically via the Internet. | April 22, 2011. |

**Note:**

- The deadline for electronic submissions is 11:59 p.m. (Eastern time) on the applicable deadline date. Transmissions must be completed and accepted by 12:00 midnight to meet the deadline.
- Paper documents that are sent through the U.S. Postal Service must be postmarked by the applicable deadline date.
- Paper documents that are hand delivered by a commercial courier must be received no later than 4:30 p.m. (Eastern time) on the applicable deadline date.
- The Secretary may consider on a case-by-case basis the effect that a major disaster, as defined in section 102(2) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122(2)), or another unusual circumstance has on an institution in meeting the deadlines.

**Proof of Mailing or Hand Delivery of Paper Documents**

If you submit paper documents when permitted by mail or by hand delivery from a commercial courier, we accept as proof one of the following:

(1) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(2) A legibly dated U.S. Postal Service postmark.

(3) A legibly dated shipping label, invoice, or receipt from a commercial courier.

(4) Other proof of mailing or delivery acceptable to the Secretary.

If the paper documents are sent through the U.S. Postal Service, we do not accept either of the following as proof of mailing: (1) A private metered postmark, or (2) a mail receipt that is not dated by the U.S. Postal Service. An institution should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an institution should check with its local post office. All institutions are encouraged to use certified or at least first-class mail.

The Department accepts hand deliveries from commercial couriers between 8:00 a.m. and 4:30 p.m., Eastern time, Monday through Friday except Federal holidays.

**Sources for Detailed Information on These Requests**

A more detailed discussion of each request for funds or waiver is provided in specific "Electronic Announcements," which are posted on the Department's IFAP Web site (*http://www.ifap.ed.gov*) at least 30 days before the established deadline date for the specific request. Information on these items is also found in the Federal Student Aid Handbook.

*Applicable Regulations:* The following regulations apply to these programs:

(1) Student Assistance General Provisions, 34 CFR part 668.

(2) General Provisions for the Federal Perkins Loan Program, Federal Work-Study Program, and Federal Supplemental Educational Opportunity Grant Program, 34 CFR part 673.

(3) Federal Perkins Loan Program, 34 CFR part 674.

(4) Federal Work-Study Programs, 34 CFR part 675.

(5) Federal Supplemental Educational Opportunity Grant Program, 34 CFR part 676.

(6) Institutional Eligibility under the Higher Education Act of 1965, as amended, 34 CFR part 600.

(7) New Restrictions on Lobbying, 34 CFR part 82.

(8) Governmentwide Requirements for Drug-Free Workplace (Financial Assistance), 34 CFR part 84.

(9) Governmentwide Debarment and Suspension (Nonprocurement), 34 CFR part 85.

(10) Drug and Alcohol Abuse Prevention, 34 CFR part 86.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Wicks, Director of Grants & Campus-Based Division, U.S. Department of Education, Federal Student Aid, 830 First Street, NE., Union Center Plaza, Room 62E3, Washington, DC 20202–5453. *Telephone:* (202) 377–3110 or via the *Internet: kathleen.wicks@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

**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.*

**Program Authority:** 20 U.S.C. 1087aa *et seq.;* 42 U.S.C. 2751 *et seq.;* and 20 U.S.C. 1070b *et seq.*

Dated: March 10, 2010.

**William J. Taggart,**

*Chief Operating Officer, Federal Student Aid.*

[FR Doc. 2010–5614 Filed 3–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before April 14, 2010.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.*

**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.

Dated: March 10, 2010.

**James Hyler,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Postsecondary Education**

*Type of Review:* New.

*Title:* Application for Grants Under the Alaska Native and Native Hawaiian-Serving Institutions Program.

*Frequency:* Annually.

*Affected Public:* Not for profit institutions.

*Reporting and Recordkeeping Hour Burden:*

Responses: 20.
Burden Hours: 805.

*Abstract:* The overall purpose of this program is to provide grants to eligible Alaska Native and native Hawaiian-Serving institutions of higher education to enable them to improve their academic quality, institutional management, and fiscal stability in order to increase their self-sufficiency and strengthen their capacity to make a substantial contribution to higher education resources of the nation. It is required that we collect this data in order to hold a program competition and award funds for program recipients.

This information collection is being submitted under the Streamlined Clearance Process for Discretionary Grant Information Collections (1894–0001). Therefore, the 30-day public comment period notice will be the only public comment notice published for this information collection.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4208. When you access the information collection, click on "Download Attachments " to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed 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. 2010–5577 Filed 3–12–10; 8:45 am]

**BILLING CODE 4000–01–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 May 14, 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: March 10, 2010.

**James Hyler,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Office of Elementary and Secondary Education**

*Type of Review:* Revision.
*Title:* School Improvement Grants.
*Frequency:* Annually.
*Affected Public:* State, Local, or Tribal Gov't, SEAs or LEAs.
*Reporting and Recordkeeping Hour Burden:*
*Responses:* 3,102.
*Burden Hours:* 229, 800.

*Abstract:* On December 10, 2009, the U.S. Department of Education (Department) published final requirements and a State educational agency (SEA) application for School Improvement Grants (SIG) authorized under section 1003(g) of Title I of the Elementary and Secondary Education Act of 1965 (ESEA), as amended, and funded through the Department of Education Appropriations Act, 2009 (FY 2009) and the American Recovery and Reinvestment Act of 2009 (ARRA). On January 21, 2010, the Department published interim final requirements and a revised SEA application, which amended the final requirements and application issued in December. Together, these requirements are referred to in this document as "final requirements."

The final requirements define the criteria that an SEA must use to award ARRA and FY 2009 SIG funds to local educational agencies (LEAs). In awarding these funds, an SEA must give priority to the LEAs with the lowest-achieving schools that demonstrate the greatest need for the funds and the strongest commitment to using the funds to provide adequate resources to their lowest-achieving schools eligible to receive services provided through SIG funds in order to raise substantially the achievement of the students attending those schools.

The final requirements also include information collection activities covered under the Paperwork Reduction Act (PRA). The activities consist of: (1) A new application for an SEA to submit to the Department to apply for FY 2009 and ARRA SIG funds; (2) the reporting of specific school-level data on the use of SIG funds and specific interventions implemented in LEAs receiving SIG funds that the Department currently does not collect through EDFacts; (3) an application for an LEA to submit to its SEA to receive SIG funds; and (4) the SEA posting its LEAs' applications.

The Department received emergency approval of the information collection activities through June 30, 2010 at the same time it issued the final requirements. The Office of Management and Budget (OMB) also approved a change to the collection at the time the Department issued the interim requirements in January. These approvals permitted the SEA application process to begin so that students in the lowest-achieving schools will begin receiving the assistance they need as soon as possible. The information collection activities in the final requirements will continue past June 30th, however. Therefore, the Department is requesting regular approval of the information collection activities.

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 4242. 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. 2010–5626 Filed 3–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education.

**SUMMARY:** The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before April 14, 2010.

**ADDRESSES:** Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.*

**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.

Dated: March 10, 2010.

**Stephanie Valentine,**

*Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.*

**Institute of Education Sciences**

*Type of Review:* New.

*Title:* National Title I Study of Implementation and Outcomes: Early Childhood Language Development (ECLD).

*Frequency:* One time.

*Affected Public:*

State, Local, or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 16.
Burden Hours: 36.

*Abstract:* The study is being conducted as part of the National Assessment of Title I, mandated by Title I, Part E, Section 1501 of the Elementary and Secondary Education Act. The data obtained by this information collection will provide a sampling frame of eligible schools for the National Title I Study of Implementation and Outcomes: Early Childhood Language Development (ECLD). Once school districts have been indentified to participate in the study, they will be asked to complete a short form providing information about Title I schools in their district. This information includes the percent of students in a selected school that are eligible for free-or-reduced-price lunch, percent of third graders who are classified as reading proficient on state assessments in 2009–10, grade levels in selected schools, and number of students in each grade. Based on the information provided, up to ten schools per district will be randomly selected to participate in the full-scale study. The U.S. Department of Education has Mathematica Policy Research to conduct this study.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4195. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed 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. 2010–5578 Filed 3–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Foreign Language Assistance Program—Local Educational Agencies with Institutions of Higher Education

**AGENCY:** Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, Department of Education.

**ACTION:** Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 84.293A.

Dates: *Applications Available:* March 15, 2010.

*Deadline for Notice of Intent To Apply:* March 26, 2010.

*Deadline for Transmittal of Applications:* April 14, 2010.

*Deadline for Intergovernmental Review:* May 14, 2010.

**Full Text of Announcement**

**I. Funding Opportunity Description**

*Purpose of Program:* The Foreign Language Assistance Program (FLAP) provides grants to local educational agencies (LEAs) for innovative model programs providing for the establishment, improvement, or expansion of foreign language study for elementary and secondary school students. Under this competition, as provided for in Division D, Title III, of the Consolidated Appropriations Act, 2010, Public Law 111–117, 5-year grants will be awarded to LEAs to work in partnership with one or more institutions of higher education (IHEs) to establish or expand articulated programs of study in languages critical to United States national security in order to enable successful students, as they advance from elementary school through secondary school and college, to achieve a superior level of

proficiency in those languages. In addition, an LEA that receives a grant under this program must use the funds to support programs that show promise of being continued beyond the grant period and demonstrate approaches that can be disseminated to and duplicated in other LEAs. Projects supported under this program may also include a professional development component.

*Priorities:* This notice involves one absolute priority and four competitive preference priorities. The absolute priority is from the notice of final priority for this program, published in the **Federal Register** on May 19, 2006 (71 FR 29228). In accordance with 34 CFR 75.105(b)(2)(iv), Competitive Preference Priorities #1 through #4 are from Title V, Part D, Subpart 9, section 5492 of the Elementary and Secondary Education Act of 1965, as amended.

*Absolute Priority:* 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:

*Critical Need Languages*

This priority supports projects that establish, improve or expand foreign language learning, primarily during the traditional school day, within grade kindergarten through grade 12, that exclusively teach one or more of the following less commonly taught languages: Arabic, Chinese, Korean, Japanese, Russian, and languages in the Indic, Iranian, and Turkic language families.

*Competitive Preference 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 competitive preference priorities. Under 34 CFR 75.105(c)(2)(ii) we give preference to an application that meets one or more of these priorities.

**Note:** There is no advantage to addressing all four competitive preference priorities. Submitting an application that addresses all four priorities may result in an unfocused program design. We give preference to applications describing programs that meet any one of these priorities.

These priorities are:

*Competitive Preference Priority #1.* Projects that include intensive summer foreign language programs for professional development.

*Competitive Preference Priority #2.* Projects that link non-native English speakers in the community with the schools in order to promote two-way language learning.

*Competitive Preference Priority #3.* Projects that make effective use of technology, such as computer-assisted instruction, language laboratories, or distance learning, to promote foreign language study.

*Competitive Preference Priority #4.* Projects that promote innovative activities, such as foreign language immersion, partial foreign language immersion, or content-based instruction.

*Program Authority:* 20 U.S.C. 7259a–7259b and Division D, Title III, of the Consolidated Appropriations Act, 2010, Public Law 111–117.

*Applicable Regulations:* (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98 and 99. (b) The notice of final priority, published in the **Federal Register** on May 19, 2006 (71 FR 29228).

**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:* $6,168,331.

*Estimated Range of Awards:* $100,000–$300,000.

*Estimated Average Size of Awards:* $200,000.

*Maximum Award:* We will reject any application that proposes a budget exceeding $300,000 for a single budget period of 12 months. The Assistant Deputy Secretary and Director for the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students (OELA) may change the maximum amount through a notice published in the **Federal Register.**

*Estimated Number of Awards:* 30.

**Note:** The Department is not bound by any estimates in this notice.

*Project Period:* 60 months. Applicants that request funding for a project period of other than 60 months will be deemed ineligible and will not be read.

## III. Eligibility Information

1. *Eligible Applicants:* LEAs, including charter schools that are considered LEAs under State law, in partnership with one or more institutions of higher education.

2. *Cost Sharing or Matching:* Title V, Part D, Subpart 9, section 5492 of the Elementary and Secondary Education Act of 1965, as amended, requires that the Federal share of a project funded under this program for each fiscal year be 50 percent. For example, an LEA requesting $100,000 in Federal funding for its foreign language program each fiscal year must match that amount with $100,000 of non-Federal funding for each year. 34 CFR 80.24 of EDGAR addresses Federal cost-sharing requirements.

If an LEA does not have adequate resources to pay the non-Federal share of the cost, a waiver may be requested. An LEA may request a waiver of part, or all, of the matching requirement. The waiver request should be submitted by letter to the Secretary of Education and included in the application. An authorized representative of the LEA, such as the superintendent of schools, should sign the letter.

The request for waiver should—

- Provide an explanation, supported with appropriate documentation, of the basis for the LEA's position that it does not have adequate resources to pay the non-Federal share of the cost of the project.
- Specify the amount, if any, of the non-Federal share that the LEA can pay.

We recommend that LEAs that are unable to provide the required level of non-Federal support for their project provide as much non-Federal support as possible. Further information on submitting a waiver request is included in the application package.

## IV. Application and Submission Information

1. *Address to Request Application Package:* Patrice Swann, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C146, Washington, DC 20202–6510. Telephone: (202) 401–1463 or by e-mail: *Patrice.Swann@ed.gov.*

**Note:** Please include "84.293A LEA IHE Application Request" in the subject heading of your e-mail.

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Notice of Intent to Apply: If you intend to apply for a grant under this competition, contact Patrice Swann by e-mail: *Patrice.Swann@ed.gov.*

**Note:** Please include "84.293A LEA IHE Intent to Apply" in the subject heading of

your e-mail. The e-mail should specify: (1) The LEA name, (2) city, (3) State, and (4) language(s) of instruction. We will consider an application submitted by the deadline date for transmittal of applications, even if the applicant did not provide us notice of its intent to apply.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to the equivalent of no more than 35 pages using the following standards:

- A "page" is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. 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 two-page abstract. However, the page limit does apply to all of the application narrative section in Part III.

We will reject your application if you exceed the page limit; or if you apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times: Applications Available:* March 15, 2010.

*Deadline for Notice of Intent to Apply:* March 26, 2010.

*Deadline for Transmittal of Applications:* April 14, 2010.

Applications for grants under this program 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 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 persons 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 14, 2010.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section in this notice.

6. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Foreign Language Assistance Program—Local Educational Agencies with Institutions of Higher Education—CFDA Number 84.293A 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: Rebecca Richey, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C141, Washington, DC 20202–6510. FAX: (202) 260–5496.

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 84.293A) 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 84.293A) 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

**Note for Mail or Hand Delivery of Paper Applications:** If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

## V. Application Review Information

*Selection Criteria:* The selection criteria for this program are from 34 CFR 75.210 of EDGAR and are listed in the following paragraphs. The *Notes* we have included after each criterion are guidance to assist applicants in understanding each criterion as they prepare their applications and are not required by statute or regulation (except that the requirements described in Notes I and II under paragraph (b) is statutory and the requirement described under paragraph (d) is in regulation. The maximum score for all of these criteria is 100 points. The maximum score for each criterion is indicated in parentheses.

(a) *Need for project.* (5 points)

The Secretary considers the need for the proposed project. In determining the need for the proposed project, the Secretary considers 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.

*Notes for (a) Need for Project*

**Note I:** In addressing this criterion, applicants may want to describe the foreign language program currently offered, including gaps or weaknesses in the current foreign language program, identify the

specific needs for the proposed project, and describe how the proposed project will address gaps or weaknesses in foreign language instruction by conducting activities, such as increasing enrollment in critical foreign languages during the course of the grant by adding languages, adding grades or course levels, recruiting students, or expanding to additional schools.

(b) *Quality of the project design.* (60 points)

The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(1) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

(2) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(3) The extent to which the design for implementing and evaluating the proposed project will result in information to guide possible replication of project activities or strategies, including information about the effectiveness of the approach or strategies employed by the project.

(4) 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.

(5) The extent to which the proposed project will establish linkages with other appropriate agencies and organizations providing services to the target population.

(6) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives.

*Notes for (b) Quality of the Project Design*

**Note I:** Under this competition, as provided for in Division D, Title III, of the Consolidated Appropriations Act, 2010, Public Law 111–117, 5-year grants will be awarded to LEAs to work in partnership with one or more institutions of higher education (IHEs) to establish or expand articulated programs of study in languages critical to United States national security in order to enable successful students as they advance from elementary school through secondary school and college to achieve a superior level of proficiency in those languages.

**Note II:** Please note that Title V, Part D, Subpart 9, section 5492 of the Elementary and Secondary Education Act of 1965, as amended, requires the establishment, improvement or expansion of foreign language study for elementary and secondary students; supports programs that show the promise of being continued beyond the grant period; and supports programs that demonstrate approaches that can be disseminated and duplicated in other LEAs. Projects supported under this program may also include a professional development component.

**Note III:** In addressing this criterion, applicants may want to consider describing how the project is aligned with standards for foreign language learning and performance guidelines for K–12 learners, is articulated across grade levels, and is designed to ensure that students will, when they graduate from high school, have the skills needed to achieve a superior level of foreign language proficiency by the end of an undergraduate program.

**Note IV:** In addressing this criterion, applicants may want to consider describing the specific definition to be used for an articulated program of study. For example: Each grade level of the elementary-school-through-college foreign language program is designed to expand sequentially on the achievement students have made in the previous level, with a goal of achieving a superior level of language proficiency.

**Note V:** In addressing this criterion, applicants may want to consider describing the specific definition to be used for a superior level of language proficiency. For example: a proficiency level of 3, as measured by the Federal Interagency Language Roundtable (ILR); or a Superior level, as measured by the American Council on the Teaching of Foreign Languages (ACTFL) Proficiency Guidelines, achieved by a student.

**Note VI:** In addressing this criterion, applicants may want to describe planned assessments to be selected or developed, how they are standards-based and performance-based, and how they are appropriate for measuring student language proficiency in the planned model of instruction and targeted languages.

**Note VII:** In addressing this criterion, applicants may want to consider describing a plan to carry out activities under the grant as part of their required partnership with one or more IHEs, such as including how each partner will be involved in the planning, development, and implementation of the project; the resources to be provided by each partner; the rationale for selecting the partner(s); and the specific activities (such as curriculum development, assessment development and professional development) that the partner(s) will contribute to the grant during each year of the project.

**Note VIII:** In addressing this criterion, applicants may want to describe how program objectives are aligned with the Government Performance and Results Act (GPRA) measures for this program.

**Note IX:** In addressing this criterion, applicants may want to consider discussing how the project design is based on a review of the relevant literature, including a review of literature on curriculum and instructional materials available in the target language.

(c) *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 factors:

(1) The qualifications, including relevant training and experience, of the project director or principal investigator.

(2) The qualifications, including relevant training and experience, of key project personnel.

(d) *Quality of the management plan.* (10 points)

The Secretary considers the quality of the management plan for the proposed project. In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(1) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(2) The 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.

**Note for (d) Quality of the management plan:** Please note that 34 CFR 75.112(b) of EDGAR requires an applicant to include a narrative that describes how and when, in each budget period of the project, the applicant plans to meet each project objective.

(e) *Quality of the project evaluation.* (15 points)

The Secretary considers the quality of the evaluation to be conducted of the proposed project. In determining the quality of the evaluation, the Secretary considers the following factors:

(1) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(2) 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.

(3) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(4) The extent to which the evaluation will provide guidance about effective strategies suitable for replication or testing in other settings.

**Note for (e) Quality of the project evaluation:** Grantees will be expected to report on the progress of their evaluation through the required annual performance report as discussed in section VI.4 of this notice. In addressing this criterion, applicants may want to consider using the evaluation plan to shape the development of the project from the beginning of the grant period. Applicants also may want to include benchmarks to monitor progress toward specific project objectives, including ambitious student foreign language proficiency objectives, and outcome measures to assess the impact on teaching and learning or other important outcomes for project participants.

## 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 two-day meeting for project directors in Washington, DC, and a FLAP meeting at the American Council on the Teaching of Foreign Languages (ACTFL) Conference in Boston, MA, November 19–21, 2010. Funding for the meeting and conference should be budgeted for each subsequent year of the grant.

4. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. You must also submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c).

5. *Performance Measures:* In response to the Government Performance and Results Act (GPRA), the Department developed three objectives for evaluating the overall effectiveness of the Foreign Language Assistance Program (FLAP) LEA program. Grantees funded under this competition will be expected to collect and report to the Department data related to these measures. Applicants should discuss in the application narrative how they propose to collect these data.

Grantees under this competition are not expected to report on Objective 1, Measures 1.1 of 2 and 1.2 of 2.

Objective 1: To expand foreign language study in non-critical languages for students served by FLAP.

Measure 1.1 of 2: The number of students participating in foreign language instruction in the non-critical languages(s) in the schools funded by FLAP.

Measure 1.2 of 2: The average number of minutes per week of foreign language instruction in the non-critical languages(s) in the schools funded by FLAP.

Objective 2: To expand foreign language study in critical languages for students served by FLAP.

Measure 2.1 of 2: The number of students participating in foreign language instruction in the critical language(s) in the schools funded by FLAP.

Measure 2.2 of 2: The average number of minutes per week of foreign language instruction in the critical languages(s) provided in the schools funded by FLAP.

Objective 3: To improve the foreign language proficiency of students served by FLAP.

Measure 3.1 of 1: The number of students in FLAP projects who meet ambitious project objectives for foreign language proficiency.

We expect each LEA funded under this competition to document how its project is helping the Department meet these performance measures. Grantees will be expected to report on progress in meeting these performance measures in their Annual Performance Report and in their Final Performance Report.

## VII. Agency Contacts

*For Further Information Contact:*

Rebecca Richey, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C141, Washington, DC 20202–6510. Telephone: (202) 401–1443 or by e-mail: *rebecca.richey@ed.gov* or Cynthia Ryan, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C140, Washington, DC 20202–6510. Telephone: (202) 401–1436 or by e-mail: *cynthia.ryan@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 persons 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: *www.gpoaccess.gov/nara/index.html.*

Dated: March 10, 2010.

**Richard Smith,**

*Acting Assistant Deputy Secretary and Director, Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students.*

[FR Doc. 2010–5616 Filed 3–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### Privacy Act of 1974; Computer Matching Program

**AGENCY:** Department of Education.

**ACTION:** Notice—Computer Matching between the Department of Education and the Department of Homeland Security, United States Citizenship and Immigration Services, formerly the Immigration and Naturalization Service.

**SUMMARY:** Pursuant to the Office of Management and Budget (OMB) *Final Guidance Interpreting the Provisions of Public Law 100–503, the Computer Matching and Privacy Protection Act of 1988* (54 FR 25818 (June 19, 1989)) and OMB Circular A–130, Appendix I (65 FR 77677 (December 12, 2000)) notice is

hereby given of the computer matching program between the Department of Education (ED) (the recipient agency), and the Department of Homeland Security, United States Citizenship and Immigration Services (USCIS) (the source agency).

In accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act of 1988, and OMB Circular A–130, the following information is provided:

1. *Names of Participating Agencies.*

The U.S. Department of Education and the U.S. Department of Homeland Security, USCIS.

2. *Purpose of the Match.*

The matching program entitled "Verification Division USCIS/ED" will permit ED to confirm the immigration status of alien applicants for, or recipients of, financial assistance under Title IV of the Higher Education Act of 1965, as amended (HEA), as authorized by section 484(g) of the HEA (20 U.S.C. 1091(g)). The Title IV programs include: the Federal Pell Grant Program; the Academic Competitiveness Grant Program; the National Science and Mathematics Access to Retain Talent Grant Program; the Iraq and Afghanistan Service Grant Program; the Federal Perkins Loan Program; the Federal Work-Study Program; the Federal Supplemental Educational Opportunity Grant Program; the Federal Family Education Loan Program; the William D. Ford Federal Direct Loan Program; the Leveraging Educational Assistance Partnership Program; and the Gaining Early Awareness and Readiness for Undergraduate Programs.

3. *Authority for Conducting the Matching Program.*

The information contained in the USCIS data base is referred to as the Verification Information System (VIS), and is authorized under the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603. ED seeks access to the VIS database for the purpose of confirming the immigration status of applicants for assistance, as authorized by section 484(g) of the HEA, 20 U.S.C. 1091(g), and consistent with the Title IV student eligibility requirements of section 484(a)(5) of the HEA, 20 U.S.C. 1091(a)(5). USCIS is authorized to participate in this immigration status verification under section 103 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1103.

4. *Categories of Records and Individuals Covered.*

The records to be used in the match and the roles of the matching participants are described as follows: Through the use of user identification codes and passwords, authorized persons from ED will transmit electronically data from its Privacy Act system of records entitled, "Federal Student Aid Application File (18–11–01)" to USCIS. The data will include the alien registration number, the first and last name, date of birth, current social security number and gender of the alien applicant for, or recipient of, Title IV assistance. This action will initiate a search for corresponding data elements in a USCIS Privacy Act system of records entitled "Verification Information System Records Notice (DHS–2007–0010)." Where there is a match of records, the system will add the following data to the record and return the file to ED: the primary or secondary verification number, the date of entry into the U.S., the country of birth, and the USCIS status code of the alien applicant or recipient, and a code indicating that the alien applicant or recipient was confirmed to be an eligible non-citizen or that this determination could not be made. In accordance with 5 U.S.C. 552a(p), ED will not suspend, terminate, reduce, or make a final denial of any Title IV assistance to such individual, or take other adverse action against such individual, as a result of information produced by such a match, until (1)(a) ED has independently verified the information; or (b) the Data Integrity Board of ED determines in accordance with guidance issued by the Director of the OMB that (i) the information is limited to identification and amount of benefits paid by ED under a Federal benefit program; and (ii) there is a high degree of confidence that the information provided to ED is accurate; (2) the individual receives a notice from ED containing a statement of its findings and informing the individual of the opportunity to contest such findings by submitting documentation demonstrating a satisfactory immigration status within 30 days of receipt of the notice; and (3) 30 days from the date of the individual's receipt of such notice has expired.

5. *Effective Dates of the Matching Program.*

The matching program will become effective 40 days after a copy of the computer matching agreement, as approved by the Data Integrity Board of each agency, is transmitted to Congress and OMB, unless the requested ten day waiver is approved by OMB or unless OMB objects to some or all of the agreement, or 30 days after publication of this notice in the **Federal Register,** whichever date is later. The matching program will continue for 18 months after the effective date and may be extended for an additional 12 months thereafter, if the conditions specified in 5 U.S.C. 552a(o)(2)(D) have been met.

6. *Address for Receipt of Public Comments or Inquires.*

Mr. Leroy Everett, Management and Program Analyst, U.S. Department of Education, Federal Student Aid, Union Center Plaza, 830 First Street, NE., Washington, DC 20002–5345. Telephone: (202) 377–3265. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (*e.g.,* braille, large print, audiotape or computer diskette) on request to the contact person listed in the preceding paragraph.

**Electronic Access to This Document**

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**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.**

**Authority:** 5 U.S.C. 552a; Pub. L. No. 100–503.

Dated: March 10, 2010.

**William J. Taggart,**

*Chief Operating Officer Federal Student Aid.*

[FR Doc. 2010–5613 Filed 3–12–10; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Energy Information Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Energy Information Administration (EIA), Department of Energy (DOE).

**ACTION:** Agency Information Collection Activities: Proposed Collection; Comment Request.

**SUMMARY:** The EIA is soliciting comments on the proposed three-year extension to the Form EIA–846, "Manufacturing Energy Consumption Survey."

**DATES:** Comments must be filed by May 14, 2010. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

**ADDRESSES:** Send comments to Tom Lorenz. To ensure receipt of the comments by the due date, submission by FAX (202–586–9753) or e-mail (*Thomas.Lorenz@eia.doe.gov*) is recommended. The mailing address is Office of Energy Markets and End Use, Energy Consumption Division, EI–63, Forrestal Building, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. Alternatively, Mr. Lorenz may be contacted by telephone at 202–586–3442.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of any forms and instructions for the Manufacturing Energy Consumption Survey (MECS) should be directed to Tom Lorenz at the address listed above. To view the form online please go to: *http://www.eia.doe.gov/emeu/mecs/mecs2006/forms2006.html*.

**SUPPLEMENTARY INFORMATION:**



## I. Background

The Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*) and (42 U.S.C. 7135(i)) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer term domestic demands and to promote sound policymaking, efficient markets, and public understanding of energy and its interaction with the economy and the environment.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Also, the EIA will later seek approval for this collection by the Office of Management and Budget (OMB) under section 3507(a) of the Paperwork Reduction Act of 1995.

The Manufacturing Energy Consumption Survey (MECS) is a self-administered sample survey designed to collect energy consumption and expenditures data from establishments in the manufacturing sector; *i.e.*, North American Industry Classification System (NAICS) codes 31–33. Previous MECS required multiple collection forms depending on an establishment's primary business activity classification under NAICS. The increased use of technology by means of an Internet data collection system however, has allowed the MECS to eliminate the need to have multiple forms.

The 2010 MECS will collect information during 2011 for business activities in calendar year 2010. For the 2010 MECS, as in the past, EIA proposes to collect the following data from each MECS establishment: (1) For each energy source consumed—consumption (total, fuel and nonfuel uses) and the expenditures for each energy source, energy storage (as applicable), energy produced onsite, and shipments (as applicable); (2) energy end uses; (3) fuel-switching capabilities (4) general energy-saving technologies; (5) energy management activities; and (6) square footage, and number of buildings in the establishment.

The MECS has been conducted seven times previously, covering the years 1985, 1988, 1991, 1994, 1998, 2002, and 2006. In all seven survey years, the MECS has collected baseline data on manufacturers' energy consumption and expenditures. The MECS collected data on fuel-switching capabilities in all years except 1998. In the 1991, 1994, 1998, 2002, and 2006 surveys, the MECS also collected data on end-uses, energy management activities, building square footage, and energy-saving technologies.

The MECS information is the basis for data and analytic products that can be found at *http://www.eia.doe.gov/emeu/mecs*. Also on this Web site are past publications, articles, and a special analytic series, "Industry Analysis Briefs." The 2010 MECS will also be used to benchmark EIA's industry forecasting model and update changes in the energy intensity and greenhouse gases data series.

The proposed 2010 MECS uses experience gained from the administration and processing of the seven previous surveys and past consultations with respondents, trade association representatives, and data users to improve the survey.

Please refer to the proposed forms and instructions for more information about the purpose, who must report, when to report, where to submit, the elements to be reported, detailed instructions, provisions for confidentiality, and uses of the information. For instructions on obtaining materials, see the **FOR FURTHER INFORMATION CONTACT** section.

## II. Current Actions

EIA is requesting a three-year extension of approval to its Manufacturing Energy Consumption Survey with no changes from the previous survey.

## III. Request for Comments

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of comments.

*As a Potential Respondent to the Request for Information*

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information to be collected?

C. Are the instructions and definitions clear and sufficient? If not, which instructions need clarification?

D. Can the information be submitted by the respondent by the due date?

E. Public reporting burden for this collection is estimated to average eight hours per response for Form EIA–846. The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate is this estimate?

F. The agency estimates that the only cost to a respondent is for the time it will take to complete the collection. Will a respondent incur any start-up costs for reporting, or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

G. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

H. Does any other Federal, State, or local agency collect similar information? If so, specify the agency, the data element(s), and the methods of collection.

*As a Potential User of the Information To Be Collected*

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information disseminated?

C. Is the information useful at the levels of detail to be collected?

D. For what purpose(s) would the information be used? Be specific.

E. Are there alternate sources for the information and are they useful? If so, what are their weaknesses and/or strengths?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

**Statutory Authority:** Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, *March 9, 2010.*

**Renee H. Miller,**

*Director, Forms Clearance and Information Quality Division, Statistics and Methods Group, Energy Information Administration.*

[FR Doc. 2010–5566 Filed 3–12–10; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. CP10–74–000]**

### Sea Robin Pipeline Company, LLC; Notice of Application

March 5, 2010.

Take notice that on March 3, 2010, Sea Robin Pipeline Company, LLC (Sea Robin), PO Box 4967, Houston, Texas 77210–4967, filed in the above referenced docket an application pursuant to section 7(b) of the Natural Gas Act (NGA) requesting authorization to abandon by removal Sea Robin's East Cameron Block 265 Valve Platform and to abandon in place 12.44 miles of its 20-inch Line 710, 1.35 miles of its 16-inch Line 710–1, and related facilities, all located offshore Louisiana, all as more fully set forth in the application which is on file with the Commission and open to public inspection. The filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY, (202) 502–8659.

Any questions concerning this application may be directed to Stephen T. Veatch, Regulatory Affairs, Sea Robin Pipeline Company, LLC, 5444 Westheimer Road, Houston, Texas 77056, at (713) 989–2024, or at *Stephen.Veatch@sug.com*.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* March 15, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–5528 Filed 3–12–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 13615–000]**

### Sweetwater Hydro, LLC and Ute Mountain Ute Tribe; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

March 8, 2010.

On November 4, 2009, Sweetwater Hydro, LLC and Ute Mountain Ute Tribe filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Sweetwater Pumped Storage Hydroelectric Project, in San Juan County, New Mexico. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of the following new facilities: (1) An upper earth embankment dam with a height of 100 feet and 9,168 feet in length; (2) an associated upper reservoir with a surface area of 141 acres, and a storage capacity of 11,018 acre feet, with a normal maximum surface elevation of 6,780 feet mean sea level (msl); (3) a lower earth embankment dam with a height of 153 feet and 3,606 feet in length; (4) an associated lower reservoir with a surface area of 423 acres, and a storage capacity of 15,319 acre feet, with a normal maximum surface elevation of 5,690 msl; (5) a 25-foot-diameter steel-lined and concrete penstock or other conduit with a length of 6,480 feet; (6) a powerhouse containing 3 units with a proposed generating capacity of 900 megawatts; and (7) a 14 mile-long 230 kilovolt transmission line from the powerhouse to an existing substation, near Shiprock, New Mexico.

*Applicant Contact:* Brent L. Smith, COO, Symbiotics, LLC, P.O. Box 535, Rigby, ID 83442; phone (208) 745–0834.

*FERC Contact:* Frank Winchell, Ph.D., Office of Energy Projects; phone 202–502–6104.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13615) in the docket number field to access the document. For assistance, contact FERC Online Support.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–5525 Filed 3–12–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 503–048]**

### Idaho Power Company, Idaho; Notice of Availability of Draft Environmental Impact Statement for the Swan Falls Project

March 5, 2010.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC's) regulations, 18 Code of Federal Regulations (CFR) part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects has reviewed Idaho Power Company's application for license for the Swan Falls Project (FERC Project No. 503–048), located on the Snake River in Ada and Owyhee counties, Idaho, about 35 miles southwest of Boise. The project currently occupies 529 acres of federal lands administered by the Bureau of Land Management; however, Idaho Power proposes a reduction in the project boundary to include only 181 acres of Federal lands. Commission staff has prepared a draft Environmental Impact Statement (EIS) for the project.

The draft EIS contains staff's evaluation of the applicant's proposal and alternatives for relicensing the Swan Falls Project. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, the license applicant, and Commission staff.

A copy of the draft EIS is available for review at the Commission in the Public Reference Branch, Room 2a, located at 888 First Street, NE., Washington, DC 20426. The draft EIS also may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, 202–502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Comments should be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All comments must be filed within 45 days of the notice date in the **Federal Register** and should reference Project No. 503–048. Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-Filing" link.

Anyone may intervene in this proceeding based on this draft EIS (18 CFR 380.10). You must file your request to intervene as specified above.[1] You do not need intervenor status to have your comments considered.

For further information, contact James Puglisi by telephone at 202–502–6241 or by e-mail at *James.Puglisi@ferc.gov*.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–5526 Filed 3–12–10; 8:45 am]

**BILLING CODE 6717–01–P**

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL08–14–005]**

### Black Oak Energy, L.L.C., EPIC Merchant Energy, LP, SESCO Enterprises, LLC v. PJM Interconnection, L.L.C.; Notice of Filing

March 8, 2010.

Take notice that on March 1, 2010, PJM Interconnection, L.L.C. filed a report of refund pursuant to the Federal Energy Regulatory Commission's (Commission) September 17, 2009, Order Accepting Compliance filing issued in this proceeding, *Black Oak Energy, L.L.C., et al.* v. *PJM Interconnection, L.L.C.,* 128 FERC ¶ 61,262 (2009) (September 17 Order).

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov*. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to

receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on March 22, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–5524 Filed 3–12–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR10–9–000]**

### Centana Intrastate Pipeline, LLC; Notice of Petition for Rate Approval

March 5, 2010.

Take notice that on March 1, 2010, Centana Intrastate Pipeline, LLC filed pursuant to section 284.123(b)(2) of the Commission's regulations, a petition requesting that the Commission approve its request of a maximum system-wide rate for both firm and interruptible section 311 transportation service of $0.3241 per MMBtu, a transportation fuel charge of 2.30 percent, and approval of market based rates for natural gas storage services pursuant to section 311 of the Natural Gas Policy Act of 1978.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern time March 19, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–5523 Filed 3–12–10; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. PR10–8–000]**

### Bay Gas Storage Company, Ltd.; Notice of Petition for Rate Approval

March 8, 2010.

Take notice that on February 26, 2010, Bay Gas Storage Company, Ltd. (Bay Gas) submitted for filing its proposal to charge a lost-an-unaccounted-for (LAUF) reimbursement percentage of 0.34 percent.

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

*Comment Date:* 5 p.m. Eastern Time on Tuesday, March 16, 2010.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2010–5527 Filed 3–12–10; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9126–9]**

### NACEPT Subcommittee on Promoting Environmental Stewardship

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

**ACTION:** Notice of conference call.

**SUMMARY:** Under the Federal Advisory Committee Act, Public Law 92–463, EPA gives notice of a conference call of the NACEPT Subcommittee on Promoting Environmental Stewardship.

The purpose of the Subcommittee on Promoting Environmental Stewardship (SPES) of the National Advisory Council for Environmental Policy and Technology (NACEPT) is to advise the U.S. Environmental Protection Agency on how to promote environmental stewardship practices that encompass all environmental aspects of an organization in the regulated community and other sectors, as appropriate, in order to enhance human health and environmental protection. A copy of the conference call agenda will be posted at *http://epa.gov/ncei/dialogue.htm.* This Web site also includes the charge of the SPES, which provides further information about the purpose of the Subcommittee.

The conference call agenda will focus on the Subcommittee's potential recommendations to the Agency on how to promote environmental stewardship.

**DATES:** The NACEPT Subcommittee on Promoting Environmental Stewardship will hold a public teleconference on Thursday, April 1, 2010 (1 p.m.–3 p.m. Eastern Standard Time).

**ADDRESSES:** The teleconference will be held in the U.S. EPA West Building, 1301 Constitution Ave., NW., Room 1144C, Washington, DC 20004.

**FOR FURTHER INFORMATION CONTACT:** Regina Langton, Designated Federal Officer, *langton.regina@epa.gov,* (202) 566–2178, U.S. EPA Office of Policy, Economics, and Innovation (MC1807T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

**SUPPLEMENTARY INFORMATION:** Requests to make oral comments or provide written comments to the NACEPT Subcommittee on Promoting Environmental Stewardship should be sent to Jennifer Peyser at (202) 965–6215 or *JPeyser@resolv.org* by March 18, 2010. Seating is limited and will be allocated on a first-come, first-served basis. Members of the public wishing to gain access to the conference room on the day of the meeting must contact Jennifer Peyser at (202) 965–6215 or *JPeyser@resolv.org* by March 18, 2010.

*Meeting Access:* For information on access or services for individuals with disabilities, please contact Jennifer Peyser at (202) 965–6215. To request accommodation of a disability, please contact Jennifer Peyser at least 10 days prior to the teleconference to give EPA as much time as possible to process your request.

Dated: March 9, 2010.

**Regina Langton,**

*Designated Federal Officer.*

[FR Doc. 2010–5597 Filed 3–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9126–3]**

### Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008

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

**ACTION:** Notice of document availability and request for comments.

**SUMMARY:** The Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008 is available for public review. Annual U.S. emissions for the period of time from 1990 through 2008 are summarized and presented by source category and sector. The inventory contains estimates of carbon dioxide ($CO_2$), methane ($CH_4$), nitrous oxide ($N_2O$), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride ($SF_6$) emissions. The inventory also includes estimates of carbon fluxes in U.S. agricultural and forest lands. The technical approach used in this report to estimate emissions and sinks for greenhouse gases is consistent with the methodologies recommended by the Intergovernmental Panel on Climate Change (IPCC), and reported in a format consistent with the United Nations Framework Convention on Climate Change (UNFCCC) reporting guidelines. The Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2008 is the latest in a series of annual U.S. submissions to the Secretariat of the UNFCCC.

**DATES:** To ensure your comments are considered for the final version of the document, please submit your comments within 30 days of the appearance of this notice. However, comments received after that date will still be welcomed and be considered for the next edition of this report.

**ADDRESSES:** Comments should be submitted to Mr. Leif Hockstad at: Environmental Protection Agency, Climate Change Division (6207J), 1200 Pennsylvania Ave., NW., Washington, DC 20460, Fax: (202) 343–2359. You are welcome and encouraged to send an e-mail with your comments to *hockstad.leif@epa.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Leif Hockstad, Environmental Protection Agency, Office of Air and Radiation, Office of Atmospheric Programs, Climate Change Division, (202) 343–9432, *hockstad.leif@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The draft report can be obtained by visiting the U.S. EPA's Climate Change Site at: *http://www.epa.gov/climatechange/emissions/usinventoryreport.html.*

Dated: March 5, 2010.

**Gina McCarthy,**

*Assistant Administrator, Office of Air and Radiation.*

[FR Doc. 2010–5595 Filed 3–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–ORD–2010–0202; FRL–9127–4]**

### Board of Scientific Counselors, Executive Committee Meeting—April 2010

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

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, Public Law 92–463, the Environmental Protection Agency, Office of Research and Development (ORD), gives notice of a public meeting (via conference call) of the Board of Scientific Counselors (BOSC) Executive Committee.

**DATES:** The conference call will be held on Thursday, April 1, 2010, from 11 a.m. to 1 p.m. eastern time, and may adjourn early if all business is finished. Requests for the draft agenda or for making oral presentations at the meeting will be accepted up to one business day before the meeting.

**ADDRESSES:** Participation in the conference call will be by teleconference only—meeting rooms will not be used. Members of the public may obtain the call-in number and access code for the calls from Greg Susanke, whose contact information is listed under the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2010–0202, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail:* Send comments by electronic mail (e-mail) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2010–0202.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2010–0202.
- *Mail:* Send comments by mail to: Board of Scientific Counselors, Executive Committee Meeting—February 2010 Docket, Mailcode: 2822T, 1301 Constitution Avenue., NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–ORD–2010–0202.
- *Hand Delivery or Courier.* Deliver comments to: EPA Docket Center (EPA/DC), Room 3334, EPA West Building, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2010–0202. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA–HQ–ORD–2010–0202. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets.*

*Docket:* All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Board of Scientific Counselors, Executive Committee Meeting—February 2010 Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the ORD Docket is (202) 566–1752.

**FOR FURTHER INFORMATION CONTACT:** The Designated Federal Officer via mail at: Greg Susanke, Mail Code 8104–R, Office of Science Policy, Office of Research and Development, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; via phone/voice mail at: (202) 564–9945; via fax at: (202) 565–2911; or via e-mail at: *susanke.greg@epa.gov.*

**SUPPLEMENTARY INFORMATION:**

**General Information**

Any member of the public interested in receiving a draft BOSC agenda or making a presentation at the meeting may contact Greg Susanke, the Designated Federal Officer, via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. In general, each individual making an oral presentation will be limited to a total of three minutes.

Proposed agenda items for the meeting include, but are not limited to: ORD response to BOSC Clean Air Report; and finalization of BOSC Decision Analysis Workshop Report. The meeting is open to the public.

*Information on Services for Individuals with Disabilities:* For information on access or services for individuals with disabilities, please contact Greg Susanke (202) 564–9945 or *susanke.greg@epa.gov.* To request accommodation of a disability, please contact Greg Susanke, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: March 2, 2010.

**Fred S. Hauchman,**

*Director, Office of Science Policy.*

[FR Doc. 2010–5591 Filed 3–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–9127–1]**

## New York State Prohibition of Discharges of Vessel Sewage; Receipt of Petition and Tentative Affirmative Determination

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

**ACTION:** Notice—Receipt of petition and tentative affirmative determination.

**SUMMARY:** Notice is hereby given that a petition has been received from the State of New York requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waterways of the New York State (NYS) Canal System, including the 524 linear miles of navigable waterways within the Erie, Oswego, Champlain, and Cayuga-Seneca canal segments, and including Onondaga, Oneida, and Cross Lakes. The waters of the proposed No Discharge Zone fall within the jurisdictions of the NYS Thruway Authority and NYS Canal Recreationway Commission.

The NYS Department of Environmental Conservation (NYSDEC) in collaboration with the New York State Canal Corporation, the New York Department of State, and the New York State Environmental Facilities Corporation prepared and submitted an application for the designation of a Vessel Waste No Discharge Zone. The NYSDEC certified the need for greater protection of the water quality. EPA hereby makes a tentative affirmative determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the New York State Canal System.

**DATES:** Comments regarding this tentative determination are due by April 14, 2010.

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

- *E-mail: chang.moses@epa.gov.* Include "Comments on Tentative Affirmative Decision for NYS Canal NDZ" in the subject line of the message.
- *Fax:* 212–637–3891.
- *Mail and Hand Delivery/Courier:* Moses Chang, U.S. EPA Region 2, 290 Broadway, 24th Floor, New York, NY 10007–1866. Deliveries are only accepted during the Regional Office's normal hours of operation (8 a.m. to 5 p.m., Monday through Friday, excluding Federal holidays), and special arrangements should be made for deliveries of boxed information.

**FOR FURTHER INFORMATION CONTACT:** Moses Chang, (212) 637–3867, e-mail address: *chang.moses@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that a petition has been received from the State of New York requesting a determination by the Regional Administrator, U.S. Environmental Protection Agency, pursuant to section 312(f)(3) of Public Law 92–500 as amended by Public Law 95–217 and Public Law 100–4, that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the NYS Canal System.

Adequate pumpout facilities are defined as one pumpout station for 300–600 boats under the Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines (**Federal Register**, Vol. 59, No. 47, March 10, 1994). There are four distinct segments of the NYS Canal System.

**Champlain Canal**

The Champlain Canal encompasses an area from the Federal lock in Troy to Whitehall, NY. The total travel distance of this area is 60 miles and to travel the entire length takes approximately 7 hours. There are 276 slips available and 7 operating pumpouts on the Champlain Canal, which leads north to Lake Champlain, a large waterbody that is a No Discharge Zone (NDZ) for pumpout waste, as well as one which prohibits direct disposal of greywater. The 1:300 ratio would only require one pumpout, if the calculation were based solely on number of slips. The availability of seven for this canal meets the criteria for sufficient access, even accounting for transient traffic. The NYS side of Lake Champlain (a waterbody that has already been designated as a NDZ) has an additional 1,014 slips available and 10 additional pumpouts.

**Erie Canal**

The Erie Canal stretches from Waterford (at the confluence of the Mohawk and Hudson Rivers) to the Tonawandas (at the Niagara River), traveling through Oneida Lake and Cross Lake, and connecting to Onondaga Lake along the way. This portion of the Canal is 338 miles long and has 45 pumpouts available for 2,555 slips. Achieving a 1:300 ratio would require a minimum of nine pumpouts for the current number of slips, therefore, there are more than sufficient number of pumpouts for this canal segment as a whole.

**Oswego Canal**

The Oswego Canal is a 24-mile long stretch from the main Erie Canal up to the Port of Oswego and Lake Ontario. This section of the canal has 407 slips and three pumpouts, all located at the City of Oswego terminus. The travel time for the length of this segment is approximately two hours and 20 minutes. Along the way, the Minetto River View Park in Minetto and the Canal Park Marina in Fulton have restrooms available for boaters.

**Cayuga-Seneca Canal**

The Cayuga-Seneca Canal is a small, 12 mile-long section of the larger canal that veers from the main Erie Canal and intersects with two Finger Lakes—Cayuga and Seneca Lakes. It contains 582 slips and seven pumpouts. In addition, although the two lakes are not included in this NYS Canal NDZ application, there are 7 pumpouts in Cayuga and 5 pumpouts in Seneca available.

In conclusion, the criterion for established by the Clean Vessel Act regarding an adequate number of pumpouts per vessel population is 1 pumpout per 300–600 vessels. All areas and sections of the NYS Canal System meet or exceed this criterion.

There are 7 facilities located in the NYS Champlain Canal Segment as follows:

*Name:* Troy Motor Boat and the Canoe Club
*Phone Number:* 518–235–9697
*Lat/Long:* 42.767277/–73.68038
*VHF Channel:* 13
*Dates of operation:* May 1–October 31, Mon–Sun
*Hours of Operation:* 8:30 a.m.–Sunset
*Facility Fee:* $0.00
*Vessel Size:* 42′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Lock 1 Marina
*Phone Number:* 518–238–1321
*Lat/Long:* 42.828375/–73.665992
*VHF Channel:* 13 & 60
*Dates of Operation:* May 1–October 31, Mon–Sun
*Hours of Operation:* 7 a.m.–9 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 50′
*Disposal/Treatment:* Holding Tank

*Name:* City of Mechanicville—Municipal Dock
*Phone Number:* 518–664–7171
*Lat/Long:* 42.904317/–73.683892
*VHF Channel:* N/A
*Dates of Operation:* April–November, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* 60′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Schuyler Yacht Basin
*Phone Number:* 518–695–3193
*Lat/Long:* 43.098056/–73.575833
*VHF Channel:* 9 & 16
*Dates of Operation:* May 1–October 15, Mon–Sun
*Hours of Operation:* 7 a.m.–7 p.m
*Facility Fee:* $5.00
*Vessel Size:* 85′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Schuyler Yacht Basin Replacement
*Phone Number:* 518–695–3193
*Lat/Long:* 43.097778/–73.575278
*VHF Channel:* 9 & 16
*Dates of Operation:* May 1–October 15, Mon–Sun
*Hours of Operation:* 7 a.m.–7 p.m
*Facility Fee:* $5.00.

*Name:* Lock 12 Marina, Inc
*Phone Number:* 518–499–2049
*Lat/Long:* 43.559722/–73.399167
*VHF Channel:* 9 & 16
*Dates of Operation:* May 15–October 15
*Hours of Operation:* 8 a.m.–4 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 60′
*Disposal/treatment:* Connection to Municipal System

*Name:* Whitehall Marina
*Phone Number:* 518–499–9700
*Lat/Long:* 43.558861/–73.401381
*VHF Channel:* 13 & 16
*Dates of Operation:* May 1–November 1, Mon–Sun
*Hours of Operation:* 7 a.m.–7 p.m.
*Facility Fee:* $7.50
*Vessel Size:* 65′
*Disposal/Treatment:* Connection to Municipal System

The following 8 pumpouts are located on the New York side of Lake Champlain which is already designated as a NDZ

*Name:* Chazy River Marina
*Phone Number:* 518–572–2280
*Lat/Long:* 44.935414/–73.396475
*VHF Channel:* 9 & 16
*Dates of Operation:* May 15–October 1, Mon–Sun
*Hours of Operation:* 8 a.m.–5 p.m
*Facility Fee:* $5.00
*Vessel Size:* 36′
*Disposal/Treatment:* Holding Tank

*Name:* Chazy Yacht Club Inc
*Phone Number:* 518–298–2866
*Lat/Long:* 44.934336/–73.393922
*VHF Channel:* 22
*Dates of Operation:* May 15–October 31, Mon–Sun
*Hours of Operation:* 9 a.m.–6 p.m.
*Facility Fee:* $ 5.00
*Vessel Size:* 50′
*Disposal/Treatment:* Holding Tank

*Name:* Gilbert Brook Marina (Monty's Bay Recreation)
*Phone Number:* 518–846–7342
*Lat/Long:* 44.83/–73.402779
*VHF Channel:* 68
*Dates of Operation:* May 1–October 15, Mon–Sun
Hours of operation: 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 36′
*Disposal/Treatment:* Connection to Municipal System

*Name:* NYSDEC—Peru Dock Boat Launch Site
*Phone Number:* 518–897–1343
*Lat/Long:* 44.605911/–73.438421
*VHF Channel:* None
*Dates of Operation:* Memorial Day–Columbus Day, Mon–Sun

*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* Unknown
*Disposal/Treatment:* Connection to Municipal System

*Name:* NYSDEC—Ticonderoga Boat Launch Site
*Phone Number:* 518–897–1343
*Lat/Long:* 43.853408/–73.385131
*VHF Channel:* None
*Dates of Operation:* Memorial Day–Columbus Day, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* Unknown
*Disposal/Treatment:* Holding Tank

*Name:* NYSDEC—Willsboro Boat Launch Site
*Phone Number:* 518–897–1343
*Lat/Long:* 44.400169/–73.390314
*VHF Channel:* None
*Dates of Operation:* Memorial Day–Columbus Day, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* Unknown
*Disposal/Treatment:* Holding Tank

*Name:* Treadwell Bay Marina & Resort
*Phone Number:* 518–563–1321
*Lat/Long:* 44.748153/–73.413267
*VHF Channel:* 9, 16 & 68
*Dates of Operation:* May 1–October 1, Mon–Sun
*Hours of Operation:* 8 a.m.–8 p.m. (Summer)
*Facilities Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Holding Tank

*Name:* Willsboro Bay Marina, Inc
*Phone Number:* (518) 963–7276
*Lat/Long:* 44.405106/–73.39655
*VHF Channel:* 9
*Dates of Operation:* May–October 15, Fri–Tues/closed Wed & Thurs (Fall Hours)
*Hours of Operation:* 8 a.m.–4:30 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 60′
*Pumpout Capacity:* N/A
*Disposal/Treatment:* Connection to Municipal System

The facilities located in the NYS Erie Canal Segment are as follow:

*Name:* Albany Marine Service Marina
*Phone Number:* (518) 783–5333
*Lat/Long:* 42.820719/−73.727322
*VHF Channel:* 16
*Dates of Operation:* May–October, Mon–Sun
*Hours of Operation:* 8 a.m.–6 p.m. Sun (10:30 a.m.–2 p.m.)
*Facility Fee:* $5.00
*Vessel Size:* 50′
*Disposal/Treatment:* Holding Tank

*Name:* Blain's Bay Marina
*Phone Number:* (518) 785–6785
*Lat/Long:* 42.794164/−73.755733
*VHF Channel:* 13
*Dates of Operation:* May–October, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 55′
*Disposal/Treatment:* Holding Tank

*Name:* Diamond Reef Yacht Club
*Phone Number:* (518) 371–2716
*Lat/Long:* 42.794297/−73.760981
*VHF Channel:* 68
*Dates of Operation:* April–October, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 40′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Waterford
*Phone Number:* (518) 237–0651
*Lat/Long:* 42.787608/−73.6798
*VHF Channel:* None
*Dates of Operation:* May 1–November 15, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $1.00
*Vessel Size:* 60′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Schenectady Yacht Club, Inc.
*Lat/Long:* 42.850978/−73.88734723
*VHF Channel:* 16
*Facility Fee:* $0.00

*Name:* Arrowhead Marina & RV Park Inc.
*Phone Number:* (518) 382–8966
*Lat/Long:* 42.849136/−74.013231
*VHF Channel:* 13
*Dates of Operation:* May 15–October 15, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 100′
*Disposal/Treatment:* Holding Tank

*Name:* City of Amsterdam–Riverlink Park
*Phone Number:* (518) 841–4311
*Lat/Long:* 42.93435/−74.19101
*VHF Channel:* None
*Dates of Operation:* May 1–October 1, Mon–Sun
*Hours of Operation:* 11 a.m.–7 p.m.
*Facility Fee:* $0.00
*Vessel Size:* NA
*Pumpout Capacity:* NA
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of St. Johnsville Marina
*Phone Number:* (518) 568–7406
*Lat/Long:* 42.994558/−74.678931
*VHF Channel:* 13
*Dates of Operation:* April 1–October 31, Mon–Sun
*Hours of Operation:* 8 a.m.–8 p.m.
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Little Falls Canal Harbor
*Phone Number:* (315) 823–2400
*Lat/Long:* 43.034692/−74.865492
*Facility Fee:* $0.00

*Name:* NYS Canal Corp—Frankfort Harbor Marina
*Phone Number:* (315) 894–1238
*Lat/Long:* 43.041175/−75.069503
*VHF Channel:* None
*Dates of Operation:* April–November, Mon–Fri
*Hours of Operation:* 24 Hours
*Facility Fee:* $1.75
*Vessel Size:* 20′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of llion Marina—Pumpout Transfer Name
*Phone Number:* (315) 894–9421
*Lat/Long:* 43.019623/−75.02821945
*Dates of Operation:* May–October, Monday–Sunday
*Hours of Operation:* 8 a.m.–6 p.m.
*Facility Fee:* $0.00
*Vessel Size:* NA
*Disposal/Treatment:* Holding Tank

*Name:* Riverside Marina, Inc.
*Phone Number:* (315) 271–7263
*Lat/Long:* 43.195972/−75.437583
*VHF Channel:* None
*Dates of Operation:* April–November, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Skinner's Harbour Marina (Mariner's Landing)
*Lat/Long:* 43.197778/−75.726111
*VHF Channel:* EN
*Days of Operation:* Mon–Sun
*Hours of Operation:* 8 a.m.–8 p.m.
*Facility Fee:* $0.00
*Disposal/Treatment:* Connection to Municipal System

*Name:* Callahan's Marina
*Phone Number:* (315) 687–9729
*Lat/Long:* 43.162589/−75.760906
*VHF Channel:* None
*Dates of Operation:* April–October, Mon–Sun
*Hours of Operation:* 24 Hour
*Facility Fee:* $5.00
*Vessel Size:* 35′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Fremac Marine Sales & Service, Inc.
*Phone Number:* (315) 633–2661
*Lat/Long:* 43.151272/−75.875583
*VHF Channel:* None
*Dates of Operation:* April–October, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 30′

*Disposal/Treatment:* Connection to Municipal System

*Name:* Fisher Bay Marina
*Lat/Long:* 43.176389/−75.981111
*VHF Channel:* NA
*Facility Fee:* $0.00

*Name:* Boathouse Marina & Restaurant
*Phone Number:* (315) 623–7642
*Lat/Long:* 43.246611/−75.997889
*VHF Channel:* None
*Dates of Operation:* April 1–November 15
*Hours of Operation:* 10 a.m.–8 p.m.
*Facility Fee:* $0.00
*Vessel Size:* 40′
*Disposal/Treatment:* Holding Tank

*Name:* Aero Marina Conway Inc.
*Phone Number:* (315) 699–7736
*Lat/Long:* 43.208269/−76.078169
*VHF Channel:* 16
*Dates of Operation:* May–October, Mon–Sun
*Hours of Operation:* 4 p.m.–8 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 50′
*Pumpout Capacity:* N/A
*Disposal/Treatment:* Connection to Municipal System

*Name:* Trade-A-Yacht, Inc. East (Brewerton)
*Phone Number:* (315) 676–3532
*Lat/Long:* 43.240231/−76.128986
*VHF Channel:* 16
*Dates of Operation:* April 1–November 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* 60′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Brewerton Boat Yard, Inc.
*Phone Number:* (315) 676–3762
*Lat/Long:* 43.239569/−76.145167
*VHF Channel:* 9
*Dates of Operation:* May 15–November 15, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Ess-Kay Yards, Inc.—Name #1
*Phone Number:* (315) 676–2711
*Lat/Long:* 43.239472/−76.150103
*VHF Channel:* 16
*Dates of Operation:* April–November, Mon–Sun
*Hours of Operation:* 9 a.m.–8 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 160′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Winter Harbor
*Phone Number:* (315) 676–9276
*Lat/Long:* 43.243686/−76.160089
*VHF Channel:* 16
*Dates of Operation:* April 15–November 15, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Holding Tank

*Name:* Winter Harbor Pumpouts #3 & #4—2007
*Phone Number:* (315) 676–9276
*Lat/Long:* 43.243956/−76.159669
*VHF Channel:* 16
*Dates of Operation:* April 15–November 15, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Holding Tank

*Name:* Pirates Cove Marina, Inc.
*Phone Number:* (315) 695–3901
*Lat/Long:* 43.214486/−76.244867
*VHF Channel:* 16
*Dates of Operation:* April 1–November 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $5.00
*Vessel Size:* 85′
*Disposal/Treatment:* Holding Tank

*Name:* County of Onondaga—P & R—Onondaga Lake Park M
*Phone Number:* (315) 453–6712
*Lat/Long:* 43.101094/−76.211103
*VHF Channel:* 16
*Dates of Operation:* April 1–September 30, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $6.50
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Cold Springs Harbor (Baldwinsville, NY)
*Phone Number:* NA
*Lat/Long:* 43.127378/−76.257536
*Facility Fee:* $0.00

*Name:* J & S Marine
*Phone Number:* (315) 622–1095
*Lat/Long:* 43.123358/−76.264567
*Facility Fee:* $0.00
*Vessel Size:* 85′

*Name:* Sun Harbor Marina
*Lat/Long:* 43.123406/−76.266144
*Facility Fee:* $0.00

*Name:* Coopers Marina, Inc.
*Phone Number:* (315) 635–7371
*Lat/Long:* 43.162361/−76.347658
*VHF Channel:* N/A
*Dates of Operation:* April 1–November 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Midway Marina & Service
*Lat/Long:* 43.072211/−76.548915
*Facility Fee:* $0

*Name:* Village of Newark—T. Spencer Knight Park
*Phone Number:* (315) 331–6199
*Lat/Long:* 43.047669/−77.092483
*VHF Channel:* N/A
*Dates of Operation:* May 1–November 15, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* 45′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Palmyra—Marin
*Phone Number:* (315) 597–4849
*Lat/Long:* 43.066944/−77.2291676
*VHF Channel:* None
*Dates of Operation:* April 1–October 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $1.00
*Vessel Size:* 50′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Mid-Lakes Erie Macedon Landing
*Phone Number:* (800) 808–4511
*Lat/Long:* 43.076678/−77.323608
*VHF Channel:* 13
*Dates of Operation:* May 1–November 15, Mon–Sun
*Hours of Operation:* Sun–Thurs 8 a.m.–5 p.m.; Fri–Sat 8 a.m.–7 p.m.
*Facility Fee:* $0.00
*Vessel Size:* 40′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Packett's Landing Canal Park (Fairport, NY)
*Lat/Long:* 43.100742/–77.440136
*Dates of Operation:* Memorial Day—November 1
*Facility Fee:* $0.00

*Name:* Village of Pittsford
*Phone Number:* (585) 586–9320
*Lat/Long:* 43.093672/−77.516136
*VHF Channel:* None
*Dates of Operation:* April 1–November 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* 60′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Spencerport—Marina
*Phone Number:* (585) 352–4771
*Lat/Long:* 43.1935669/−77.800469
*VHF Channel:* None
*Dates of Operation:* April 1–November 30, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Brockport Lift Bridge
*Lat/Long:* 43.216898/−77.938367
*Facility Fee:* $0.00

*Name:* Village of Holley

*Phone Number:* (585) 303–5512
*Lat/Long:* 43.228889/−78.021778
*VHF Channel:* None
*Dates of Operation:* May 1–October 25, Mon–Sun
*Hours of Operation:* 24 Hour
*Facility Fee:* $0.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Medina—Canal Basin
*Phone Number:* (585) 798–1790
*Lat/Long:* 43.221169/−78.385531
*VHF Channel:* None
*Dates of Operation:* April–November, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Gasport Marina
*Phone Number:* (716) 772–2964
*Lat/Long:* 43.201617/−78.557633
*VHF Channel:* 13
*Dates of Operation:* April–November, Mon–Sun
*Hours of Operation:* 8 a.m.–6 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 40′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Nelson C. Goehle Marine Park
*Phone Number:* (716) 439–6624
*Lat/Long:* 43.184979/−78.668337
*Facility Fee:* $0.00

*Name:* Town of Amherst—Amherst Veteran's Canal Park
*Phone Number:* (716) 631–7113
*Lat/Long:* 43.064917/−78.803208
*VHF Channel:* 19
*Dates of Operation:* May–October, Mon–Fri
*Hours of Operation:* 7 a.m.–3 p.m.
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Holding Tank

*Name:* City of Tonawanda—Gateway Harbor
*Phone Number:* (716) 695–8658
*Lat/Long:* 43.021661/−78.874394
*VHF Channel:* 13 & 16
*Dates of Operation:* May 1–September 30, Mon–Sun
*Hours of Operation:* Mon–Fri (3 p.m.–9 p.m.); Sat & Sun (12 p.m.–9 p.m.)
*Facility Fee:* $2.00
*Vessel Size:* 50′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Inner Harbor Yacht Club
*Phone Number:* (716) 692–9920
*Lat/Long:* 43.019894/−78.873939
*VHF Channel:* 16
*Dates of Operation:* May 1–October 31, Mon–Sun
*Hours of Operation:* 8 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 30′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Wardell Boat Yard
*Phone Number:* (716) 692–9428
*Lat/Long:* 43.022306/−78.880361
*VHF Channel:* None
*Dates of Operation:* March–November, Mon–Sun
*Hours of Operation:* 8 a.m.–8 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 70′
*Disposal/Treatment:* Holding Tank

*Name:* City of Rochester—River St. Waterfront Name
*Phone Number:* (585) 303–9644
*Lat/Long:* 43.24911/−77.611669
*VHF Channel:* 16
*Dates of Operation:* January–December, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* 88′
*Disposal/Treatment:* Connection to Municipal System

The facilities located in the NYS Cayuga-Seneca Canal Section, Cayuga Lake and Seneca Lake pumpouts are as follow:

*Name:* Troy's Marina & Campground (Cayuga, NY)
*Lat/Long:* 42. 856781/−76.7042972
*Facility Fee:* $0.00

*Name:* Trade-A-Yacht, Inc.—Hibiscus Harbor
*Phone Number:* (315) 889–5086
*Lat/Long:* 42.856781/−76.706081
*VHF Channel:* 16
*Dates of Operation:* April 1–November 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $5.00
*Vessel Size:* 60′
*Disposal/Treatment:* Holding Tank

*Name:* Castelli's Marina Inc.
*Phone Number:* (315) 889–5532
*Lat/Long:* 42.839778/−76.695769
*VHF Channel:* 16
*Dates of Operation:* April 15–October 15, Mon–Sat
*Hours of Operation:* 9 a.m.–4:30 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 40′
*Disposal/Treatment:* Connection to Municipal System

*Name:* NYSOPRHP—Taughannock Falls State Park
*Phone Number:* (607) 387–6739
*Lat/Long:* 42.547636/−76595714
*VHF Channel:* None
*Dates of Operation:* March–October 15
*Hours of Operation:* N/A
*Facility Fee:* $0.00
*Vessel Size:* 50′
*Disposal/Treatment:* On-Site Septic System

*Name:* Pinney's Marina
*Phone Number:* (607) 533–4889
*Lat/Long:* 42.564683/−76.591064
*VHF Channel:* None
*Dates of Operation:* May–October, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* None
*Disposal/Treatment:* Holding Tank

*Name:* NYSOPRHP—Alan H. Treman State Marine Park
*Phone Number:* (607) 273–3440
*Lat/Long:* 42.458467/–76.513033
*VHF Channel:* None
*Dates of Operation:* May 1–October 15, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $2.00
*Vessel Size:* 50′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Johnson Boat Yard (dba)—Pierce Cleveland, Inc.
*Phone Number:* (607) 272–5191
*Lat/Long:* 42.452369/–76.510231
*VHF Channel:* 16
*Dates of Operation:* April 1–November 1, Mon–Sun
*Hours of Operation:* Mon–Sat (9 a.m.–5 p.m.); Sun (9 a.m.–4 p.m.)
*Facility Fee:* $0.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Seneca Falls
*Phone Number:* (315) 568–8107
*Lat/Long:* 42.909675/–76.795863
*VHF Channel:* None
*Dates of Operation:* May 1–November 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $2.00
*Vessel Size:* 50′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Waterloo—Oak Island Marina Facility
*Phone Number:* (315) 539–9131
*Lat/Long:* 42.900983/–76.866894
*VHF Channel:* None
*Dates of Operation:* April 1–October 1, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $0.00
*Vessel Size:* 25′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Barrett Marine, Inc.
*Phone Number:* (800) 924–8940
*Lat/Long:* 42.874167/–76.935906
*VHF Channel:* 16
*Dates of Operation:* April 15–October 15, Mon–Sun
*Hours of Operation:* 8 a.m.–7 p.m.

*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* Empty to Existing Pumpout

*Name:* Barrett Marine, Inc.—Stationary
*Phone Number:* (800) 924–8940
*Lat/Long:* 42.874167/–76.935906
*VHF Channel:* None
*Dates of Operation:* Year Round, Mon–Sun
*Hours of Operation:* Mon–Sat (8 a.m.–7 p.m.); Sun (9 a.m.–6 p.m.)
*Facility Fee:* $0.00
*Vessel Size:* 50′
*Disposal/Treatment:* On-Site Septic System

*Name:* NYSOPRH—Seneca Lake State Park
*Phone Number:* (315) 789–2331
*Lat/Long:* 42.870575/–76.939667
*VHF Channel:* None
*Dates of Operation:* April 1–September 30, Mon–Sun
*Hours of Operation:* 24 Hours
*Facility Fee:* $2.00
*Vessel Size:* 40′
*Disposal/Treatment:* On-Site Septic System

*Name:* Stivers Seneca Marina
*Phone Number:* (315) 789–5520
*Lat/Long:* 42.868925/ − 76.939064
*VHF Channel:* 18
*Dates of Operation:* May 1–Labor Day, Mon–Sun
*Hours of Operation:* 7 a.m.–9 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 50′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Stivers Seneca Marina Boat
*Phone Number:* (315) 789–5520
*Lat/Long:* 42.868889/ − 76.939444
*VHF Channel:* 18
*Dates of Operation:* May 1–Labor Day, as scheduled or as service requested
*Hours of Operation:* As scheduled or as service requested
*Facility Fee:* $0.00
*Vessel Size:* N/A
*Disposal/Treatment:* Connection to Municipal System

*Name:* NYSOPRHP—Samson State Park Marina (Romulus, NY)
*Lat/Long:* 42.4247/ − 76.9119
*Facility Fee:* $0.00

*Name:* Ervay's Inc. Full Service Marina
*Phone Number:* (607) 535–2671
*Lat/Long:* 42.370636 − 76.859106
*VHF Channel:* None
*Dates of Operation:* April–November, Mon–Sun
*Hours of Operation:* 9 a.m.–5 p.m.
*Facility Fee:* $5.00
*Vessel Size:* Unlimited
*Disposal/Treatment:* On-site Septic System

*Name:* Glen Harbor Marina (Watkins Glen, NY)
*Lat/Long:* 42.383099/ − 76.861575
*Facility Fee:* $0.00

*Name:* Village Marina
*Phone Number:* (607) 546–8505
*Lat/Long:* 42.3846306/ − 76.8716972
*VHF Channel:* 16
*Dates of Operation:* June–October, Mon–Sun
*Hours of Operation:* 11 a.m.–6 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 45′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Village of Montour Falls—Municipal Marina
*Phone Number:* (607) 535–9580
*Lat/Long:* 42.354167/ − 76.853333
*VHF Channel:* None
*Dates of Operation:* May 2–October 15, Mon–Sun
*Hours of Operation:* 7 a.m.–7 p.m.
*Facility Fee:* $5.00
*Vessel Size:* Unknown
*Disposal/Treatment:* Connection to Municipal System

The facilities located in the NYS Oswego Canal Segment are as follows:

*Name:* City of Oswego—Wrights Landing Muni-Dump Station
*Phone Number:* (315) 342–8186
*Lat/Long:* 43.463447/ − 76.579444
*VHF Channel:* None
*Dates of Operation:* April 1–November 11, Mon–Sun
*Hours of Operation:* 4 a.m.–10 p.m.
*Facility Fee:* $0.00
*Vessel Size:* 50′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Coal Trestle Marina—Oswego Marina Management
*Phone Number:* (315) 343–1967
*Lat/Long:* 43.461289/ − 76.510367
*VHF Channel:* 16
*Dates of Operation:* Memorial Day–Labor Day, Mon–Sun
*Hours of Operation:* 8:30 a.m.–8 p.m.
*Facility Fee:* $5.00
*Vessel Size:* 100′
*Disposal/Treatment:* Connection to Municipal System

*Name:* Oswego Marina—Grawl Enterprises, Inc.
*Phone Number:* (315) 343–1967
*Lat/Long:* 43.461289/ − 76.510376
*VHF Channel:* 16
*Dates of Operation:* Memorial Day–Labor Day, Mon–Sun
*Hours of Operation:* 8:30 a.m.–8 p.m.
*Facility Fee:* $0.00
*Vessel Size:* 100′
*Pumpout Capacity:* N/A
*Disposal/Treatment:* Connection to Municipal System

EPA hereby makes a tentative affirmative determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the waters of the New York State Canal System, including the 524 linear miles of navigable waterways within Erie, Oswego, Champlain, and Cayuga-Seneca canal segments, and including Onondaga, Oneida, and Cross Lakes. A 30-day period for public comment has been opened on this matter which may result in a prohibition of all sewage discharges from vessels in the above-described NYS Canal System in New York.

Dated: March 4, 2010.

**Judith A. Enck,**

*Regional Administrator, Region 2.*

[FR Doc. 2010–5586 Filed 3–12–10; 8:45 am]

**BILLING CODE 6560–50–P**

## EXPORT-IMPORT BANK OF THE U.S.

**[Public Notice 147]**

### Agency Information Collection Activities: Emergency Clearance; Comment Request

**AGENCY:** Export-Import Bank of the U.S.

**ACTION:** Submission for OMB Emergency Clearance Review and Comments Request.

**FORM TITLE:** EIB 10–01 Questionnaire Regarding Activities Related to the Islamic Republic of Iran—OMB 3048–XXXX.

**SUMMARY:** The Export-Import Bank of the United States ("Ex-Im Bank"), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. Our customers will be able to submit this form on paper or electronically.

The purpose of this questionnaire is to allow the Ex-Im Bank to comply with the Consolidated Appropriations Act of 2010 (Pub. L. 111–117) ("the Act") and ensure the Ex-Im Bank does not authorize transactions involving prohibited parties subject to the Iran sanctions language of the Act.

**DATES:** Comments should be received on or before March 25, 2010 to be assured of consideration.

**ADDRESSES:** Comments maybe submitted through *http://www.regulations.gov* or mailed to Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20038 attention: OMB Number 3048–XXXX.

**SUPPLEMENTARY INFORMATION:**

*Titles and Form Number:* EIB 10–01.

*OMB Number:* 3048–XXXX.

*Type of Review:* Emergency Clearance.

*Need and Use:*

*Affected Public:* Borrowers, guarantors, sponsors, purchasers and end-users in proposed Ex-Im Bank transactions.

*Annual Number of Respondents:* 485.

*Estimated Time per Respondent:* 30 minutes.

*Government Annual Burden Hours:* 122 hours.

*Frequency of Reporting or Use:* As needed to request support for a long term or medium term export sale.

**Faisal B. Siddiqui,**

*Assistant General Counsel for Administration.*

**Questionnaire Regarding Activities Related to the Islamic Republic of Iran**

The Export-Import Bank of the United States ("Ex-Im Bank") is prohibited from supporting certain transactions involving parties that conduct business with the Iranian energy sector. To ensure compliance, Ex-Im Bank requires your company to complete this Questionnaire. In addition, Ex-Im Bank reserves the right to ask further questions as necessary.

**Part A: General Information**

1. Company Information:

Company Name: _____

Address: _____

_____

_____

Contact:

Name and Title: _____

Telephone: _____

Email: _____

2. Are you an energy producer [1] or refiner? [2] (Check "yes" if any part of your business involves energy production or refinery operations). If yes, please complete Part B of this Questionnaire.

☐ Yes

☐ No

3. Are you affiliated though common ownership with, or control by, an energy producer or refiner? (Check "yes" if any part of such person/entity's business involves energy production or refinery operations. Also check "yes" if you are owned either in part or in full by a sovereign and your sovereign owner has an ownership interest in an energy producer or refiner.) If yes, please complete Part B of this Questionnaire.

☐ Yes

☐ No

If yes, name(s) of energy producer or refiner: _____

Address: _____

_____

_____

Contact:

Name and Title: _____

Telephone: _____

E-mail: _____

**Part B: Description of Business Dealings With Iran**

1. Does your company (or the energy producer/refiner named in A.3 above) provide Iran or any Iranian entity with refined petroleum resources, or is your company (or the energy producer/refiner named in A.3 above) currently negotiating to do so? If yes, please provide detailed information about such arrangements, amounts, timeframes, counterparties and other details of the transaction or proposed transaction.

2. Does your company (or the energy producer/refiner named in A.3 above) contribute in any way to Iran's capability to import refined petroleum resources, or is your company (or the energy producer/refiner named in A.3 above) currently negotiating to do so? If yes, please provide a detailed explanation.

3. Does your company (or the energy producer/refiner named in A.3 above) have any role in allowing Iran to maintain or expand its domestic production of refined petroleum resources, including any assistance in refinery construction, modernization or repair, or is your company (or the energy producer/refiner named in A.3 above) currently negotiating to have such a role? If yes, please provide a detailed explanation.

4. Please describe in detail any business dealings pertaining to the energy sector that your company (or the energy producer/refiner named in A.3 above) has had with Iran or any Iranian entity in the past 5 years.

**Part C: Certification**

*Certification.* The submitter of this questionnaire ("Submitter") certifies that the facts stated and the representations made above and in any attachments to this Questionnaire are true, to the best of the Submitter's knowledge and belief after due diligence, and that the Submitter has not misrepresented or omitted any material facts. The Submitter further understands that this is an official submission to the United States Government and this Certification is subject to the penalties for fraud against the U.S. Government (18 U.S.C. 1001, *et seq.*). The Submitter further certifies that it will provide additional information with respect to any of the matters covered in this Questionnaire upon Ex-Im Bank's request. The authorized officer or employee signing below is fully authorized to certify the answers in this Questionnaire on behalf of the Submitter.

Company Name: _____

By: _____

(Authorized Officer or Employee)

Name:

Title:

[FR Doc. 2010–5615 Filed 3–12–10; 8:45 am]

**BILLING CODE 6690–01–P**

[1] For purposes of this Questionnaire, an "energy producer" means a business that produces energy of any kind, including (without limitation) gas- or oil-fueled, coal, nuclear, hydro, chemical reaction, electromagnetic, wave or tidal action, biofuels-based, geothermal and/or renewable energy production.

[2] For purposes of this Questionnaire, a "refiner" means a business that refines hydrocarbons into products of value or that refines matter into combustible fuel.

## FEDERAL COMMUNICATIONS COMMISSION

### Notice of Public Information Collection Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority, Comments Requested

March 5, 2010.

**SUMMARY:** The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. Comments are requested concerning: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that

does not display a currently valid OMB control number.

**DATES:** Persons wishing to comments on this information collection should submit comments on or before May 14, 2010. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Nicholas A. Fraser, Office of Management and Budget (OMB), via fax at (202) 395–5167, or via the Internet at Nicholas_A._Fraser@omb.eop.gov and to Judith B. Herman, Federal Communications Commission (FCC).

**FOR FURTHER INFORMATION CONTACT:** Judith B. Herman, OMD, 202–418–0214. For additional information about the information collection(s) send an e–mail to PRA@fcc.gov or contact Judith B. Herman, 202–418–0214.

**SUPPLEMENTARY INFORMATION:**

OMB Control No: 3060–1003.

Title: Communications Disaster Information Reporting System (DIRS).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit and not–for–profit institutions.

Number of Respondents: 3,900 respondents for updated and new contact information (3,200 for updated contact information and 700 for new contacts); 300 respondents for critical information input. Total number of respondents is 4,200.

Estimated Time Per Response: 0.1 hours for updated or new contact information; 0.5 hours for initial input of critical information; and 0.1 hours for daily updates of critical information.

Frequency of Response: On occasion and annual reporting requirements. Annual requirement is for updated contact information. For critical information, the information is requested on a daily basis during a declared emergency and activation of the Disaster Information Reporting System (DIRS). The information is updated daily until the emergency ends, on average about 10 days per emergency. Three emergencies requiring data collection through DIRS are assumed to occur per year.

Obligation to Respond: Voluntary. Statutory authority for this collection of information is contained in 47 U.S.C. sections 154(i), 218, and 303(r).

Total Annual Burden: 390 hours for new and updated contact information; 1,160 hours for critical information input = 1,650 total annual burden hours.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: Because the information input to DIRS is sensitive, for national security and/or commercial reasons, DIRS filings are non–public and treated as presumptively confidential upon filing. DIRS filings will, however, be shared with the National Communications System (NCS) and other Federal agencies authorized to participate in Emergency Support Function–2 (ESF–2) (Communications) of the National Response Framework.

Need and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them. The Commission is requesting an extension (no change in the reporting requirements). The Commission has reduced the information collection burden for this expiring collection which is due to fewer respondents.

This collection as currently approved by OMB is need to be able to reach emergency contact personnel at key telecommunications providers (such as wireline, wireless, broadcast, cable and satellite entities) during an emergency to assess the status of their facilities and network(s), and to determine appropriate agency response.

DIRS is an electronic database that telecommunications providers can access via the Internet to voluntarily enter and update emergency contact information and, in the event of an actual emergency, infrastructure and network status and damage information and/or resource requirements. In the event of a natural disaster or other emergency event, the DIRS database may be used to contact communications providers in affected areas and to inform them that DIRS has been activated and they can input data into DIRS, to further determine the extent of any damage and to gauge the appropriate agency response.

The Commission needs to continue OMB approval for this information collection in order to perform its homeland security and public safety functions as required by the Communications Act of 1934, as amended; coordinate DIRS data with the Department of Homeland Security's National Communications System (NCS) in support of NCS's role as the primary agency for ESF–2 (Communications) of the National Response Framework; and coordinate DIRS data with other Federal agencies authorized to participate in ESF–2 (Communications) of the National Response Framework.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary,*

*Office of the Secretary,*

*Office of Managing Director.*

[FR Doc. 2010–5497 Filed 3–12–10; 8:45 am]

**BILLING CODE 6712–01–S**

## 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 March 30, 2010.

**A. Federal Reserve Bank of Chicago** (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

*1. Gaetano M. Cecchini, as trustee of the Gaetano Mattioli Cecchini Living Trust*, both of Canton, Ohio; to acquire voting shares of Southport Financial Corporation, and thereby indirectly acquire voting shares of Southport Bank, both of Kenosha, Wisconsin.

**B. Federal Reserve Bank of Dallas** (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

*1. Michael Montgomery*, Dallas, Texas; to acquire voting shares of Casey Bancorp., Inc., and thereby indirectly acquire voting shares of Grand Bank of Texas, both of Grand Prairie, Texas.

Board of Governors of the Federal Reserve System, March 10, 2010.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2010–5544 Filed 3–12–10; 8:45 am]

**BILLING CODE 6210–01–S**

## 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 April 9, 2010.

**A. Federal Reserve Bank of Dallas** (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201–2272:

*1. TexStar Bancshares, Inc.*; to become a bank holding company by acquiring 100 percent of the voting shares of TexStar National Bank, both of Universal City, Texas.

Board of Governors of the Federal Reserve System, March 10, 2010.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 2010–5545 Filed 3–12–10; 8:45 am]

**BILLING CODE 6210–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration on Aging

### Agency Information Collection Activities; Proposed Collection; Comment Request; Alzheimer's Disease Supportive Services Program Standardized Data Collection

**AGENCY:** Administration on Aging, HHS.

**ACTION:** Notice.

**SUMMARY:** The Administration on Aging (AoA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection requirements relating to the Alzheimer's Disease Supportive Services Program.

**DATES:** Submit written or electronic comments on the collection of information by May 14, 2010.

**ADDRESSES:** Submit electronic comments on the collection of information to *shannon.skowronski@aoa.hhs.gov.* Submit written comments on the collection of information to Shannon Skowronski, U.S. Administration on Aging, Washington, DC 20201.

**FOR FURTHER INFORMATION CONTACT:** Shannon Skowronski 202–357–0149 or e-mail: *shannon.skowronski@aoa.hhs.gov.*

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency request or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, AoA is publishing notice of the proposed collection of information set forth in this document. With respect to the following collection of information, AoA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of AoA's functions, including whether the information will have practical utility; (2) the accuracy of AoA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques when appropriate, and other forms of information technology.

The Alzheimer's Disease Supportive Services Program (ADSSP) is authorized through Sections 398, 399 and 399A of the Public Health Service (PHS) Act, as amended by Public Law 101–557 Home Health Care and Alzheimer's Disease Amendments of 1990. The ADSSP helps states extend supportive services to persons with Alzheimer's disease and their caregivers, including underserved populations.

In compliance with the PHS Act, AoA developed an ADSSP Data Collection Reporting Tool (ADSSP–DCRT) in 2007. The ADSSP–DCRT collects information about the delivery of direct services by ADSSP state grantees, as well as basic demographic information about service recipients. This revised version includes some revisions to the approved 2007 version. The revised version would be in effect for the FY2011 reporting year and thereafter, while the current reporting tool, OMB Approval Number 0985–0022, would be extended to the end of the FY2010 reporting cycle.

The proposed FY2011 ADSSP–DCRT can be found on AoA's Web site at: *http://www.aoa.gov/AoARoot/AoA_Programs/HCLTC/Alz_Grants/docs/ADSSP.pdf.* AoA estimates the burden of this collection of information to be as follows: 1,410 hours.

Dated: March 9, 2010.

**Kathy Greenlee,**

*Assistant Secretary for Aging.*

[FR Doc. 2010–5584 Filed 3–12–10; 8:45 am]

**BILLING CODE 4154–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed 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 Child Health and Human Development Special Emphasis Panel, Pharmacokinetics and Pharmacodynamics of Antibiotics in Premature Infants.

*Date:* April 8, 2010.

*Time:* 2 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852. (Telephone Conference Call.)

*Contact Person:* Rita Anand, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01, Bethesda, MD 20892. (301) 496–1487. *anandr@mail.nih.gov.*

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel, HIV/AIDS.

*Date:* April 9, 2010.

*Time:* 2 p.m. to 4 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852. (Telephone Conference Call.)

*Contact Person:* Rita Anand, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01, Bethesda, MD 20892. (301) 496–1487. *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 10, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5617 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel; Scientific Conference Grant Review.

*Date:* April 12, 2010.

*Time:* 8:30 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Natcher Building, 45 Center Drive, Room 3AN12B, Bethesda, MD 20892, (Virtual Meeting).

*Contact Person:* Arthur L. Zachary, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3AN–12, Bethesda, MD 20892, 301–594–2886, *zacharya@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: March 10, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5621 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of General Medical Sciences Special Emphasis Panel; NIGMS PSI–Biology Centers for Membrane Proteins.

*Date:* April 9–10, 2010.

*Time:* 8 a.m. to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Legacy Hotel and Meeting Center, 1775 Rockville Pike, Rockville, MD 20852.

*Contact Person:* C. Craig Hyde, PhD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, (301) 435–3825, *hydec@nigms.nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: March 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5623 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as

amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel; Rett Syndrome Program.

*Date:* April 5, 2010.

*Time:* 12:30 p.m. to 3 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852, (Telephone Conference Call)

*Contact Person:* Norman Chang, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health And Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 496–1485, *changn@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5625 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel; First and Second Trimester Evaluation of Structural Malformations.

*Date:* April 6, 2010.

*Time:* 1 p.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Blvd, Room 5B01, Bethesda, MD 20892, (Telephone Conference Call)

*Contact Person:* Rita Anand, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd. Room 5B01, Bethesda, MD 20892, (301) 496–1487, *anandr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 10, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5624 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Mental Health Special Emphasis Panel, NeuroAIDS Therapies.

*Date:* March 29, 2010.

*Time:* 9 a.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:* David W Miller, PhD, Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608. 301–443–9734. *millerda@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: March 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5611 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

### Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Translating Research Into Healthy Eye and Vision Loss Prevention, Funding Opportunity Announcement (FOA) DP 10–004, Initial Review

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the aforementioned meeting:

*Time and Date:* 10 a.m.–5 p.m., April 29, 2010 (Closed).

*Place:* Teleconference.

*Status:* The meeting will be closed to the public in accordance with provisions set forth in section 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

*Matters To Be Discussed:* The meeting will include the initial review, discussion, and evaluation of applications of "Translating Research into Healthy Eye and Vision Loss Prevention, RFA DP 10–004."

*Contact Person for More Information:* Donald Blackman, Ph.D., Scientific Review Officer, National Center for Chronic Disease and Health Promotion, Office of the Director, Extramural Research Program Office, 4770 Buford Highway, NE., Mailstop K–92, Atlanta, GA 30341, Telephone: (770) 488–3023, E-mail: *DBY7@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: March 8, 2010.

**Elaine L. Baker,**

*Director, Management Analysis and Services Office Centers for Disease Control and Prevention.*

[FR Doc. 2010–5537 Filed 3–12–10; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel, Corpus Luteal Contribution to Maternal Pregnancy Physiology and Outcomes in ART.

*Date:* April 5, 2010.

*Time:* 12:30 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852. (Telephone Conference Call.)

*Contact Person:* Peter Zelazowski, PhD, Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Boulevard, Rm. 5B01, Bethesda, MD 20892–7510. 301–435–6902. *peter.zelazowski@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5612 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Toxicology Program (NTP); Office of Liaison, Policy and Review; Meeting of the NTP Board of Scientific Counselors

**AGENCY:** National Institute of Environmental Health Sciences (NIEHS), National Institutes of Health, HHS.

**ACTION:** Meeting announcement and request for comments.

**SUMMARY:** Pursuant to Public Law 92–463, notice is hereby given of a meeting of the NTP Board of Scientific Counselors (BSC). The BSC is a Federally chartered, external advisory group composed of scientists from the public and private sectors that provides primary scientific oversight to the NTP Director and evaluates the scientific merit of the NTP's intramural and collaborative programs.

**DATES:** The BSC meeting will be held on May 10, 2010. The deadline for submission of written comments is April 26, 2010, and for pre-registration to attend the meeting, including registering to present oral comments, is May 3, 2010. Persons needing interpreting services in order to attend should contact 301–402–8180 (voice) or 301–435–1908 (TTY). For other accommodations while on the NIEHS campus, contact 919–541–2475 or e-mail *niehsoeeo@niehs.nih.gov*. Requests should be made at least 7 business days in advance of the event.

**ADDRESSES:** The BSC meeting will be held in the Rodbell Auditorium, Rall Building at the NIEHS, 111 T.W. Alexander Drive, Research Triangle Park, NC 27709. Public comments on all agenda topics and any other correspondence should be submitted to Dr. Lori White, Designated Federal Officer for the BSC, NTP Office of Liaison, Policy and Review, NIEHS, P.O. Box 12233, K2–03, Research Triangle Park, NC 27709; telephone: 919–541–9834; fax: 919–541–0295; e-mail: *whiteld@niehs.nih.gov*. Courier address: NIEHS, 530 Davis Drive, Room K2136, Morrisville, NC 27560.

**FOR FURTHER INFORMATION CONTACT:** Dr. Lori D. White (telephone: 919–541–9834 or e-mail: *whiteld@niehs.nih.gov*).

**SUPPLEMENTARY INFORMATION:**

#### Preliminary Agenda Topics and Availability of Meeting Materials

The preliminary agenda topics for this meeting are (1) Peer review of the draft NTP Brief on Soy Infant Formula, (2) a research concept for NTP studies on soy infant formula, (3) a concept on the approach for the Center for the Evaluation of Risks to Human Reproduction evaluation of low-level lead. (An evaluation of low-level lead was discussed by the BSC at a meeting in December 2007; minutes available at *http://ntp.niehs.nih.gov/go/9741*), and (4) the Technical Reports Review Subcommittee report for the meeting held on November 19, 2009.

The preliminary agenda, roster of BSC members, background materials, public comments, and any additional information, when available, will be posted on the BSC meeting Web site (*http://ntp.niehs.nih.gov/go/165*) or may be requested in hardcopy from the Designated Federal Officer for the BSC (*see* **ADDRESSES** above). The draft NTP Brief on Soy Infant Formula will be posted on the meeting Web site by March 15, 2010. Updates to the agenda will also be posted to this site. Following the meeting, summary minutes will be prepared and made available on the BSC meeting Web site.

#### Attendance and Registration

The meeting is scheduled for May 10, 2010, beginning at 8 a.m. (Eastern Daylight Time) and continuing to approximately 4:30 p.m. This meeting is open to the public with attendance limited only by the space available. Individuals who plan to attend are encouraged to register online at the BSC meeting Web site (*http://ntp.niehs.nih.gov/go/165*) by May 3, 2010, to facilitate planning for the meeting. Registered attendees are encouraged to access the meeting Web site to stay abreast of the most current information regarding the meeting. The NTP is making plans to videocast the meeting through the Internet at *http://www.niehs.nih.gov/news/video/live*.

#### Request for Comments

Written comments submitted in response to this notice should be received by April 26, 2010. Comments will be posted on the BSC meeting Web site and persons submitting them will be identified by their name and affiliation and/or sponsoring organization, if applicable. Persons submitting written comments should include their name, affiliation (if applicable), phone, e-mail, and sponsoring organization (if any) with the document.

Time will be allotted during the meeting for the public to present oral comments to the BSC on the agenda topics. In addition to in-person oral comments at the meeting at the NIEHS, public comments can be presented by

teleconference line. There will be 50 lines for this call; availability will be on a first-come, first-served basis. The available lines will be open from 8 a.m. until 5:30 p.m. on May 10, although public comments will be received only during the formal public comment periods, which will be indicated on the preliminary agenda. Each organization is allowed one time slot per agenda topic. At least 7 minutes will be allotted to each speaker, and if time permits, may be extended to 10 minutes at the discretion of the BSC chair. Persons wishing to present oral comments are encouraged to pre-register on the NTP meeting Web site and indicate whether they will present comments in-person or via the teleconference line. The access number will be provided prior to the meeting. Registration for oral comments will also be available on May 10, although time allowed for presentation by these registrants may be less than that for pre-registered speakers and will be determined by the number of persons who register at the meeting.

Persons registering to make oral comments are asked to send a copy of their statement to the Designated Federal Officer for the BSC (*see* **ADDRESSES** above) by May 3, 2010, to enable review by the BSC prior to the meeting. Written statements can supplement and may expand the oral presentation. If registering on-site and reading from written text, please bring 40 copies of the statement for distribution to the BSC and NTP staff and to supplement the record. Registered speakers using PowerPoint slides with their oral comments should send them to the Designated Federal Officer (*see* **ADDRESSES**) by May 3, 2010.

**Background Information on the NTP Board of Scientific Counselors**

The BSC is a technical advisory body comprised of scientists from the public and private sectors that provides primary scientific oversight to the NTP. Specifically, the BSC advises the NTP on matters of scientific program content, both present and future, and conducts periodic review of the program for the purpose of determining and advising on the scientific merit of its activities and their overall scientific quality. Its members are selected from recognized authorities knowledgeable in fields such as toxicology, pharmacology, pathology, biochemistry, epidemiology, risk assessment, carcinogenesis, mutagenesis, molecular biology, behavioral toxicology, neurotoxicology, immunotoxicology, reproductive toxicology or teratology, and biostatistics. Members serve overlapping terms of up to four years. The BSC usually meets biannually.

Dated: March 5, 2010.

**John R. Bucher,**

*Associate Director, National Toxicology Program.*

[FR Doc. 2010–5608 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Institute of Child Health and Human Development Special Emphasis Panel; Human Capital Interventions Across Childhood and Adolescence.

*Date:* April 6, 2010.

*Time:* 10 a.m. to 1 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, 6100 Executive Boulevard, Room 5B01, Rockville, MD 20852, (Telephone Conference Call).

*Contact Person:* Carla T. Walls, PhD, Scientific Review Officer, Division Of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, (301) 435–6898, *wallsc@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 9, 2010.

**Jennifer Spaeth,**

*Director, Office of Federal Advisory Committee Policy.*

[FR Doc. 2010–5620 Filed 3–12–10; 8:45 am]

**BILLING CODE 4140–01–P**

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

### Program Comment for the Department of the Navy for the Disposition of Historic Vessels

**AGENCY:** Advisory Council on Historic Preservation.

**ACTION:** Notice of Issuance of Program Comments for the Department of the Navy for the Disposition of Historic Vessels.

**SUMMARY:** The Advisory Council on Historic Preservation has issued a Program Comment for the Department of the Navy setting forth the way in which it will comply with Section 106 of the National Historic Preservation Act with regard to the determination of National Register of Historic Places eligibility of its vessels and the treatment of adverse effects that may result from their disposition.

**DATES:** The Program Comment was issued, and went into effect, on March 5, 2010.

**ADDRESSES:** Address any questions concerning this Program Comment to Dr. Tom McCulloch, Office of Federal Agency Programs, Advisory Council on Historic Preservation, 1100 Pennsylvania Avenue, NW., Suite 803, Washington, DC 20004. Fax (202) 606–8647. You may address questions through electronic mail to: *tmcculloch@achp.gov.*

**FOR FURTHER INFORMATION CONTACT:** Dr. Tom McCulloch, (202) 606–8554, *tmcculloch@achp.gov.*

**SUPPLEMENTARY INFORMATION:** Section 106 of the National Historic Preservation Act requires Federal agencies to consider the effects of their undertakings on historic properties and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which Federal agencies comply with these duties. Those regulations are codified under 36 CFR part 800 (Section 106 regulations)

Under Section 800.14(e) of those regulations, agencies can request the ACHP to provide a "Program Comment" on a particular category of undertakings in lieu of conducting individual reviews of each individual undertaking under such category, as set forth in 36 CFR 800.4 through 800.7. An agency can meet its Section 106 responsibilities with regard to the effects of particular aspects of those undertakings by taking into account ACHP's Program Comment

and following the steps set forth in that comment.

**I. Background**

On March 5, 2010, the ACHP issued a Program Comment to the Department of the Navy (Navy) that sets forth the way in which it will comply with Section 106 of the National Historic Preservation Act with regard to the determination of National Register of Historic Places (National Register) eligibility of its vessels and the treatment of adverse effects that may result from their disposition.

On January 22, 2010 the ACHP published in the **Federal Register** its "Notice of Intent to Issue Program Comments for the Department of the Navy for the Disposition of Historic Vessels." Please refer to that notice for additional background on the Program Comment (75 FR 3746–3750).

The ACHP also notified via e-mail State and Tribal Historic Preservation Officers, Indian tribes and Native Hawaiian Organizations, and other preservation partners of its intent and provided them with the **Federal Register** notice.

A total of 6 comments were received by the end of the comment period on February 12. Most of the comments centered on the need to keep the SHPOs better informed regarding the Navy's statements of eligibility or noneligibility of the vessels to be decommissioned in the following year and when the Navy would strike those historic vessels from the Naval Vessel Register and dispose of them.

Other comments asked for clarification of various issues, such as whether the applicability of the program comment is limited to floating vessels (it is) and whether the program comment would preclude the disposition of vessels for recycling (it does not).

After the close of the comment period, the ACHP staff met with their Navy counterparts to address the comments and make edits as appropriate. The issued version of the Program Comment, reproduced below, reflects such edits.

**II. Final Text of the Program Comment**

The following is the text of issued Program Comment:

Program Comment Pursuant to 36 CFR 800.14(e) Implementing Section 106 of the National Historic Preservation Act for the Evaluation of Vessels for Eligibility for Listing in the National Register of Historic Places and the Treatment of Eligible Vessels to Resolve Adverse Effects that May Result from Certain Methods of Final Disposition

**I. Introduction**

Section 106 of the National Historic Preservation Act (NHP) requires Federal agencies to "take into account the effect of [ an] undertaking on any * * * structure * * * eligible for inclusion in the National Register" and to "afford the Advisory Council on Historic Preservation * * * a reasonable opportunity to comment with regard to such undertaking." Regulations promulgated by the Advisory Council on Historic Preservation (ACHP) and codified at 36 CFR Part 800 describe the procedures Federal agencies must follow to meet their Section 106 obligations. Under 36 CFR 800.14, the ACHP provides Federal agencies with "a variety of alternative methods * * * to meet their Section 106 obligations," thereby allowing agencies "to tailor the Section 106 process to their needs." (65 FR 77698–01)

The following Program Comment was proposed by the Navy, and issued by the ACHP on (date to be determined), pursuant to 36 CFR 800.14(e). The Program Comment benefits the Navy and the historic preservation stakeholders by providing the Navy with a process for evaluating floating vessels to determine eligibility for listing in the National Register of Historic Places (NRHP) for Section 106 and Section 110 purposes. The Program Comment also provides a Section 106 method of treatment of eligible vessels to resolve adverse effects that result from certain methods of final disposition. The Program Comment will enable Navy decision-makers to apply the eligibility criteria as defined by the National Park Service (NPS) at 36 CFR Part 60 to vessels in active service and decommissioned vessels. Furthermore, the Program Comment will give the public and various historic preservation stakeholders opportunities to provide input regarding a vessel's eligibility for listing in the NRHP. The Program Comment will establish a type of treatment (*i.e.,* collecting documentation in accordance with Section IV of this Program) that will begin immediately from the time a vessel is determined eligible, and thus, well before a Navy decision to dispose of the vessel. Finally, the Program Comment will clarify that the Navy will not need to conduct Section 106 reviews regarding effects to active vessels.

By implementing the Program Comment, the Navy will no longer be required to follow the standard Section 106 process for each final disposition decision affecting inactive vessels. In addition to satisfying the Navy's obligations under Section 106 of the NHPA for vessels, the Program Comment enables the Navy to fulfill its responsibility under Section 110 of the NHPA to manage and maintain vessels that may be eligible for listing in the NRHP in a way that considers the preservation of their historic value.

**II. Background**

Naval vessels are the ships and service craft built by and for the Navy, used in furthering the Navy's military mission, and listed in the Naval Vessel Register (NVR). Naval vessels are an unusual type of historic property. They are mobile assets that are put into harm's way and remain in active service for typically less than fifty years. Because naval vessels have a limited useful life, the Chief of Naval Operations undertakes a Ship Disposition Review (SDR) each year to determine whether any vessels should be decommissioned from active service. The total number of vessels to be decommissioned varies from year to year, but currently averages eight per year.

Upon the decommissioning of a vessel, the Secretary of the Navy is authorized, under 10 U.S.C. 7304, to strike the vessel from the NVR. By the authority of the Secretary of the Navy under 10 U.S.C. 5 7305–7307, stricken Navy vessels may be: (1) Sold; (2) dismantled; (3) transferred, by gift or otherwise, to any State, Commonwealth, or possession of the U.S., the District of Columbia, or non-profit entity; (4) used for experimental purposes, including Navy sink exercises (SINKEXes); (5) transferred, by gift or otherwise, to any State, Commonwealth or possession of the U.S. for use as an artificial reef; or (6) disposed to a foreign nation by sale, lease, grant, loan, barter, transfer or otherwise. These six methods of final disposition, which are "undertakings" as defined by 36 CFR 800.16(y), are available to the Navy because it is neither cost effective nor consistent with the Navy's mission to retain vessels that have surpassed their useful life.

**III. Determining Eligibility for Listing in the NRHP**

*A. Criteria*

The Secretary of the Interior, through the NPS, established four criteria pursuant to its authority under the NHPA for determining whether property is eligible for listing in the NRHP. The four evaluation criteria are codified at 36 CFR 60.4 and listed below. The Navy is required to evaluate vessels for eligibility for listing in the NRHP using the four evaluation criteria:

i. Are associated with events that have made a significant contribution to the broad patterns of our history;

ii. are associated with the lives of persons significant in our past;

iii. embody the distinctive characteristics of a type, period, or method of construction; or

iv. have yielded, or may be likely to yield, information important in prehistory or history.

Navy vessels that meet one or more of these criteria, and that continue to possess integrity of (as appropriate) design, materials, workmanship, feeling and/or association are eligible for listing in the NRHP.

Recognizing that vessels have a limited useful life of typically less than fifty years, the Navy has determined that, for Section 106 and Section 110 purposes, vessels possessing any of the following characteristics at any time, including during active service, are of exceptional importance and meet the listing eligibility criteria established by the NPS and codified at 36 CFR 60.4:

i. The vessel was awarded an individual Presidential Unit Citation. (A Presidential Unit Citation is awarded to military units that have performed an extremely meritorious or heroic act, usually in the face of an armed enemy.)

ii. An individual act of heroism took place aboard the vessel such that an individual was subsequently awarded the Medal of Honor or the Navy Cross. (The Medal of Honor is awarded for valor in action against an enemy force. The Navy Cross is awarded for extraordinary heroism in action not justifying an award of the Medal of Honor.)

iii. A President of the United States was assigned to the vessel during his or her naval service.

iv. The vessel was the first to incorporate engineering, weapons systems, or other upgrades that represent a revolutionary change in naval design or warfighting capabilities, or other special and unique considerations.

v. Some other historic or socially significant event occurred on the vessel.

*B. Process*

Each year, qualified Navy historians with knowledge about Navy vessels will review each vessel in active service to determine which, if any, possess any of the characteristics described above, and integrity, and therefore, will be determined eligible for listing in the NRHP.

Upon decommissioning, those vessels that have not already been determined eligible for listing in the NRHP will be evaluated by qualified Navy historians with knowledge about Navy vessels in accordance with the listing eligibility criteria established by the NPS, including whether the vessels possess integrity, and informed by the above, and thus, prior to making any final disposition decision with the potential to adversely affect historic property.

Depending on the availability of funds, the Navy may also develop type-specific context studies to determine NRHP listing eligibility of classes of vessels. Context studies shall be consistent with the eligibility criteria noted above and with the NPS publications "How to Apply the National Register Criteria for Evaluation," "How to Complete the National Register Multiple Property Documentation Form," and "Nominating Historic Vessels and Shipwrecks to the National Register of Historic Places." Vessels will be analyzed by class and the appropriate historic preservation stakeholders will be consulted on appropriate application of the National Register criteria. In the event that context studies are developed, they will be made available to the public in accordance with Section IV of this Program.

*C. Participation by Historic Preservation Stakeholder*

The Navy encourages historic preservation stakeholders, including but not limited to the ACHP, the NPS, State Historic Preservation Officers (SHPO), the National Conference of State Historic Preservation Officers (NCSHPO), the National Trust for Historic Preservation (National Trust), and the public to participate in the process for determining whether a vessel meets the eligibility criteria for listing in the NRHP. Through its existing public outreach programs the Navy will invite the public and historic preservation stakeholders to provide written comments and justification that support determining a vessel eligible for listing in the NRHP.

After the annual SDR, the Navy provides a list of vessels planned to be decommissioned over the next five years in a Report to Congress on the Annual Long-Range Plan for Construction of Naval Vessels. Subsequent to the release of the annual report to Congress, the Navy will provide statements of eligibility or ineligibility for listing in the NRHP to the NCSHPO, as well as place them on its Web site for those vessels to be decommissioned in the forthcoming year. The Navy will then solicit written comments on those statements of eligibility or ineligibility for listing in the NRHP from historic preservation stakeholders via its Web site. Historic preservation stakeholders will have sixty days from the time of publication of the list of vessels to be decommissioned to provide their comments. The Navy will notify historic preservation stakeholders, including the Historic Naval Ships Association (HNSA) and other Veterans affiliated organizations, of the beginning of the sixty-day period. All written comments should be mailed to the Naval History and Heritage Command (NHHC) or submitted electronically via the NHHC's Web site. The Navy will consider all written comments received before making a final determination as to whether a vessel is eligible for listing in the NRHP. If the Navy determines no question exists as to whether a vessel is eligible for listing in the NRHP, then the Navy will publish its final determination of listing eligibility for each vessel on its Web site. If the Navy determines that a question exists as to whether a vessel is eligible for listing in the NRHP, or if the ACHP or the Secretary of the Interior so request, the Navy will seek a formal determination of eligibility from the Keeper. Upon review, the Keeper's determination of listing eligibility shall be final.

An historic preservation stakeholder may also comment on a vessel's eligibility or ineligibility for listing in the NRHP in writing while the vessel is in active service. These comments should be mailed to the NHHC or submitted electronically via the NHHC's Web site. The NHHC will acknowledge receipt of the comments in writing, and retain the comments for consideration when preparing the statement of eligibility or ineligibility for the vessel prior to the vessel's scheduled decommissioning.

*D. Effect of Eligibility Determination on Active Vessels*

A determination that a vessel in active service is eligible for listing in the NRHP shall not affect the vessel's availability for routine operations, combat operations, and modernization to keep the vessel battle-worthy, safe, and habitable, as required by the Navy's military mission. Specifically, the Navy shall employ, deploy, activate, inactivate, repair, modify, move and decommission such vessels without regard to their eligibility and without needing to consider effects to them under Section 106 of the NHPA.

**IV. Treatment of Vessels Determined To Be Eligible for Listing in the NRHP**

The Navy will take the following steps regarding vessels determined to be eligible for listing in the NRHP during

active service or upon decommissioning:

i. Annotate the vessel's entry in the NVR to reflect listing eligibility and include the basis for eligibility (the public can access the NVR at *http://www.nvr.navy.mil*); and

ii. Make available a documentation package consisting of historically significant records such as command operation reports, war diaries, and deck logs, as they are submitted (the public would be able to access the documentation package at the NHHC; unclassified command operation reports will be available at *http://www.history.navy.mil*).

The Navy will also strongly consider making the vessel available for donation only upon decommissioning and striking from the NVR pursuant to 10 U.S.C. 7306 for up to two years unless:

i. The vessel is designated for Foreign Military sales (FMS) transfer;

ii. There are other Navy requirements for its continued use;

iii. The material condition of the vessel precludes donation;

iv. National security or other restrictions preclude donation; or

v. The vessel is nuclear powered. (Additional coordination with the Director, Naval Nuclear Propulsion Program is required to determine donation feasibility.)

The Navy's Ship Donation Program is described at *http://peoships.crane.navy.mil/donation/.* Donation application requirements include submission of acceptable curatorial/museum and maintenance plans among other plans for the preservation of the vessel in a condition satisfactory to the Secretary of the Navy. If a qualified donee is not identified within two years, the Navy may remove the vessel from donation hold status and proceed with another method of final disposition. Contracts between the Navy and qualified donees include provisions that address the historic preservation of the vessel. As part of its Section 106 responsibilities, the Navy provides these contractual provisions to each appropriate SHPO for comment before finalizing the contract.

The Navy will publish a list of vessels available for donation in the Federal Register and at *http://peoships.crane.navy.mil/donation/.* The list will include any NRHP eligible vessel initially precluded from donation that, due to a change in status, becomes available for donation.

The Navy will take the following steps regarding decommissioned vessels determined eligible for listing in the NRHP before final disposition by a method other than donation:

i. Give priority to compiling histories of these eligible vessels when preparing entries in the Dictionary of American Naval Fighting Ships;

ii. Retain and, depending on classification, provide public access to historical documentation from NRHP eligible vessels such as command operation reports, war diaries, and ship deck logs at the NHHC (deck logs that are more than thirty years old are transferred to the National Archives and Records Administration (NARA) for permanent retention);

iii. In addition to the standard curator items removed from the vessel upon decommissioning in accordance with required Navy policy, including citations, correspondence of significant historical value, ship histories, paintings, ship silver services, and photographs selected to best display the physical characteristics of the vessel, the Navy would make the vessel available to the Navy Curator and eligible non-profit organizations for removal of additional equipment, parts of the vessel, etc. that contribute to the historical significance of the vessel. Items removed by the Navy Curator will be maintained and considered for loan to qualified U.S. non-profit organizations in accordance with 10 U.S.C. 2572, 4575; and

iv. Within three years of designating a NRHP-eligible vessel for final disposition, deposit with the NARA documentation consisting of archivally stable media of the following items:

a. A Booklet of General Plans; and

b. The last report of the Board of Inspection and Survey describing the material condition of the vessel.

Note that accessibility to the public will depend on the document's classification and NARZ' policies.

**V. Reports**

The Navy will submit an annual report to the NCSHPQ and the ACHP on the progress of this Program Comment on 1 December, annually. The report will include the following information:

i. The names and status of active vessels identified as eligible for listing in the NRHP, and the basis for their eligibility;

ii. The names and status of decommissioned vessels identified as eligible for listing in the NRHP, and a copy of the statement of eligibility;

iii. The names and status of decommissioned vessels identified as ineligible for listing in the NRHP, and a copy of the statement of ineligibility; and

iv. The names of the vessels eligible for listing in the NRHP whose final disposition occurred during the reporting period, along with the status of the documentation supporting final disposition.

The annual report will also be made available to the public on the Navy's donation Web site.

**VI. Effect of the Program Comment**

By following this Program Comment, the Navy will meet its responsibilities for compliance with Section 110, in part, and Section 106 of the NHPA concerning the evaluation of vessels for eligibility for listing in the NRHP and the final disposition of eligible vessels. Accordingly, the Navy will no longer be required to follow the standard Section 106 process for each final disposition decision affecting inactive vessels, except as provided in this Program Comment.

Vessels already determined eligible for listing in the NRHP that are not subject to an existing agreement established through the Section 106 consultation process will be subject to this Program Comment as if their eligibility had been established as a result of this Program Comment. Vessels that are the subject of an existing agreement established pursuant to the Section 106 regulations will continue to be subject to that existing agreement.

The Program Comment described herein will remain in effect for twenty years, unless and until the Navy decides to terminate its application or the ACHP "determines that the consideration of historic [vessels] is not being carried out in a manner consistent with the program comment" and withdraws the comment. (36 CFR 800.14(e)(6).) Upon either event, the Navy shall comply with the requirements of 36 CFR part 800 for each undertaking within the scope of this Program Comment. The Navy shall inform historic preservation stakeholders of the Program Comment's termination.

The Navy shall reexamine the Program Comment's effectiveness after the first year of implementation and every five years thereafter within the context of its annual report or by convening a meeting with historic preservation stakeholders. In reexamining the Program Comment's effectiveness, the Navy shall consider any written recommendations for improvement submitted by historic preservation stakeholders to the NHHC. Once in effect, the Program Comment may be amended when such an amendment is agreed to in writing by the Navy and the ACHP. The amendment will be effective on the date a copy of the amended Program Comment signed by the Navy and the ACHP is filed with the ACHP.

## Appendix A—Definitions

a. *Command Operation Report,* formerly *Command History Report* means a report that covers the operational and administrative actions of the command for each calendar year and usually consists of a chronology, a narrative, and enclosures. Some Command Operation Reports are classified for a set period of time.

b. *Decommission* means to remove a vessel from active service.

c. *Documentation package* means a compilation of historically significant records including, but not limited to, command operation reports, war diaries, and deck logs.

d. *Effect* means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

e. *Historic Preservation Stakeholder* means the EQ–I?, t1ie NP, SHPOs, NCSHPO, the National Trust, any other agency or organization specifically concerned with historic preservation issues, and the public.

f. *Naval Vessel Register* means the official inventory of ships and service craft titled to or in the custody of the U.S. Navy. It includes information about vessels from the time of their authorization through their life cycle and final disposition.

g. *Ship deck log* means a daily chronology of particular events for administrative and legal purposes, as set forth by the Office of the Chief of Naval Operations Instruction 3100.7 series.

h. *Ship disposition review* means an annual review of vessels in active service conducted by the Chief of Naval Operations to determine which vessels will be decommissioned from active service and retained for potential reactivation or stricken from the Naval Vessel Register and designated for disposal.

i. *Stricken vessel* means a decommissioned vessel that has been removed from the Naval Vessel Register.

j. *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

k. *Vessel* means the floating ships and service craft built by and for the Navy, used in furthering the Navy's military mission, and listed in the Naval Vessel Register. Vessel does not include shipwrecks or those vessels retained in Navy custody for public display (i.e., USS CONSTITUTION, NAUTILUS (SSN 571), ex-BARRY (DD 933)).

1. *War diary* means a ship's recounting of wartime operations. Some war diaries are written in a cursory fashion. Others are works of literary art. War diaries for combat actions are included with the Command Operations Report.

**Authority:** 36 CFR 800.14(e)

Dated: March 8, 2010.

**John M. Fowler,**

*Executive Director.*

[FR Doc. 2010–5373 Filed 3–12–10; 8:45 am]

**BILLING CODE 4310–K6–M**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

### Agency Information Collection Activities: Form I–134, Extension of an Existing Information Collection; Comment Request

**ACTION:** 30-Day Notice of Information Collection Under Review: Form I–134, Affidavit of Support; OMB Control No. 1615–0014.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on November 12, 2009, at 74 FR 58302 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until April 14, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Clearance Office, 111 Massachusetts Avenue, Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0014. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Overview of this information collection:*

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Affidavit of Support.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–134. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals and households.* This information collection is necessary to determine if at the time of application into the United States, the applicant is likely to become a public charge.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 44,000 responses at 90 minutes (1.5 hours) per response.

(5) *An estimate of the total public burden (in hours) associated with the collection:* 66,000 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Products Division, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210; Telephone 202–272–8377.

Dated: March 9, 2010.

**Stephen Tarragon,**

*Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2010–5506 Filed 3–12–10; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### U.S. Citizenship and Immigration Services

### Agency Information Collection Activities: Form I–191, Extension of a Currently Approved Information Collection; Comment Request

**ACTION:** 30-Day Notice of Information Collection under Review: Form I–191, Application for Advance Permission to Return to Unrelinquished Domicile; OMB Control Number 1615–0016.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on November 24, 2009, at 74 FR 61359 allowing for a 60-day public comment period. USCIS did not receive any comments for this information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until April 14, 2010. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), and to the Office of Management and Budget (OMB) USCIS Desk Officer. Comments may be submitted to: USCIS, Chief, Regulatory Products Division, Clearance Office, 111 Massachusetts Avenue, Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and OMB USCIS Desk Officer via facsimile at 202–395–5806 or via e-mail at *oira_submission@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0016. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

*Overview of this information collection:*

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Advance Permission to Return to Unrelinquished Domicile.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–191. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or Households. The information collected on this form will be used by U.S. Citizenship and Immigration Services to determine whether the applicant is eligible for discretionary relief under section 212(c) of the Act.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 300 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 75 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov.*

We may also be contacted at: USCIS, Regulatory Products Division, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210; Telephone 202–272–8377.

Dated: March 9, 2010.

**Stephen Tarragon,**

*Deputy Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.*

[FR Doc. 2010–5505 Filed 3–12–10; 8:45 am]

**BILLING CODE 9111–97–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[Docket No. USCG–2009–0983]**

### Notification of the Imposition of Conditions of Entry for Certain Vessels Arriving to the United States From the Democratic Republic of Timor-Leste

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice.

**SUMMARY:** The Coast Guard announces that it will impose conditions of entry on vessels arriving to the United States from the Democratic Republic of Timor-Leste.

**DATES:** The requirements announced in this notice will become effective March 29, 2010.

**ADDRESSES:** This notice will be available for inspection and copying at the Docket Management Facility at the U.S. Department of Transportation, Room W12–140 on the Ground Floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this notice, call Mr. Michael Brown, International Port Security Evaluation Division, Coast Guard, telephone 202–372–1081. 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:**

#### Background and Purpose

Section 70110 of title 46, United States Code, enacted as part of section 102(a) of the Maritime Transportation Security Act of 2002 (Pub. L. 107–295, Nov. 25, 2002) authorizes the Secretary of Homeland Security to prescribe conditions of entry into the United States on vessels arriving from ports that are not maintaining effective anti-terrorism measures and to deny entry into the United States to any vessel that does not meet such conditions. It also requires public notice for passengers of the ineffective anti-terrorism measures. The Secretary has delegated to the Coast Guard authority to carry out the provisions of this section. Previous notices have imposed or removed conditions of entry on vessels arriving from certain countries and those conditions of entry and the countries they pertain to remain in effect unless modified by this notice.

Based on an assessment conducted pursuant to the provisions of 46 U.S.C. 70108 and the International Ship and Port Facility Security (ISPS) Code, the Coast Guard has determined that ports in the Democratic Republic of Timor-Leste are not maintaining effective anti-terrorism measures. Inclusive to this determination is an assessment that the Democratic Republic of Timor-Leste presents significant risk of introducing instruments of terror into international maritime commerce. The Coast Guard notified the Department of State of this determination pursuant to 46 U.S.C. 70110(c).

The United States notified the Democratic Republic of Timor-Leste of this determination on June 29, 2009, and identified steps necessary to improve the antiterrorism measures in use at ports in the Democratic Republic of Timor-Leste, as required by 46 U.S.C. 70109. To date, the United States cannot confirm that the identified deficiencies have been corrected.

Accordingly, effective March 29, 2010, the Coast Guard will impose the following conditions of entry into the United States on vessels that visited ports in the Democratic Republic of Timor-Leste during their last five port calls. Vessels must:

- Implement measures per the ship's security plan equivalent to "Security Level 2" while in a port in the Democratic Republic of Timor-Leste.
- As defined in the ISPS Code and incorporated herein, "Security Level 2" refers to the "level for which appropriate additional protective security measures shall be maintained for a period of time as a result of heightened risk of a security incident."
- Ensure that each access point to the ship is guarded and that the guards have total visibility of the exterior (both landside and waterside) of the vessel while the vessel is in ports in the Democratic Republic of Timor-Leste.
- Guards may be provided by the ship's crew, however additional crewmembers should be placed on the ship if necessary to ensure that limits on maximum hours of work are not exceeded and/or minimum hours of rest are met. Guards may also be provided by outside security forces approved by the ship's master and "Company Security Officer." As defined in the ISPS Code and incorporated herein, "Company Security Officer" refers to the "person designated by the Company for ensuring that a ship security assessment is carried out; that a ship security plan is developed, submitted for approval, and thereafter implemented and maintained and for liaison with port facility security officers and the ship security officer."
- Attempt to execute a Declaration of Security while in port in the Democratic Republic of Timor-Leste;
- Log all security actions in the ship's log; and
- Report actions taken to the cognizant Coast Guard Captain of the Port prior to arrival into U.S. waters.

In addition, based on the findings of a Coast Guard boarding or examination, vessels may be required to ensure that each access point to the ship is guarded by armed security guards and that they have total visibility of the exterior (both landside and waterside) of the vessel while in U.S. ports. The number and position of the guards has to be acceptable to the cognizant Coast Guard Captain of the Port prior to the vessel's arrival.

Consistent with 46 U.S.C. 70110, the United States may deny entry into the United States to any vessel that does not meet the conditions set forth herein. This notice also informs passengers of the ineffective antiterrorism measures at ports in the Democratic Republic of Timor-Leste.

This notice is issued under authority of 46 U.S.C. 70110(a).

Dated: January 29, 2010.

**Rear Admiral Sally Brice-O'Hara,**

*USCG, Deputy Commandant for Operations.*

[FR Doc. 2010–5520 Filed 3–12–10; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5380–N–14]**

### Notice of Proposed Information Collection for Public Comment; FHA Lender Approval, Annual Renewal, Periodic Updates and Noncompliance Reporting by FHA Approved Lenders

**AGENCY:** Office of the Assistant Secretary for Housing, HUD.

**ACTION:** Notice.

**SUMMARY:** The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

**DATES:** *Comments Due Date:* May 14, 2010.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Leroy McKinney, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail *Leroy.McKinney_Jr.@hud.gov* or telephone (202) 402–8048 or the number for the Federal Information Relay Service (1–800–877–8339).

**FOR FURTHER INFORMATION CONTACT:** Program Contact, Joy Hadley, Director, Office of Lender Activities and Program Compliance, Department of Housing and Urban Development, 451 7th Street, SW., Room B133–P3214, Washington, DC 20410, telephone (202) 708–1515 (this is not a toll free number) for copies of the proposed forms and other available information.

**SUPPLEMENTARY INFORMATION:** The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

This Notice also lists the following information:

*Title of Proposal:* FHA Lender Approval, Annual Renewal, Periodic Updates and Noncompliance Reports by FHA Approved Lenders.

*OMB Control Number, if applicable:* 2502–0005.

*Description of the need for the information and proposed use:* The information is used by FHA to verify that lenders meet all approval, renewal, update and compliance requirements at all times. It is also used to assist FHA in managing its financial risks and protect consumers from lender noncompliance with FHA rules and regulations.

*Agency form numbers, if applicable:*

| | |
|---|---|
| HUD–92001–A | FHA Lender Approval Application Form |
| HUD–92001–B | FHA Branch Registration Form |
| HUD 92001–C (Formally HUD 92001–D) | Noncompliances on Title I Lenders |

*Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:* The number of burden hours is 15,145. The number of respondents is 4,360, the number of responses is 21,820, the frequency of response is on occasion, and the burden hour per response is 16.25.

*Status of the proposed information collection:* Revision of currently approved collection.

**Authority:** The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: March 9, 2010.

**Ronald Y. Spraker,**

*Associate General Deputy Assistant Secretary for Housing.*

[FR Doc. 2010–5582 Filed 3–12–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5328–N–04]**

### Final Fair Market Rents for the Housing Choice Voucher Program and Moderate Rehabilitation Single Room Occupancy Program for Fiscal Year 2010; Revised Correction

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice of Final Fair Market Rents (FMRs) for Fiscal Year 2010, Update Correction.

**SUMMARY:** Today's **Federal Register** notice corrects a notice published on Thursday, March 11, 2010, that updated the FMRs for Reno-Sparks, NV, and Ward County, ND. The March 11, 2010, notice inadvertently listed the 0 bedroom rent for Ward County, ND, as $425. In fact, the FMR for 0 bedroom rent for Ward County, ND, is $413.

**DATES:** *Effective Date:* March 15, 2010.

**FOR FURTHER INFORMATION CONTACT:** Marie L. Lihn or Lynn A. Rodgers, Economic and Market Analysis Division, Office of Economic Affairs, Office of Policy Development and Research, telephone (202) 708–0590. Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339. (Other than the HUD USER information line and TTY numbers, telephone numbers are not toll-free.)

**SUPPLEMENTARY INFORMATION:**

On March 11, 2010, HUD published a notice in the **Federal Register** that updated the FMRs for Reno-Sparks, NV, and Ward County, ND. As discussed in that notice, the update was based on Random Digit Dialing (RDD) surveys conducted by HUD from October, 2009, through November, 2009. The March 11, 2010, notice inadvertently listed the 0 bedroom rent for Ward County, ND. Today's notice corrects the 0 bedroom rent for Ward County, ND. The 0 bedroom rent is $413, and not $425 as listed in HUD's previous publication. For ease of reference, HUD is publishing the corrected FMRs for Ward County, ND.

The FMRs for the Ward County, ND is corrected as follows:

| 2010 Fair market rent area | FMR by number of bedrooms in unit | | | | |
|---|---|---|---|---|---|
| | 0 BR | 1 BR | 2 BR | 3 BR | 4 BR |
| Ward County, ND | $413 | $512 | $631 | $872 | $1,035 |

Dated: March 9, 2010.

**Edward J. Szymanoski,**

*Associate Deputy Assistant Secretary for Economic Affairs.*

[FR Doc. 2010–5593 Filed 3–12–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–5406–N–01]**

### Conference Call Meeting of the Manufactured Housing Consensus Committee

**AGENCY:** Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

**ACTION:** Notice of upcoming meeting via conference call.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of an upcoming meeting of the Manufactured Housing Consensus Committee (the Committee) to be held via telephone conference. This meeting is open to the general public, which may participate by following the instructions below.

**DATES:** The conference call meeting will be held on Tuesday, March 23, 2010, by conference call from 11 a.m. to 2 p.m. EST.

*Conference Call:* Members of the public who wish to join the call may call the toll-free number 877–320–2367 and enter pass code 4191690. Additional information concerning the conference call can be obtained from the Department's Consensus Committee Administering Organization, the National Fire Protection Association (NFPA). Interested parties can access the NFPA Web site to obtain additional information about the Manufactured Housing Consensus Committee and the Administering Organization. The link can be found at: *http://www.nfpa.org/categoryList.asp?categoryID=858.* Locate *Quick Links* on the Web page and select *Meeting Notices.*

Alternately, interested parties may contact Jill McGovern of NFPA at (617) 984–7404 (this is not a toll-free number) for conference call information.

**FOR FURTHER INFORMATION CONTACT:** William W. Matchneer III, Associate Deputy Assistant Secretary, Office of Regulatory Affairs and Manufactured Housing, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708–6409 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is provided in accordance with sections 10(a) and (b) of the Federal Advisory Committee Act (5 U.S.C. App. 2) and 41 CFR 102–3.150. The Manufactured Housing Consensus

Committee was established under Section 604(a)(3) of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. 5403(a)(3). The Committee is charged with providing recommendations to the Secretary to adopt, revise, and interpret manufactured home construction and safety standards and procedural and enforcement regulations, and with developing and recommending proposed model installation standards to the Secretary.

The purpose of this conference call meeting is for the Committee to review and provide comments to the Secretary on a draft proposed rule for revising and clarifying the current exemption for recreational vehicles in 24 CFR 3282.8(g) of the Manufactured Home Procedural and Enforcement Regulations from coverage under the Act and the Federal Manufactured Housing Program.

**Tentative Agenda**

A. Roll call.
B. Welcome and opening remarks.
C. Public testimony.
D. Full committee meeting to review and provide commentary on a draft proposed rule to revise the current exception for recreational vehicles and recreational park trailers.
E. Adjournment.

Dated: March 9, 2010.

**David H. Stevens,**

*Assistant Secretary for Housing—Federal Housing Commissioner.*

[FR Doc. 2010–5580 Filed 3–12–10; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF THE INTERIOR

### National Park Sevice

### 60-Day Notice of Intention To Request Clearance of Collection of Information—Opportunity for Public Comment

**AGENCY:** Department of the Interior; National Park Service

**ACTION:** Notice and request for comments.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3507) and 5 CFR 1320, Reporting and Recordkeeping Requirements, the National Park Service invites public comments on an extension of a currently approved collection of information Office of Management and Budget (OMB) #1024–0034. 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.

**DATES:** Public comments will be accepted on or before May 14, 2010.

**ADDRESSES:** Send comments to Michael D. Wilson, Chief or Laurie Heupel, Outdoor Recreation Planner, State and Local Assistance Programs Division, National Park Service (2225), 1849 C Street, NW., Washington, DC 20240–0001 or via e-mail at *michael_d_wilson@nps.gov* or *laurie_heupel@nps.gov.* All responses to this notice will be summarized and included in the request.

*To Request a Draft of Proposed Collection of Information Contact:* Michael D. Wilson, Chief or Laurie Heupel, Outdoor Recreation Planner, State and Local Assistance Programs Division, National Park Service (2225), 1849 C Street, NW., Washington, DC 20240–0001 or via e-mail at *Michael_d_wilson@nps.gov* or *Laurie_heupel@nps.gov.* You are entitled to a copy of the entire ICR package free-of-charge.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 1024–0034.

*Title:* Land and Water Conservation Fund On-Site Inspection Report.

*Expiration Date:* August 31, 2010.

*Form:* None.

*Type of Request:* Extension of currently approved information collection

*Abstract:* The National Park Service (NPS) administers the Land and Water Conservation Fund (L&WCF) State assistance program. Matching grants are provided to States, and through States to local communities, for the acquisition and development of outdoor recreation areas and facilities. On Site Inspection Reports are used to determine project eligibility for funding and to insure compliance with all applicable Federal Laws and guidelines.

*Affected Public:* State Governments, DC, and Territories.

*Obligation to Respond:* Required to Obtain Benefits.

*Frequency of Response:* 1 per respondent.

*Estimated total annual respondents:* 6,000.

*Estimated average completion time per response:* 30 minutes.

*Estimated total annual reporting burden:* 3,000 hours.

*Estimated annual non hour cost burden:* None.

The NPS also is asking for comments on (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information we cannot guarantee that we will be able to do so.

Dated: March 9, 2010.

**Cartina Miller,**

*Information Collection Officer, National Park Service.*

[FR Doc. 2010–5518 Filed 3–12–10; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### U.S. Geological Survey

### National Cooperative Geologic Mapping Program (NCGMP) Advisory Committee

**AGENCY:** U.S. Geological Survey, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to Public Law 106–148, the NCGMP Advisory Committee will meet on May 18th, 2010, in Room #1–475 of the Ziggurat building, 3rd Street West, Building 707, Sacramento, California 95605, and on May 19th, 2010, in Room 1200 of the California Geological Survey Headquarters Building, 801 K Street, Sacramento, California 95814. The Advisory Committee, comprising representatives from Federal agencies, State agencies, academic institutions, and private companies, shall advise the Director of the U.S. Geological Survey on planning and implementation of the geologic mapping and data preservation programs.

The Committee will hear updates on progress of the NCGMP toward fulfilling the purposes of the National Geological Mapping Act of 1992; the Federal, State, and education components of the NCGMP; and the National Geological and Geophysical Data Preservation Program.

**DATES:** May 18–19, 2010, commencing at 8:30 a.m. on May 18 and adjourning by 1 p.m. on May 19.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Brown, U.S. Geological

Survey, Mail Stop 908, National Center, Reston, Virginia 20192, (703) 648–6948.

**SUPPLEMENTARY INFORMATION:** Meetings of the National Cooperative Geological Mapping Program Advisory Committee are open to the Public.

Dated: March 8, 2010.

**Linda Gundersen,**

*Acting Associate Director for Geology and International Programs.*

[FR Doc. 2010–5543 Filed 3–12–10; 8:45 am]

**BILLING CODE 4311–AM–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

**AGENCY:** National Park Service, U.S. Department of the Interior.

**ACTION:** National Preservation Technology and Training Board—National Center for Preservation Technology and Training: meeting notice.

**SUMMARY:** Notice is hereby given in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix (1988)), that the Preservation Technology and Training Board (PTTBoard) of the National Center for Preservation Technology and Training, National Park Service, will meet on Thursday and Friday, April 15–16, 2010 in Natchitoches, Louisiana.

The PTTBoard was established by Congress to provide leadership, policy advice, and professional oversight to the National Center for Preservation Technology and Training (NCPTT) in compliance with Section 404 of the National Historic Preservation Act of 1966, as amended, (16 U.S.C. 470x–2(e)).

The PTTBoard will meet at Lee H. Nelson Hall, the headquarters of NCPTT, at 645 University Parkway, Natchitoches, LA 71457—telephone (318) 356–7444. The meeting will run from 9 a.m. to 5 p.m. on April 15 and from 9 a.m. to 5 p.m. on April 16.

The PTTBoard's meeting agenda will include: review and comment on NCPTT FY2009 accomplishments and operational priorities for FY2010; FY2010 and FY2011 National Center budget and initiatives; the National Center's Sustainability and Preservation initiative; revitalization of the Friends of NCPTT; and training programs.

The PTTBoard meeting is open to the public. Facilities and space for accommodating members of the public are limited, however, persons will be accommodated on a first-come, first-served basis. Any member of the public may file a written statement concerning any of the matters to be discussed by the PTTBoard.

**DATES:** The Meeting Dates are: April 15–16, 2010, 9 a.m. to 5 p.m., Natchitoches, LA.

**ADDRESSES:** The meeting location is: NCPTT 645 University Parkway, Natchitoches, LA 71457.

**SUPPLEMENTARY INFORMATION:** Persons wishing more information concerning this meeting, or who wish to submit written statements, may contact: Mr. Kirk A. Cordell, Executive Director, National Center for Preservation Technology and Training, National Park Service, U.S. Department of the Interior, 645 University Parkway, Natchitoches, LA 71457—telephone (318) 356–7444. In addition to U.S. Mail or commercial delivery, written comments may be sent by fax to Mr. Cordell at (318) 356–9119. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Minutes of the meeting will be available for public inspection no later than 90 days after the meeting at the office of the Executive Director, National Center for Preservation Technology and Training, National Park Service, U.S. Department of the Interior, 645 University Parkway, Natchitoches, LA 71457—telephone (318) 356–7444.

Dated: March 4, 2010.

**Kirk A. Cordell,**

*Executive Director, National Center for Preservation Technology and Training, National Park Service.*

[FR Doc. 2010–5517 Filed 3–12–10; 8:45 am]

**BILLING CODE 4312–52–P**

## DEPARTMENT OF THE INTERIOR

### National Park Service

### Official Trail Marker for the Ala Kahakai National Historic Trail

**AGENCY:** National Park Service, Interior.

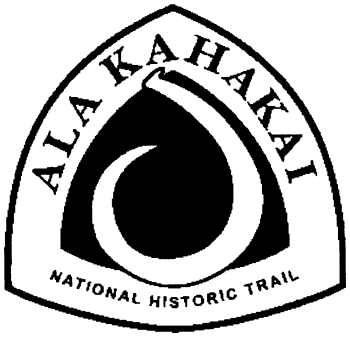
**ACTION:** Official Insignia, Designation.

**Authority:** National Trails System Act, 16 U.S.C. 1241(a) and l246(c) and Protection of Official Badges, Insignia, *etc.* in 18 U.S.C. 701.

**SUMMARY:** This notice issues the official trail marker insignia of the Ala Kahakai National Historic Trail. The original graphic image was developed as part of the Trail's comprehensive management and use Plan. It first came into public use in 2009. The National Park Service official uses this insignia to mark the trail's route. This publication accomplishes the official designation of the insignia now in use by the National Park Service.

**SUPPLEMENTARY INFORMATION:** The primary author of this document is Aric P. Arakaki, Superintendent, Ala Kahakai National Historic Trail.

The insignia depicted below is prescribed as the official trail marker logo for the Ala Kahakai National Historic Trail, administered by the National Park Service, Ala Kahakai National Historic Trail Office, Hawai'i Island, Hawai'i. Authorization for use of this trail marker is controlled by the administrator of the Trail.



In making this prescription, notice is hereby given that whoever manufactures, sells, or possesses this insignia, or any colorable imitation thereof, or photographs or prints or in any other manner makes or executes any engraving, photograph or print, or impression in the likeness of this insignia, or any colorable imitation thereof, without written authorization from the United States Department of the Interior is subject to the penalty provisions of section 701 of Title 18 of the United States Code.

**FOR FURTHER INFORMATION CONTACT:** Aric P. Arakaki, Superintendent, Ala Kahakai National Historic Trail, National Park Service, 73–4786 Kanalani Street, Suite #14, Kailua-Kona, HI 96740, 808–326–6012.

Dated: February 5, 2010.

**Aric P. Arakaki,**

*Superintendent, Ala Kahakai National Historic Trail.*

[FR Doc. 2010–5514 Filed 3–12–10; 8:45 am]

**BILLING CODE 4310–70–P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

**[WY–923–1310–FI; WYW150539]**

### Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW150539, Wyoming

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Proposed Reinstatement of Terminated Oil and Gas Lease.

**SUMMARY:** Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(2), the Bureau of Land Management (BLM) received a petition for reinstatement from Gas Holdings, Inc., for non-competitive oil and gas lease WYW150539 for land in Park County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

**FOR FURTHER INFORMATION CONTACT:** Bureau of Land Management, Julie L. Weaver, Chief, Branch of Fluid Minerals Adjudication, at (307) 775–6176.

**SUPPLEMENTARY INFORMATION:** The lessee has agreed to the amended lease terms for rentals and royalties at rates of $5 per acre, or fraction thereof, per year and 16⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW150539 effective May 1, 2009, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. BLM has not issued a valid lease affecting the lands.

**Julie L. Weaver,**

*Chief, Branch of Fluid Minerals Adjudication.*

[FR Doc. 2010–5391 Filed 3–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

**[FWS–R9–IA–2010–N049; 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 to conduct certain activities with endangered species, marine mammals, or both. With some exceptions, the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) prohibit activities with listed species unless a Federal permit is issued that allows such activities. Both laws require that we invite public comment before issuing these permits.

**DATES:** We must receive requests for documents or comments on or before April 14, 2010. We must receive requests for marine mammal permit public hearings, in writing, at the address shown in the **ADDRESSES** section by April 14, 2010.

**ADDRESSES:** Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 558–7725; or e-mail *DMAFR@fws.gov.*

**FOR FURTHER INFORMATION CONTACT:** Brenda Tapia, (703) 358–2104 (telephone); (703) 558–7725 (fax); *DMAFR@fws.gov* (e-mail).

**SUPPLEMENTARY INFORMATION:**

#### I. Public Comment Procedures

*A. How Do I Request Copies of Applications or Comment on Submitted Applications?*

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an e-mail or address not listed under **ADDRESSES**. If you provide an e-mail address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (*see* **DATES**) or comments delivered to an address other than those listed above (*see* **ADDRESSES**).

*B. May I Review Comments Submitted by Others?*

Comments, including names and street addresses of respondents, will be available for public review at the address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### II. Background

To help us carry out our conservation responsibilities for affected species, the Endangered Species Act of 1973, section 10(a)(1)(A), as amended (16 U.S.C. 1531 *et seq.*), and our regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and our regulations in the Code of

Federal Regulations (CFR) at 50 CFR 18 require that we invite public comment before final action on these permit applications. Under the MMPA, you may request a hearing on any MMPA application received. If you request a hearing, give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Service Director.

**III. Permit Applications**

*A. Endangered Species*

Applicant: Dr. Michael A. Jarvis, Oregon Health and Sciences University, Portland, OR, PRT–01458A

The applicant requests a permit to acquire from Coriell Institute of Medical Research, Camden, NJ, in interstate commerce fibroblast cell line cultures from gorillas (*Gorilla gorilla*) for the purpose of scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Felix Staninoha, Houston, TX, PRT–093431

The applicant request renewal of their permit authorizing interstate and foreign commerce, export, and cull of excess male barasingha (*Recurvus duvauceli*) from their captive herd for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Douglas Wayne Swick, Fort Worth, TX, PRT–03756A

Applicant: Brian Charles Isham, Houston, TX, PRT–03194A

*B. Endangered Marine Mammals and Marine Mammals*

Applicant: U.S. Fish and Wildlife Service, Boquerón, PR, PRT–231088

The applicant requests a permit and a letter of authorization for the rescue, rehabilitation and release of unlimited number of stranded West Indian manatees (*Trichechus manatus*) in the waters of the United States, the import of rescued manatees, and import and export of biological specimens. This notification covers activities to be conducted by the applicant over a 5-year period.

Concurrent with publishing this notice in the **Federal Register**, we are forwarding copies of the above application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Dated: March 5, 2010.

**Brenda Tapia,**

*Program Analyst, Branch of Permits, Division of Management Authority.*

[FR Doc. 2010–5512 Filed 3–12–10; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States, et al. v. Election Systems and Software, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States, et al.* v. *Election Systems and Software Inc.,* Civil Action No. 10–00380. On March 8, 2010, the United States filed a Complaint alleging that the proposed acquisition by Election Systems and Software, Inc., ("ES&S") of Premier Election Services, Inc., and PES Holdings, Inc. violated Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires ES&S to divest certain tangible and intangible assets.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530 (telephone: 202–307–0924).

**Patricia A. Brink,**

*Deputy Director of Operations.*

**United States District Court for the District of Columbia**

CASE: 1:10–cv–00380
Assigned To: Bates, John D.
Assign Date: 3/8/2010
Description: Antitrust

UNITED STATES OF AMERICA Department of Justice, Antitrust Division, 450 5th Street, NW., Suite 8700, Washington, D.C. 20530; STATE OF ARIZONA Office of the Attorney General, 1275 West Washington, Phoenix, Arizona 85007; STATE OF COLORADO Office of the Attorney General, 1525 Sherman St., Seventh Floor, Denver, Colorado 80203; STATE OF FLORIDA Office of the Attorney General, PL–01, The Capitol, Tallahassee, Florida 32399; STATE OF MAINE Office of the Attorney General, 6 State House Station, Augusta, Maine 04333; STATE OF MARYLAND Office of the Attorney General, Antitrust Division, 200 St. Paul Place, 19th Floor, Baltimore, Maryland 21202; COMMONWEALTH OF MASSACHUSETTS Office of the Attorney General Martha Coakley, One Ashburton Place, Boston, Massachusetts 02108; STATE OF NEW MEXICO Office of the Attorney General of New Mexico, 111 Lomas Blvd. NW., Suite 300, Albuquerque, New Mexico 87102; STATE OF TENNESSEE Office of the Attorney General and Reporter, 425 Fifth Avenue North, Nashville, Tennessee 37243; and STATE OF WASHINGTON Office of the Attorney General, 800 Fifth Avenue, Suite 2000, Seattle, Washington 98104; *Plaintiffs*, v. ELECTION SYSTEMS AND SOFTWARE, INC. 11208 John Galt Boulevard, Omaha, Nebraska 68137; *Defendant.*

*COMPLAINT*

Plaintiffs, the United States of America ("United States"), acting under the direction of the Attorney General of the United States, and the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), acting under the direction of their respective Attorneys General, bring this civil antitrust action against defendant Election Systems and Software, Inc. ("ES&S"), to obtain a permanent injunction and other relief to remedy the harm to competition caused by

ES&S's acquisition of Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier"). Plaintiffs allege as follows:

*I. NATURE OF THE ACTION*

1. ES&S is the largest provider of voting equipment systems in the United States. On September 2, 2009, ES&S acquired Premier, a subsidiary of Diebold, Inc. ("Diebold"), then the second largest provider of voting equipment systems in the United States. As a result of that acquisition, ES&S provides more than 70 percent of the voting equipment systems that registered voters rely on to vote in federal, state and local elections held in the United States.

2. Competition in the provision of voting equipment systems is critical to ensure that vendors continue to develop accurate, reliable and secure systems, and provide those systems to state, county and local election administrators at competitive prices.

3. ES&S's acquisition of Premier combined the two largest providers of voting equipment systems in the United States and the two firms that had been, for many customers, the closest bidders for the provision of voting equipment systems. As a result of this transaction, prices for voting equipment systems likely will increase, while quality and innovation likely will decline, as a consequence of reduced competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

*II. THE DEFENDANT*

4. Defendant Election Systems and Software, Inc. ("ES&S") is a Nebraska corporation with its headquarters in Omaha, Nebraska, and includes its successors and assigns, its subsidiaries, including Premier, and its divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees. Prior to its acquisition of Premier, ES&S was already the largest provider of voting equipment systems in the United States, had systems installed in at least 41 states, and collected revenue of $149.4 million in 2008. Premier, now an ES&S subsidiary, was the second largest provider of voting equipment systems in the United States prior to its acquisition, had equipment installed in 33 states, and collected revenue of approximately $88.3 million in 2008.

*III. JURISDICTION AND VENUE*

5. The United States brings this action against defendant ES&S under Section 15 of the Clayton Act, 15 U.S.C. § 25, as amended, to prevent and restrain ES&S from continuing to violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Each of the Plaintiff States brings this action under Section 16 of the Clayton Act, 15 U.S.C. § 26, to prevent and restrain the violation by Defendant of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Plaintiff States, by and through their respective Attorneys General, or other authorized officials, bring this action in their sovereign capacities and as parens patriae on behalf of the citizens, general welfare, and economy of each of their states.

6. Defendant ES&S develops, sells and services voting equipment systems in the flow of interstate commerce. ES&S's activities in developing, selling and servicing voting equipment systems substantially affect interstate commerce. The Court has jurisdiction over this action and over the parties pursuant to 15 U.S.C. § 25 and 28 U.S.C. §§ 1331 and 1337.

7. ES&S transacts business, and has consented to venue and personal jurisdiction, in the District of Columbia. Venue is therefore proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

*IV. BACKGROUND*

8. In the wake of the 2000 Presidential Election, Congress enacted the Help America Vote Act (HAVA) to address perceived shortfalls in the accuracy, security and reliability of voting equipment. 42 U.S.C. 15301–15545 (2002). HAVA authorized funding of approximately $3.86 billion to encourage jurisdictions responsible for the administration of elections to replace mechanical voting devices such as lever and punch card machines with new electronic voting equipment systems. HAVA also created a new agency, the Election Assistance Commission (EAC), to adopt standards for and certify voting equipment systems to ensure their reliability and security. The EAC issued standards in 2002 and 2005, and those standards continue to evolve. HAVA also required that voting equipment systems contain devices that allow disabled voters to cast and verify their votes privately and independently. 42 U.S.C. 15481(a)(3)(A)–(B) (2002).

9. State law sets the certification requirements for any voting equipment system installed within a state. Most states require that voting equipment systems or the devices that comprise those systems be certified, either at the federal level by the EAC, or at the state level according to standards set by the election authorities of that state. State certification regimes may be more or less rigorous than that of the EAC, and some states require that a vendor be certified by both the EAC and the state's own process. A minority of states require neither federal nor state certification, but describe technical standards for vendors responding to requests for proposal ("RFP") for voting equipment systems.

10. Voting equipment systems are purchased either by a state agency or by an election board or official at the county or local level. A jurisdiction typically goes through an extensive public procurement process to identify the correct system to meet its needs and determine its preferred vendor. Before bids are seriously considered, vendors often must be qualified by meeting certain financial criteria. The procurement process for large, complex customers can span more than a year, involves extensive communications between the customer and vendors, typically requires public demonstrations of equipment, and often involves third-party consultants hired by the customer. As vendors proceed through the procurement process, they usually become more familiar with the needs of the customer and the competing vendors under consideration. Often, customers allow a discrete group of vendors to proceed to a best and final round, where vendors may revise the terms of their bids, including price terms, before a winning bid is selected.

11. Performance of voting equipment systems on Election Day is critical because the failure of a system, or any of the devices within a system, can affect the integrity of the democratic process, a failure that often cannot be remedied. Although certification testing of voting equipment systems and devices is designed to identify technical deficiencies, many certified devices have demonstrated security and accuracy problems when deployed in the field for an election. However, customers typically use voting equipment systems only once or twice every two years, so opportunities to test the reliability of equipment are few. As a result, an established record of successful voting equipment performance is of great importance to customers in evaluating the likely accuracy and reliability of a voting equipment system. Election administrators, who often are elected officials themselves, use successful past experience as one basis for judging the reliability of a voting equipment system.

12. The significant variation of election laws and practices among jurisdictions results in substantial differences in customers' technical requirements for their voting equipment systems. A jurisdiction's voting equipment system needs also may be

based on the number of registered voters; the density of population within geographic boundaries; the number of polling sites; accommodation of the needs of disabled voters; ballot complexity, including legal requirements for ballot design, and the number of different ballot layouts, languages, and political parties; frequency of elections; requirements for processing absentee ballots; timing of reporting results; and other issues.

13. Between 2002 and 2006, most states procured new voting equipment systems, exhausting their HAVA funds. Most of these jurisdictions anticipate that their new systems will last at least ten years. Given the current economic environment, many jurisdictions are considering attempts to extend the life of existing systems by investing in repair, service, and upgrades, in order to forestall the need to purchase new systems. However, a few states and several large counties anticipate purchasing a new voting equipment system in the next year or two. A number of other jurisdictions have relatively old voting equipment systems that may need to be replaced within the next several years.

14. Since 2005, several jurisdictions have required that voting equipment systems create a paper-based record of each vote cast, out of concern that the electronic audit component of some devices within the system was insufficiently secure to guarantee the accuracy of election results. Vendors believe this movement has created and will continue to create additional demand for new voting equipment systems over the next few years, despite the exhaustion of HAVA funding.

## V. TRADE AND COMMERCE

### A. The Relevant Product Market

15. A voting equipment system is the integrated collection of customized hardware, software, firmware and associated services used to electronically record, tabulate, transmit and report votes in an election. The number, variety, and operation of electronic components vary depending on the needs of the jurisdiction responsible for administering elections, which may be the state, county or local government, depending on state law.

16. A voting equipment system differs from the mechanical lever and punch card voting devices used in the past in conjunction with manual tabulation methods. Mechanical systems cannot accommodate speedy tabulation across a large number of voters; do not allow disabled voters the opportunity to cast an independent, private ballot; and are considered less accurate and reliable than voting equipment systems.

17. Hardware devices used to electronically record votes vary by recording method, and can be used for a variety of functions. These devices may include precinct or central count Optical Scan ("OS") devices; Direct Recording Electronic ("DRE") devices; and Ballot Marking Devices ("BMD"). In addition to the basic function of recording a vote cast on Election Day, these devices may be used to create a paper record of each vote, to allow independent voting by disabled voters, and to read votes cast by absentee or vote-by-mail voters. Depending on the needs of the jurisdiction, a voting equipment system may include only one type of device, or several different types of devices used in concert. All three types of recording devices feed votes into a tabulator, which counts each vote and prepares a report, with the assistance of associated software and firmware.

18. OS devices create a paper record of each vote and are commonly used to read absentee ballots, but cannot provide a completely private and independent voting experience for any disabled voter. OS devices require a voter to mark an individual paper ballot, which is then inserted into a scanner to be electronically read. Central Count OS devices, particularly high-speed, digital models, are commonly used to read ballots submitted by absentee or vote-by-mail voters. Most OS devices read and record voter marks as data, though some digital devices capture the actual image of the ballot, to better judge the intent of the voter. Typically, OS devices cannot fully enable a disabled voter to cast a ballot independently, as assistance in marking the ballot and transferring it to the ballot box is required.

19. DRE devices, sometimes referred to as touch screens, allow a voter to enter a vote by interfacing directly with a monitor screen, and some models are equipped with a device that creates a scrolling paper record of the votes recorded, often referred to as a Voter Verified Paper Trail. DRE devices allow disabled voters to cast their vote independently, so they often are provided exclusively for the use of disabled voters at polling places that may otherwise rely on OS equipment. DRE devices cannot be used to read ballots submitted by mail.

20. BMD's require a voter to insert an individual paper ballot into an electronic device, and then mark that ballot using a small monitor interface and specialized electronic pen. BMDs are designed to accommodate disabled voters, allowing the independent recording of a vote, but pollworker assistance still is required to transfer the marked ballot to the ballot box. BMDs cannot be used to read ballots submitted by mail.

21. The recording and tabulation devices contained within a voting equipment system are bound together by a collection of proprietary election management software and firmware. The software and firmware enables the operation of each device, communication between devices and reporting of the election results.

22. Jurisdictions purchase voting equipment systems bundled with a variety of services for the initial implementation and long-term service and support of the system. Initial implementation services often include project management, equipment delivery, administrator and pollworker training, and warrantees on devices. Post-implementation services include hardware, software and firmware maintenance agreements, and also may include annual services such as ballot layout, ballot printing, Election Day help-desk support and other Election Day services. Typically, any service that may require changes to hardware, software or firmware must be performed by the original vendor, or that vendor's licensed representative.

23. Jurisdictions evaluate competing bids to provide voting equipment systems based on compliance with state law, technical standards, certification standards, experience in other jurisdictions and commercial standards such as price, delivery schedule and other terms of sale. The combined technical and commercial needs of the customer differ for each voting equipment system bid.

24. A small but significant increase in the price that vendors bid to provide voting equipment systems to customers would not cause customers to substitute away from electronic voting equipment systems so as to make such a price increase unprofitable. Accordingly, voting equipment systems are a line of commerce and relevant product market within the meaning of Section 7 of the Clayton Act.

### B. Geographic Market

25. In the United States, customers of voting equipment systems prefer suppliers with a substantial physical presence in the United States, including a network of sales, technical and support personnel and parts distribution.

26. Customers prefer such vendors because, during the design, bid, and implementation phases of installing a

new voting equipment system, customers interact with vendors to test system functionality, adjust technical specifications, correct design flaws, track progress and ensure successful implementation. Further, customers require that vendors have a significant local service presence to assist annually in the preparation for Election Day, and to immediately address system problems arising on Election Day.

27. A small but significant increase in the price of voting equipment systems would not cause a sufficient number of U.S. customers to turn to suppliers of voting equipment systems that do not have a substantial physical presence in the United States so as to make such a price increase unprofitable. Accordingly, the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

C. Anticompetitive Effects of the Acquisition

28. ES&S's acquisition of Premier united two firms that many customers considered the two closest competitors in the provision of voting equipment systems, with the likely effects of higher prices, a decline in quality and innovation and changes in other key elements that are considered detrimental by most U.S. customers in the evaluation of bids to provide voting equipment systems. ES&S and Premier were considered the closest competitors by many customers because the two companies offer systems certified in the greatest number of jurisdictions; offer a complete suite of voting equipment system products; and have a reputation for reliable equipment. Having acquired its closest competitor, ES&S will have a reduced incentive to compete as aggressively for bids or to invest in new products, unilaterally reducing the quality and increasing the price of voting equipment systems available to most jurisdictions.

29. Some customers identified ES&S and Premier as the only vendors qualified to meet the jurisdiction's certification requirements. For instance, ES&S and Premier are the only two vendors that offer EAC-certified voting equipment systems that include an OS device and a BMD. Indeed, at the time of the acquisition, ES&S and Premier were the only active vendors that had achieved EAC-certification at all. Likewise, ES&S and Premier voting equipment systems are certified or approved in 42 and 33 states, respectively; more states, by far, than any other vendor.

30. Prior to the acquisition, ES&S and Premier had the unique ability to offer a complete suite of voting equipment choices. An array of devices often is important to meet the goals of providing a paper-based system, accommodating disabled voters, and processing absentee ballots expeditiously. Because voting equipment systems use proprietary software, customers do not have the option of selecting the best in breed of each type of device from many vendors and integrating those pieces into a coherent system. A vendor that can offer a full complement of equipment choices within a given system often provides a benefit to the customer.

31. In order to better secure voting equipment systems that have been tested by past experience in similar jurisdictions, many customers view the past experience of a vendor's equipment as a key element in evaluating its bid. Moreover, the more that past experience replicates conditions anticipated in the customer's jurisdiction, the more it augurs for success. ES&S and Premier are two of only three vendors whose voting equipment systems have been deployed in multiple statewide implementations. Likewise, the two companies have the broadest range of past experiences to call upon, making them most likely to be the bidders with the most experience and the most relevant experience for any particular bid.

32. Only three other firms compete to provide voting equipment systems. None of these competitors is likely to replace the constraint Premier once exercised on ES&S's bidding behavior. Each of these firms is limited by the level of certification obtained, lack of a full product line, and the lack of proven equipment. At least one of these firms is also limited by the lack of financial ability to expand. None of these vendors shares the attributes that made Premier a close competitor to ES&S, and none is likely to substantially constrain ES&S's behavior in future bids.

33. In contrast, numerous jurisdictions have benefitted from vigorous price competition between ES&S and Premier in the past. ES&S and Premier were the first and second lowest bidders for recent bids let by states for statewide voting equipment systems. In at least three recent bids for county-wide voting equipment systems, each worth between $1 million and $6 million, ES&S and Premier were the closest bidders.

34. ES&S and Premier have been more successful than any other vendor in competing to meet the disparate requirements of U.S. customers, as evidenced by each company's portion of the installed base of voting equipment systems. Prior to the acquisition, ES&S was the incumbent provider to 47 percent of all registered voters in the United States, and Premier was the incumbent to 23 percent of all registered voters. As a result of its acquisition of Premier, ES&S became the incumbent for more than 70 percent of all registered voters in the United States.

35. One recent state-wide procurement illustrates the closeness of competition between ES&S and Premier, and how that competition restrained ES&S's bidding behavior. The state issued a long-anticipated set of RFPs for procurement of a new statewide voting equipment system that called for the provision of a system that included OS devices that had been tested by an EAC-certified laboratory. As part of the scoring methodology, the RFPs also required that bidders identify past installations of voting equipment systems, and describe the scope and complexity of the installed jurisdiction. ES&S anticipated Premier would be the front runner for this opportunity. In early 2009, ES&S projected that Premier would low-ball the bid, and gave serious consideration to changing its bid price in response. Six days before bids were due, ES&S acquired Premier. Bids were submitted on behalf of both Premier and ES&S, but the state could not consider the Premier bid as a result of ES&S's acquisition of and changes to Premier. No other vendor responded to this RFP, and ES&S was approved by the state board overseeing the procurement in December 2009.

36. The acquisition of Premier both ended its competitive influence on specific bids, and reduced ES&S's incentive to develop new products and upgrade existing products. In response to continuing concerns about the security and reliability of voting equipment systems, technical standards for voting equipment systems are constantly evolving. ES&S considered Premier the firm most responsive to these evolving certification standards, and elected to follow Premier's lead in the development of new products. For example, in the Fall of 2009, ES&S introduced its own digital scan high-speed OS central count device in response to a similar device introduced by Premier a year earlier. ES&S is unlikely to continue such innovation absent competition from Premier. Prior to its acquisition, Premier submitted an improved voting equipment system to certification authorities for testing in two states, but ES&S withdrew those applications following the acquisition. In the absence of competitive pressure from Premier, ES&S is unlikely to have the same incentive to develop new products in the future.

37. ES&S's acquisition of Premier, therefore, likely will substantially lessen competition in the United States market for voting equipment systems, which likely will lead to higher prices, lower quality and less innovation in violation of Section 7 of the Clayton Act.

D. Difficulty of Entry Into the Provision of Voting Equipment Systems

38. Successful entry into the provision of voting equipment systems is challenging, time-consuming, and costly. Entry requires not only the design and development of hardware, software and firmware products, but also obtaining multiple levels of certification, establishing a reputation for reliable performance, and financial wherewithal sufficient to assure a buyer of long-term service capabilities.

39. EAC certification may cost more than $1 million for each system certified, and may take fifteen to twenty-four months. These costs are in addition to internal development costs, estimated at $2.5 to $5 million. Previous certification attempts by established companies such as Premier have consumed more than $3 million and required three years. For at least three of the largest state jurisdictions, certification requires an additional investment of time and money. ES&S, for instance, spent approximately $4 million to become certified in one state. Other states may be even more rigorous, requiring that voting systems be certified both by the EAC and by the state.

40. Certification alone is not sufficient for a company that does not have equipment with a proven record of reliable performance. One company recently obtained 2005 EAC-certification for its new OS device, after two years of product development and testing, and an investment of millions of dollars. Despite the time and money invested, the company has yet to sell a single certified device.

41. Given the time and expense required for certification, the long lifecycle of voting equipment systems, the time required to demonstrate reliable performance of equipment, and the absence of ready capital to fund new investment in the voting equipment system industry, entry into the provision of voting equipment systems would not be timely, likely and sufficient to prevent an exercise of market power by ES&S.

*VI. VIOLATION ALLEGED*

42. ES&S's acquisition of Premier substantially lessened competition in the U.S. market for voting equipment systems in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

43. This acquisition has had the following anticompetitive effects, among others:

a. competition between ES&S and Premier in the provision of voting equipment systems in the United States has been eliminated;

b. competition generally in the provision of voting equipment systems in the United States has been substantially lessened; and

c. prices will likely increase, quality will likely decrease, and innovation will be less likely.

*VII. REQUESTED RELIEF*

44. Plaintiffs request that this Court:

a. Adjudge and decree that the Defendant ES&S's acquisition of Premier violated Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. Compel ES&S to divest Premier assets related to the development, manufacture and sale of the relevant products to enable independent and effective competition;

c. Award such temporary and preliminary injunctive and ancillary relief as may be necessary to avert the likelihood of the dissipation of Premier's tangible and intangible assets during the pendency of this action and to preserve the possibility of effective final relief;

d. Award the Plaintiffs the cost of this action; and

e. Grant the Plaintiffs such other and further relief as the case requires and the Court deems just and proper.

Dated: March 8, 2010.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

/s/ _____
Molly S. Boast,
*Acting Assistant Attorney General.*

/s/ _____
Patricia A. Brink,
*Deputy Director of Operations.*

/s/ _____
Maribeth Petrizzi,
*Assistant Chief, Litigation II Section, D.C. Bar # 435204.*

/s/ _____
Dorothy B. Fountain,
*Assistant Chief, Litigation II Section, D.C. Bar #439469.*

Stephanie A. Fleming, James K. Foster, Erin Carter Grace, Blake Rushforth,
*Attorneys, U.S. Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, D.C. 20530, Tel: (202) 514–9228, Fax: (202) 514–9033, Email: Stephanie.Fleming@usdoj.gov.*

**CERTIFICATE OF SERVICE**

I, Stephanie Fleming, hereby certify that on March 8, 2010, I caused a copy of the Complaint to be served on defendant Election Systems and Software, Inc., by mailing the document via email to the duly authorized legal representative of the defendant, as follows:

FOR ELECTION SYSTEMS & SOFTWARE, INC.
Joseph G. Krauss, Hogan & Hartson LLP, 555 Thirteenth Street, NW., Washington, DC. 20004, (202) 637–5600, *jgkrauss@hhlaw.com*

/s/ _____
Stephanie A. Fleming, Esq.
*United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, D.C. 20530, (202) 514–9228, (202) 514–9033, stephanie.fleming@usdoj.gov*

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

CASE NO.:
JUDGE:
DECK TYPE: Antitrust
DATE STAMP:

UNITED STATES OF AMERICA, *et al.*, *Plaintiffs*, v. ELECTION SYSTEMS AND SOFTWARE, INC., *Defendant.*

*FINAL JUDGMENT*

WHEREAS, Plaintiffs, the United States of America ("United States"), the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), filed their Complaint on March 8, 2010; Plaintiffs and Defendant, Election Systems and Software, Inc., by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendant agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendant to restore competition;

AND WHEREAS, the United States requires Defendant to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendant has represented to the United States that the

divestiture required below can and will be made and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

*I. JURISDICTION*

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendant under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

*II. DEFINITIONS*

As used in this Final Judgment:

A. "Acquirer" means the entity to whom Defendant divests the Divestiture Assets.

B. "ES&S" means Defendant, Election Systems & Software, Inc., a Delaware corporation with its headquarters in Omaha, Nebraska, its successors and assigns, its subsidiaries, including Premier Election Solutions, Inc. and PES Holdings, Inc., both Delaware corporations (collectively, "Premier"), and its divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Premier Voting Equipment System Products" means all versions, past, present, and in development, of Premier hardware, software, and firmware used to record, tabulate, transmit or report votes, including all such systems certified by federal certification authorities (including, but not limited to the Assure 1.2 system that was certified by the United States Election Assistance Commission on August 6, 2009), and all such systems certified by the election authorities of any state.

D. "AutoMARK Products" means ES&S's ballot marking device that allows voters with disabilities to privately and independently mark a ballot.

E. "Divestiture Assets" means:

(1) all intangible assets related to the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products, including, but not limited to, intellectual property (including, but not limited to, patents, patent applications, licenses, sublicenses, copyrights, databases containing design information and, with respect to the Assure 1.2 suite of products only, trademarks, trade secrets, trade names, service marks, service names, slogans, domain names, logos and trade dress); the unregistered trademark "Premier"; data related to the use, operation, certification testing, internal testing, and beta testing; documentation of pending and current certification efforts with the United States Election Assistance Commission ("EAC") and the election authorities of any state; technical information, software, software source code and related documentation, know-how, drawings, blueprints, designs, design tools and simulation capability, and specifications for materials, parts, and devices; safety procedures for the handling of materials and substances; quality assurance and control procedures; all manuals, performance, financial, operational, and other records Defendant provides to its own employees, customers, suppliers, agents, dealers or licensees; and all available research data concerning historic and current research and development efforts relating to the Premier Voting Equipment System Products, including, but not limited to, designs of experiments and the results of successful and unsuccessful designs and experiments;

(2) tangible assets, including:

(a) all tooling and fixed assets owned by Defendant and used in connection with the manufacture, assembly, production, service and repair of the Premier Voting Equipment System Products, as detailed in Section 2.7 and Schedule 2.7(a) of the Purchase Agreement by and among ES&S, Diebold, Inc., Premier Election Solutions, Inc., PES Holdings, Inc., and Premier Election Solutions Canada ULC, dated September 2, 2009 ("Diebold Purchase Agreement").

(b) inventory, parts and components for both the Premier Voting Equipment Products and the AutoMARK Products, including those that are not commercially available, sufficient for the Acquirer to assemble, manufacture, produce, service and repair the Premier Voting Equipment System Products and the AutoMARK Products.

(3) a fully paid-up, non-exclusive, perpetual, transferable license to certify, produce, modify, enhance, distribute, sell, repair and service the AutoMARK Products. Such license shall include all intellectual property (including, but not limited to, patents, patent applications, licenses, sublicenses, copyrights, trademarks, trade names, trade secrets, service marks, service names, slogans, domain names, logos, and trade dress), data, drawings, ideas, concepts, know-how, procedures, processes, technical information, software, software source code and related documentation, blueprints, specifications, manuals, and any other intangible assets related to the use, operation, certification, production, modification, enhancement, distribution, sale, repair or service of the AutoMARK Products.

*III. APPLICABILITY*

A. This Final Judgment applies to ES&S, as defined above, and all other persons in active concert or participation with it who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and V of this Final Judgment, Defendant sells or otherwise disposes of all or substantially all of its assets or of lesser business units that include the Divestiture Assets, it shall require the purchaser to be bound by the provisions of this Final Judgment. Defendant need not obtain such an agreement from the Acquirer of the assets divested pursuant to this Final Judgment.

*IV. DIVESTITURE*

A. Defendant is ordered and directed, within sixty (60) calendar days after the filing of the Complaint in this matter, or five (5) calendar days after notice of the entry of this Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States. The United States, in its sole discretion, after consultation with the Plaintiff States, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. Defendant agrees to use its best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In accomplishing the divestiture ordered by this Final Judgment, Defendant promptly shall make known, by usual and customary means, the availability of the Divestiture Assets. Defendant shall inform any person making inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment. Defendant shall offer to furnish to any prospective Acquirer, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process, except such information or documents subject to the attorney-client privilege or work-product doctrine. Defendant shall make available such information to the

United States at the same time that such information is made available to any other person.

C. Defendant shall provide the Acquirer and the United States information relating to its current and former employees involved in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or Premier's use of the AutoMARK Products to enable the Acquirer to make offers of employment to such personnel. Defendant shall not interfere with any negotiations by the Acquirer to employ any such employee whose primary responsibility is the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or Premier's use of the AutoMARK Products.

D. Defendant shall waive all nondisclosure and noncompete agreements for all of the current and former employees of Premier for a period of six (6) months following the date of the divestiture of the Divestiture Assets, for the exclusive purpose of allowing those employees to seek employment with the Acquirer.

E. Defendant shall permit any prospective Acquirer of the Divestiture Assets to have reasonable access to personnel involved in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or the AutoMARK Products, and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

F. At the option of the Acquirer, Defendant shall enter into a contract for the purchase of additional parts and inventory for up to two (2) years sufficient to meet the Acquirer's needs to assemble, manufacture, produce, service or repair the Premier Voting Equipment System Products. The terms and conditions of any sale or contractual arrangement intended to satisfy this provision must be commercially reasonable.

G. In addition, Defendant shall provide any Acquirer of the Divestiture Assets information relating to suppliers of parts and components used for the assembly, manufacture, production, repair or service of the Premier Voting Equipment System Products and the AutoMARK Products. Defendant shall not interfere with the Acquirer's ability to contract for the supply of parts or components from any vendor.

H. Defendant shall immediately provide any Acquirer with a list of all current and former customers for the Premier Voting Equipment System Products.

I. To the extent that current Premier contracts prevent Premier customers from selecting the Acquirer as its provider of equipment or services related to the Premier Voting Equipment System Products, the Defendant agrees to waive any such contractual impediment at the option of the customer.

J. At the option of the Acquirer, Defendant shall enter into a transition services agreement sufficient to meet the Acquirer's needs for assistance in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products and/or the AutoMARK Products for a period of up to six (6) months. The terms and conditions of any contractual arrangement intended to satisfy this provision must be commercially reasonable.

K. On the date of the sale of the Divestiture Assets, Defendant shall provide Acquirer with copies of contracts with all current and former customers for any of the Premier Voting Equipment System Products.

L. The Acquirer shall grant Defendant a non-exclusive license to use the Premier Voting Equipment System Products and the assets described in II(E)(2)(A), but Defendant may not use such a license to attempt to compete for any opportunity to sell or lease Premier Voting Equipment System Products contained within a Request for Proposal (or RFP) or a Request for Quote (or RFQ) for a voting equipment system, or any upgrade, request or order that calls for replacement of 50 percent or more of a customer's installed voting equipment, other than in the case of a force majeure event (i.e., Act of God, fire, earthquake, flood, explosion, war, or terrorist act), or to the extent the Defendant is obligated under a contract with a Premier or Diebold customer in existence at the time of Closing, or to the extent that the Defendant is obligated under a settlement agreement formed by Diebold pursuant to Section 4.2(d) of the Diebold Purchase Agreement. Subject to the limitations described in Section IV, Defendant may use the license described in this paragraph to provide equipment and services to current customers.

M. Any improvement or modification to the Divestiture Assets developed by either Defendant or the Acquirer shall be owned solely by the developing party.

N. Defendant shall not take any action that will impede in any way the operation or divestiture of the Divestiture Assets.

O. Unless the United States, in its sole discretion, after consultation with the Plaintiff States, otherwise consents in writing, the divestiture pursuant to Section IV, or by trustee appointed pursuant to Section V, of this Final Judgment shall include the entire Divestiture Assets, and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, after consultation with the Plaintiff States, that the Divestiture Assets can and will be used by the Acquirer as part of a viable, ongoing business that is engaged in the provision of voting equipment systems and services. The divestiture, whether pursuant to Section IV or Section V of this Final Judgment:

(1) Shall be made to an Acquirer that, in the United State's sole judgment, after consultation with the Plaintiff States, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the provision of voting equipment systems and services; and

(2) Shall be accomplished so as to satisfy the United States, in its sole discretion, after consultation with the Plaintiff States, that none of the terms of any agreement between an Acquirer and Defendant gives Defendant the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

*V. Appointment of Trustee*

A. If Defendant has not divested the Divestiture Assets within the time period specified in Section IV(A), it shall notify the United States of that fact in writing. Upon application of the United States, the Court shall appoint a trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a trustee becomes effective, only the trustee shall have the right to sell the Divestiture Assets. The trustee shall have the power and authority to accomplish the divestiture to an Acquirer acceptable to the United States, in its sole discretion, after consultation with the Plaintiff States, at such price and on such terms as are then obtainable upon reasonable effort by the trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V(D) of

this Final Judgment, the trustee may hire at the cost and expense of Defendant any investment bankers, attorneys, or other agents, who shall be solely accountable to the trustee, reasonably necessary in the trustee's judgment to assist in the divestiture.

C. Defendant shall not object to a sale by the trustee on any ground other than the trustee's malfeasance. Any such objections by Defendant must be conveyed in writing to the United States and the trustee within ten (10) calendar days after the trustee has provided the notice required under Section VI.

D. The trustee shall serve at the cost and expense of Defendant, on such terms and conditions as the United States approves, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining money shall be paid to Defendant and the trust shall then be terminated. The compensation of the trustee and any professionals and agents retained by the trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount.

E. Defendant shall use its best efforts to assist the trustee in accomplishing the required divestiture. The trustee and any consultants, accountants, attorneys, and other persons retained by the trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendant shall develop financial and other information relevant to such business as the trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information. Defendant shall take no action to interfere with or to impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the United States, the Plaintiff States, and the Court setting forth the trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the trustee has not accomplished the divestiture ordered under this Final Judgment within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth: (1) The trustee's efforts to accomplish the required divestiture; (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished; and (3) the trustee's recommendations. To the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such report to the United States and the Plaintiff States, which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the trustee's appointment by a period requested by the United States.

*VI. Notice of Proposed Divestiture*

A. Within two (2) business days following execution of a definitive divestiture agreement, Defendant shall notify the United States, and the Plaintiff States, of any proposed divestiture required by Section IV of this Final Judgment. Within two (2) business days following execution of a definitive divestiture agreement, the trustee shall notify the United States of any proposed divestiture required by Section V of this Final Judgment. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States and the Plaintiff States of such notice, the United States and any Plaintiff State may request from Defendant, the proposed Acquirer, any other third party, or the trustee if applicable, additional information concerning the proposed divestiture, the proposed Acquirer, and any other potential Acquirer. Defendant and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendant, the proposed Acquirer, any third party, and the trustee, whichever is later, the United States, in its sole discretion, after consultation with the Plaintiff States, shall provide written notice to Defendant and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States, after consultation with the Plaintiff States, provides written notice that it does not object, the divestiture may be consummated, subject only to Defendant's limited right to object to the sale under Section V(C) of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendant under Section V(C), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

*VII. FINANCING*

Defendant shall not finance all or any part of any purchase made pursuant to Section IV or V of this Final Judgment.

*VIII. ASSET PRESERVATION*

Until the divestiture required by this Final Judgment has been accomplished, Defendant shall take all steps necessary to comply with the Asset Preservation Stipulation and Order entered by this Court. Defendant shall take no action that would jeopardize the divestiture ordered by this Court.

*IX. AFFIDAVITS*

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or V, Defendant shall deliver to the United States, the Plaintiff States, an affidavit as to the fact and manner of its compliance with Section IV or V of this Final Judgment. Each such affidavit shall include the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about

acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts Defendant have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States, after consultation with the Plaintiff States, to information provided by Defendant, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendant shall deliver to the United States an affidavit that describes in reasonable detail all actions it has taken and all steps Defendant has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendant shall deliver to the United States, the Plaintiff States, an affidavit describing any changes to the efforts and actions outlined in Defendant's earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendant shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

*X. COMPLIANCE INSPECTION*

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice Antitrust Division ("Antitrust Division"), including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendant, be permitted:

(1) Access during Defendant's office hours to inspect and copy, or at the option of the United States, to require Defendant to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendant, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendant's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendant.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendant shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, or to the Attorneys General of any of the Plaintiff States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendant to the United States, Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendant marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give Defendant ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

*XI. NOTIFICATION*

Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), Defendant, without providing advance notification to the Antitrust Division, the Plaintiff States, shall not directly or indirectly acquire any assets of or any interest (including, but not limited to, any financial, security, loan, equity, or management interest) in any entity engaged in the provision of voting equipment systems and services in the United States during the term of this Final Judgment.

Such notification shall be provided to the Antitrust Division, the Plaintiff States, in the same format as, and per the instructions relating to the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 9 of the instructions must be provided only about voting equipment systems and services. Notification shall be provided at least thirty (30) calendar days prior to acquiring any such interest, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If, within the 30-day period after notification, representatives of the Antitrust Division make a written request for additional information, Defendant shall not consummate the proposed transaction or agreement until thirty (30) calendar days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

*XII. NO REACQUISITION*

Defendant may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

*XIII. RETENTION OF JURISDICTION*

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

*XIV. EXPIRATION OF FINAL JUDGMENT*

Unless this Court grants an extension, this Final Judgment shall expire ten (10) years from the date of its entry.

*XV. PUBLIC INTEREST DETERMINATION*

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon

and the United States's responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

_____

United States District Judge

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

CASE: 1:10–cv–00380
Assigned To: Bates, John D.
Assign Date: 3/8/2010
Description: Antitrust

UNITED STATES OF AMERICA, *et al., Plaintiffs,* v. ELECTION SYSTEMS & SOFTWARE, Inc., *Defendant.*

*COMPETITIVE IMPACT STATEMENT*

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

*I. NATURE AND PURPOSE OF THE PROCEEDING*

Defendant Election Systems and Software, Inc. ("ES&S") executed a Purchase Agreement on September 2, 2009, pursuant to which ES&S agreed to acquire Premier Election Solutions, Inc. and PES Holdings, Inc. (collectively, "Premier"), and other subsidiaries of Diebold, Inc ("Diebold"). ES&S's acquisition of Premier was consummated on the same day. Since the acquisition, Premier no longer functions as an independent subsidiary, but has been integrated into ES&S's corporate structure.

The United States and the States of Arizona, Colorado, Florida, Maine, Maryland, New Mexico, Tennessee, and Washington, and the Commonwealth of Massachusetts (the "Plaintiff States"), filed a civil antitrust Complaint on March 8, 2010, seeking injunctive and other relief to remedy the likely anticompetitive effects arising from ES&S's acquisition of Premier. The Complaint alleged that the acquisition combined the two largest providers of voting equipment systems in the United States, and the two firms that had been, for many customers, the closest bidders for the provision of voting equipment systems. This combination resulted in a substantial reduction in competition for the provision of voting equipment systems in the United States, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The loss of Premier as an independent competitor likely would result in higher prices, a reduction in quality, and less innovation in the U.S. voting equipment systems market.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order ("APSO") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of ES&S's consummated acquisition of Premier. Under the proposed Final Judgment, which is explained more fully below, ES&S is required to divest all of the assets needed for an acquirer to compete to provide voting equipment systems, including the intellectual property related to the Premier voting equipment systems that it purchased from Diebold; the tooling and fixed assets used to manufacture those systems; and existing inventory and parts related to the Premier voting equipment systems (collectively, "Divestiture Assets"). In addition, ES&S is required to divest a fully paid-up, non-exclusive, irrevocable license to ES&S's AutoMARK products. Under the proposed Final Judgment, only the Acquirer may offer Premier systems to compete for a new voting equipment system procurement, including orders that would require replacement of more than fifty percent of an installed system. To facilitate the Acquirer's ability to service the existing installations of Premier voting equipment systems, the proposed Final Judgment also requires that ES&S waive all non-competition agreements for employees and waive any contractual terms that would otherwise prevent customers from selecting the Acquirer as their voting equipment system service provider. ES&S must also provide transition services to the Acquirer. Under the terms of the APSO, ES&S will take certain steps to ensure that the Divestiture Assets are preserved in their current condition and segregated from ES&S.

The United States and ES&S have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment until the divestiture is consummated and to punish violations thereof.

*II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATIONS*

A. The Defendant

Election Systems and Software, Inc. is the largest provider of voting equipment systems in the United States. Prior to its acquisition of Premier, ES&S provided 47 percent of installed systems, in at least 41 states, and collected revenue of $149.4 million in 2008. Premier, now an ES&S subsidiary, was the second largest provider of voting equipment systems in the United States prior to its acquisition, with approximately 23 percent of all installed systems in 33 states, and collected revenue of approximately $88.3 million in 2008. On September 2, 2009, ES&S acquired Premier and other Diebold Inc., subsidiaries, for $5 million in cash, and 70 percent of certain receivables.[1]

B. The Competitive Effects of the Acquisition on the U.S. Market for Voting Equipment Systems

1. Relevant Markets

Since the 2002 implementation of the Help America Vote Act ("HAVA"), 42 U.S.C. 15301–15545, most Americans rely on voting equipment systems to electronically cast their votes in local, state and federal elections. HAVA authorized funding for voting equipment systems to replace mechanical voting devices, such as lever and punch card machines, and established a new federal certification agency, the Election Assistance Commission (EAC), in order to ensure the accuracy, security and reliability of the voting process. Id. The EAC issued standards for voting equipment systems in 2002 and 2005, and those standards are continually evolving. HAVA also required that the voting equipment systems provide disabled voters the opportunity to cast a private and independent ballot. 42 U.S.C. 15481(a)(3)(A)–(B) (2002).

A voting equipment system consists of the integrated collection of customized hardware, software, firmware and associated services used to electronically record, tabulate, transmit and report votes in an election. Hardware components may include recording devices such as precinct or central count Optical Scan ("OS") machines; Direct Recording Electronic

[1] Because the purchase price for this transaction fell below the reporting thresholds of the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act of 1976, ES&S was not required to report the acquisition to the Department of Justice or the Federal Trade Commission before consummation. See 15 U.S.C. § 18a(a)(2)(B)(i) (2000); 75 Fed. Reg. 3468 (Jan. 21, 2010).

("DRE") machines; and Ballot Marking Devices ("BMD"). Recording devices may be used not only to cast votes, but also to create a paper record of each vote, to allow independent voting by disabled voters, and to read votes cast by absentee or vote-by-mail voters. Depending on the needs of the jurisdiction, a voting equipment system may include only one type of device, or several different types of devices used in concert. Each type of recording device feeds votes into a tabulator, which counts each vote and prepares a report. All devices are bound together by a collection of proprietary election management software and firmware, which enables their operation and the communication and reporting of election results.

The number, variety, and operation of electronic components within a voting equipment system vary depending on the needs of the jurisdiction responsible for administering elections, which may be the state, county or local government, depending on state law. Voting equipment systems typically are sold to state, county and municipal jurisdictions, pursuant to request for proposals. The jurisdictions typically evaluate competing bids using a public procurement process and select a winning bid based on its compliance with state law, technical standards, certification standards, experience in other jurisdictions and commercial terms, such as price, delivery schedule and other conditions of sale. The combined technical and commercial needs vary among customers. Most successful bids also include multi-year service agreements.

A voting equipment system differs from the mechanical lever and punch card voting devices used in the past in conjunction with manual tabulation methods. Mechanical systems cannot accommodate speedy tabulation across a large number of voters; do not allow disabled voters the opportunity to cast an independent, private ballot; and are considered less accurate and reliable than voting equipment systems.

A small but significant increase in the price that vendors bid to provide voting equipment systems to customers would not cause customers to substitute away from electronic voting equipment systems so as to make such a price increase unprofitable. Accordingly, the Plaintiffs allege that voting equipment systems are a relevant product market within the meaning of Section 7 of the Clayton Act.

In the United States, customers of voting equipment systems prefer suppliers with a substantial physical presence in the United States, including a network of sales, technical and support personnel and parts distribution. Customers prefer such vendors because, during the design, bid, and implementation phases of installing a new voting equipment system, customers interact with vendors to test system functionality, adjust technical specifications, correct design flaws, track progress and ensure successful implementation. A significant local service presence also is required to assist annually in the preparation for Election Day, and to address immediately system problems arising on Election Day.

A small but significant increase in the price of voting equipment systems in the United States would not cause a sufficient number of U.S. customers to turn to suppliers of voting equipment systems that do not have a substantial physical presence in the United States so as to make such a price increase unprofitable. Accordingly, the Plaintiffs allege that the United States is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

2. Anticompetitive Effects

ES&S's acquisition of Premier combined two firms that many customers considered the two closest competitors in the provision of voting equipment systems, and the two largest providers of U.S. voting equipment systems, substantially reducing competition for the provision of voting equipment systems in the United States. As a result of ES&S's acquisition of its closest competitor, ES&S has a reduced incentive both to compete as aggressively for bids and to invest in new products, thereby increasing the price and reducing the quality of the voting equipment systems available to most jurisdictions.

Prior to the acquisition, ES&S and Premier were considered the closest competitors by many customers because the two companies offered voting equipment systems certified in the greatest number of jurisdictions; offered a complete suite of voting equipment system products; had a reputation for reliable equipment; and enjoyed an incumbent vendor's expertise on election administration in several jurisdictions. ES&S and Premier were certified in more states by far than any other vendor, and were the only two active vendors with EAC certification at the time of the acquisition. Prior to the acquisition, ES&S and Premier also offered two of the most complete suites of voting equipment choices, an important factor for many jurisdictions because proprietary election management software prevents customers from selecting the best in breed of each type of device. Further, ES&S and Premier voting equipment systems had the broadest installed bases prior to the acquisition, which helped assure customers that the systems were proven by experience in the field. A proven voting equipment system is an important consideration for many customers because, although certification testing is designed to screen out technical problems, even certified machines have demonstrated security and accuracy problems when deployed in an actual election, which can undermine the integrity of the democratic process. In addition to supplying customers with proven equipment, ES&S and Premier employees provided a variety of valuable services to their customers, which gave the companies greater familiarity with the needs of each customer, and a resulting advantage in competing to sell each customer a new installation in the future.

A number of recent bid events substantiate the close competition between ES&S and Premier prior to the acquisition, and demonstrate that ES&S has responded to Premier's competition by reducing its own prices and offering other favorable terms. ES&S's acquisition of Premier eliminated ES&S's strongest competitor and, as a result, has given ES&S both the incentive and ability to profitably raise its bid prices significantly above the level they would be absent the acquisition. The remaining three competitors, limited by the lack of a full product line, inadequate certification, a limited record of proven equipment and, in at least one case, lack of financing, cannot fully constrain a unilateral exercise of market power by ES&S.

The acquisition of Premier also reduces ES&S's incentive to develop new, more accurate, and more secure voting equipment system products. In the past, ES&S has responded to Premier's efforts to meet new standards by following Premier's lead in the development of new products. The acquisition removes the firms' competitive pressure on each other to innovate, and is likely to reduce the quality and variety of new products brought to the market, reducing the choices offered to customers. Since its acquisition of Premier, ES&S has already withdrawn Premier products from certification testing in two states. In the absence of competitive pressure from Premier, ES&S is unlikely to have the same incentive to develop new products in the future.

Finally, entry or expansion by any other firm into the U.S. market for the provision of voting equipment systems is unlikely to prevent the substantial lessening of competition resulting from ES&S's acquisition of Premier. Firms attempting to enter into the development, production, and sale of voting equipment systems in the United States face several barriers that make successful entry challenging, time-consuming, and costly. Entry requires not only the design and development of hardware, software and firmware products, but also obtaining multiple levels of certification, establishing a reputation for reliable equipment performance, and the financial wherewithal sufficient to assure a buyer of long-term service capabilities. The design and development of technology requires a considerable, risky capital investment over a period of several years. Most jurisdictions also require that vendors obtain federal and/or state certification, which can cost millions and take multiple years to complete. In addition, firms must establish a reputation for reliable system performance. As most voting equipment systems are used only once or twice every two years, establishing a reputation for reliable system operation takes several years of successful performance. Finally, providers of voting equipment systems must demonstrate both that they are financially sound and that they will respond quickly and effectively to requests for service or parts for many years after a new voting equipment system has been installed.

Therefore, ES&S's completed acquisition of Premier likely will substantially lessen competition in the United States market for voting equipment systems, which likely will lead to higher prices, lower quality and less innovation in violation of Section 7 of the Clayton Act.

## III. *ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT*

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendant. The United States could have continued the litigation and sought a permanent injunction requiring that ES&S divest the Premier assets and voting securities. However, the acquisition of Premier by ES&S was consummated before the United States learned of the transaction and could commence an investigation. Given the diminution of the Premier assets since ES&S acquired the company, relief that replicates the condition of Premier prior to the acquisition is not available. Premier operated as an independent subsidiary of Diebold prior to the acquisition. After ES&S acquired the company, it dismantled the business units necessary for independent operation, subsuming Premier operations into the ES&S corporate structure. Less than a month after the acquisition, the Premier business units responsible for sales, product design and development, and voting equipment system certification all were dismantled, and most employees of these business units were terminated. While ES&S continues to serve current Premier customers, it does so with the assistance of ES&S resources, staffing and operations. Consequently, unwinding the transaction to require a divestiture of only Premier voting securities and remaining assets would not be sufficient to restore the Premier entity that existed prior to ES&S's acquisition of the company.

Further, the litigation process would likely take considerable time. The Premier assets likely would diminish substantially during the pendency of litigation, particularly as preliminary relief is not available to compel ES&S to invest in ongoing research, development and certification of future Premier voting equipment systems. Even if a court ultimately ordered a divestiture, the delay would diminish, if not forestall, the competitive value of the Premier assets in the hands of a divestiture buyer because the standards for voting equipment systems would have evolved away from Premier's current line of products. The United States is satisfied that the proposed Final Judgment has allowed the government to secure relief more quickly than if the matter had gone to litigation, and that the divestiture of the assets described in the proposed Final Judgment will preserve competition for the provision of voting equipment systems in the United States. Thus, the proposed Final Judgment will achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

## IV. *EXPLANATION OF THE PROPOSED FINAL JUDGMENT*

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects that would otherwise likely result from ES&S's acquisition of Premier. The divestiture will restore competition by making available to an independent competitor the Premier assets necessary to equip an economically viable competitor to ES&S in the provision of voting equipment systems in the United States.

The proposed Final Judgment requires ES&S to take certain actions, including divesting, within sixty (60) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, the following assets: (1) all of the intangible assets related to past and present Premier voting equipment system products, as well as those that were in development at the time of the acquisition; (2) tangible assets including all tooling and fixed assets related to the production, assembly and repair of those products; and (3) inventory and parts sufficient to meet the needs of the Acquirer.

In addition to these divestitures, the proposed Final Judgment also requires ES&S to grant a fully paid-up, non-exclusive, irrevocable license to ES&S's AutoMARK products. The AutoMARK products are Ballot Marking Devices ("BMD"), used in some jurisdictions to allow some disabled voters the opportunity to cast a private and independent ballot. Prior to the acquisition, Premier used a limited, non-exclusive license from ES&S to offer AutoMARK products as part of its EAC-certified Assure 1.2 system. To allow customers the greatest number of choices of systems that include an EAC-certified BMD, ES&S must provide the Acquirer with a license to use, service, repair, modify and improve the AutoMARK products.

In order to facilitate the Acquirer's ability to provide services related to voting equipment systems to existing Premier customers, the proposed Final Judgement also requires that ES&S waive all non-competition and non-disclosure agreements for all current and former Premier employees. Access to Premier employees will allow the Acquirer to recruit employees with experience serving current customers, and expertise related to the development, sale, repair or service of Premier voting equipment system products. Allowing such recruitment will enable the Acquirer to re-establish the experience and expertise of Premier before its acquisition by ES&S, and so will facilitate its ability to restore competition in the sale of voting equipment systems. In addition to waiving all non-competition and non-disclosure agreements, ES&S is prohibited from interfering with the Acquirer's efforts to recruit Premier employees. The waiver is limited to six months, in order to encourage the Acquirer to solicit staff expeditiously, and minimize the disruption to upcoming elections that otherwise

might result from significant staff turnover.

Under the terms of the proposed Final Judgment, only the Acquirer will be permitted to offer Premier voting equipment systems to existing customers for new installations. New installations of voting equipment systems are defined broadly to capture any procurement let under a Request for Proposal or Request for Quote, as well as any procurement that calls for replacement of 50 percent or more of a customer's installed equipment. By providing the Acquirer with the exclusive right to offer the Premier voting equipment systems to customers for new installations, the remedy replicates the incentive that Premier would have had, giving the Acquirer the greatest incentive to invest in the development of new Premier products.

The proposed Final Judgment also provides for the creation of new competition in the provision of services related to voting equipment systems, in order to permit the Acquirer to replace the competition in the sale of voting equipment systems that was lost as a result of ES&S's acquisition of Premier. Currently, only one vendor typically is able to provide certain services to a voting equipment system customer, as these services are linked to the proprietary election management software that a particular vendor provides. The proposed Final Judgment, however, will allow both the Acquirer and ES&S to compete to provide all services related to Premier voting equipment systems, giving customers the option to switch to the Acquirer or to remain with ES&S for service of their existing Premier voting equipment systems. ES&S is required to waive any contractual provisions that otherwise would prevent or hinder the Acquirer from competing to provide services to current Premier customers. The potential to serve current customers enhances competition in the sale of voting equipment systems by enabling the Acquirer to develop expertise about a customer's election administration needs and practices. These provisions further enhance the divestiture's efficacy by ensuring that ES&S does not retain sole control over the quality and extent of service on the installed base of Premier equipment, and would not be able to use its provision of service to undermine the competitive goals of the divestiture. Leaving the ultimate choice of service providers to customers accommodates customer concerns that an outright divestiture of customer service contracts would disrupt the administration of upcoming primaries and elections.

In addition, the proposed Final Judgment requires that ES&S provide a transition services agreement and a transitional supply agreement for parts and inventory. The transition services agreement must be sufficient to meet the Acquirer's needs for assistance in matters relating to the utilization of the divestiture assets for a period of up to six months. ES&S also must agree to supply parts and inventory to the Acquirer at commercially reasonable terms for up to two years, in order to allow the Acquirer access to parts and inventory while it arranges for independent manufacturing. ES&S also must not interfere with the Acquirer's efforts to contract with third party manufacturers, on whom vendors typically rely for the manufacture of parts and assembly of finished devices.

The divestiture must be accomplished in such a way as to satisfy the United States in its sole discretion, after consultation with the Plaintiff States, that these assets can and will be operated by the Acquirer as a viable, ongoing business that will compete effectively in the development, production, sale, repair, and service of voting equipment systems in the United States. ES&S must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that ES&S does not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that ES&S will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price and terms obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

The divestiture and other provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result from ES&S's acquisition of Premier.

V. *REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS*

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendant.

VI. *PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT*

The United States and Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**. Written comments should be submitted to:

Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, N.W., Suite 8700, Washington, D.C. 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the

modification, interpretation, or enforcement of the Final Judgment.

VII. *STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT*

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); United States v. InBev N.V./S.A., 2009–2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)); see also Microsoft, 56 F.3d at 1460–62; United States v. Alcoa, Inc., 152 F. Supp. 2d 37, 40 (D.D.C. 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17; see also Microsoft, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); United States v. Archer-Daniels-Midland Co., 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' " United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see also United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). Therefore, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." SBC Commc'ns, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." Microsoft, 56 F.3d at 1459; see also InBev, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. Microsoft, 56 F.3d at 1459–60. As this Court confirmed in SBC Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[3] Congress made clear its

[2] Cf. BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

[3] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. Compare 15 U.S.C. § 16(e) (2004), with 15 U.S.C. § 16(e)(1) (2006); see also SBC Commc'ns, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.[4]

VIII. *DETERMINATIVE DOCUMENTS*

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: March 8, 2010

Respectfully submitted,

_____/s/_____

Stephanie A. Fleming, Esq.

*United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, D.C. 20530, (202) 514–9228, (202) 514–9033, stephanie.fleming@usdoj.gov.*

*CERTIFICATE OF SERVICE*

I, Stephanie A. Fleming, hereby certify that on March 8, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon Defendant Election Systems and Software, Inc. and the Plaintiff States by mailing the documents electronically to their duly authorized legal representatives as follows:

FOR DEFENDANT, ELECTION SYSTEMS & SOFTWARE, INC.

Joseph G. Krauss, Esq., Hogan & Hartson, LLP, 555 Thirteenth Street, NW., Washington, DC 20004, (202) 637–5832, *jgkrauss@hhlaw.com*

FOR PLAINTIFF STATE OF ARIZONA

Nancy M. Bonnell, Antitrust Unit Chief, Consumer Protection & Advocacy Section, 1275 West Washington, Phoenix, AZ 85007, Tel: (602) 542–7728, Fax: (602) 542–9088, Email: *Nancy.Bonnell@azag.gov*

FOR PLAINTIFF STATE OF COLORADO

Devin Laiho, Assistant Attorney General, Antitrust Enforcement, Office of the Attorney General, 1525 Sherman St., Seventh Floor, Denver, Colorado 80203, Tel: (303) 866–5079, *devin.laiho@state.co.us*

FOR PLAINTIFF STATE OF FLORIDA

Russell S. Kent, Special Counsel for Litigation, Office of the Attorney General, PL–01; The Capitol, Tallahassee, FL 32399, Tel: (850) 414–3300, Fax: (850) 488–9134, Email: *russell.kent@myfloridalegal.com*

FOR PLAINTIFF STATE OF MAINE

Christina M. Moylan, Assistant Attorney General, 6 State House Station, Augusta, ME 04333, Tel: (207) 626–8838, Fax: (207) 624–7730, Email: *christina.moylan@maine.gov*

FOR PLAINTIFF STATE OF MARYLAND

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FOR PLAINTIFF COMMONWEALTH OF MASSACHUSETTS

Matthew M. Lyons, Assistant Attorney General, Office of Attorney General Martha Coakley, One Ashburton Place, Boston, MA 02108, Tel: (617) 727–2200, Fax: (617) 727–5765, Email: *Matthew.Lyons@state.ma.us*

FOR PLAINTIFF STATE OF NEW MEXICO

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FOR PLAINTIFF STATE OF TENNESSEE

Victor J. Domen, Jr., Senior Counsel, Office of the Tennessee Attorney General, Consumer Advocate and Protection Division, 425 Fifth Avenue North, Nashville, TN 37243, Tel: (615) 532–5732, Fax: (615) 532–2910, Email: *Vic.Domen@ag.tn.gov*

FOR PLAINTIFF STATE OF WASHINGTON

David Kerwin, Assistant Attorney General, Washington State Attorney General's Office, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104, Tel: (206) 464–7030, Fax: (206) 464–6338, Email: *davidk3@atg.wa.gov*

_____/s/_____

Stephanie A. Fleming, Esq.

United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, D.C. 20530, (202) 514–9228, (202) 514–9033, *stephanie.fleming@usdoj.gov*

[FR Doc. 2010–5519 Filed 3–12–10; 8:45 am]

**BILLING CODE 4410–11–P**

[4] See United States v. Enova Corp., 107 F. Supp. 2d 10, 17 (D.DC 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); United States v. Mid-Am. Dairymen, Inc., 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93–298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

### Division of Federal Employees' Compensation; Proposed Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721) and Notice of Law Enforcement Officer's Death (CA–722). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before May 14, 2010.

**ADDRESSES:** Mr. Vincent Alvarez, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0372, fax (202) 693–1378, E-mail *Alvarez.Vincent@dol.gov*. Please use only one method of transmission for comments (mail, fax, or E-mail).

**SUPPLEMENTARY INFORMATION:**

I. *Background:* The Federal Employees' Compensation Act (FECA) provides, under 5 U.S.C. 8191, *et.seq.* and 20 CFR 10.735, that non-Federal law enforcement officers injured or killed under certain circumstances are entitled to the benefits of the Act, to the same extent as if they were employees of the Federal Government. The CA–721 and CA–722 are used by non-Federal law enforcement officers and their survivors to claim compensation under the FECA. Form CA–721 is used for claims for injury. Form CA–722 is used for claims for death. This information collection is currently approved for use through August 31, 2010.

II. *Review Focus:* The Department of Labor is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. *Current Actions:* The Department of Labor seeks the extension of approval to collect this information to determine eligibility for benefits.

*Type of Review:* Revision.

*Agency:* Office of Workers' Compensation Programs.

*Title:* Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721), Notice of Law Enforcement Officer's Death (CA–722).

*OMB Number:* 1240–0116.

*Agency Number:* CA–721 and CA–722.

*Affected Public:* Individuals or Households; Business or other for-profit; State, Local or Tribal Government.

*Total Respondents:* 13.

*Total Annual Responses:* 13.

*Average Time per Response:* 60–90 minutes.

*Estimated Total Burden Hours:* 17.

*Frequency:* On occasion.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $6.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: March 10, 2010.

**Vincent Alvarez,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, US Department of Labor.*

[FR Doc. 2010–5561 Filed 3–12–10; 8:45 am]

**BILLING CODE 4510–CH–P**

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

### Division of Federal Employees' Compensation Proposed Collection; Comment Request

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Claim for Reimbursement of Benefit Payments and Claims Expense Under the War Hazards Compensation Act (CA–278). A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

**DATES:** Written comments must be submitted to the office listed in the addresses section below on or before May 14, 2010.

**ADDRESSES:** Mr. Vincent Alvarez, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0372, fax (202) 693–1378, E-mail *Alvarez.Vincent@dol.gov.* Please use only one method of transmission for comments (mail, fax, or E-mail).

**SUPPLEMENTARY INFORMATION:**

*I. Background:* The Office of Workers' Compensation Programs (OWCP) is the federal agency responsible for administration of the War Hazards Compensation Act (WHCA), 42 U.S.C. 1701 *et seq.* Under section 1704(a) of the WHCA, an insurance carrier or self-insured who has paid workers' compensation benefits to or on account of any person for a war-risk hazard may seek reimbursement for benefits paid (plus expenses) out of the Employment Compensation Fund for the Federal Employees' Compensation Act (FECA) at 5 U.S.C. 8147. Form CA–278 is used by insurance carriers and the self-insured to request reimbursement. The information collected is used by OWCP staff to process requests for reimbursement of WHCA benefit payments and claims expense that are submitted by insurance carriers and self-insureds. The information is also used by OWCP to decide whether it should opt to pay ongoing WHCA benefits directly to the injured worker. This information collection is currently approved for use through August 31, 2010.

*II. Review Focus:* The Department of Labor is particularly interested in comments which:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

*III. Current Actions:* The Department of Labor seeks extension of approval to collect this information in order to carry out its responsibility to reimburse

insurance carriers and self-insureds who meet the statutory requirements of the War Hazards Compensation Act (WHCA) for reimbursement.

*Type of Review:* Revision.

*Agency:* Office of Workers' Compensation Programs.

*Title:* Claim for Reimbursement of Benefit Payments and Claims Expense Under the War Hazards Compensation Act.

*OMB Number:* 1240–0202.

*Agency Number:* CA–278.

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

*Total Respondents:* 269.

*Total Responses:* 269.

*Estimated Total Burden Hours:* 135.

*Total Burden Cost (capital/startup):* $0.

*Total Burden Cost (operating/maintenance):* $557.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: March 10, 2010.

**Vincent Alvarez,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, US Department of Labor.*

[FR Doc. 2010–5558 Filed 3–12–10; 8:45 am]

**BILLING CODE 4510–CH–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### Notice of Availability of Funds and Solicitation for Grant Applications (SGA) for Community-Based Job Training Grants

**AGENCY:** Employment and Training Administration, U.S. Department of Labor.

*Announcement Type:* Notice of Solicitation for Grant Applications.

*Funding Opportunity Number:* SGA/DFA PY 09–07.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 17.269.

**Key Dates**

The closing date for receipt of applications under this announcement is April 29, 2010. Applications must be received no later than 4 p.m. Eastern Time. A pre-recorded Webinar will be on-line (*http://www.workforce3one.org*) and accessible for viewing on April 6, 2010, and will be available for viewing any time after that date. While a review of this Webinar is encouraged it is not mandatory that applicants view this recording.

**ADDRESSES:** Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: Donna Kelly, Grant Officer, Reference SGA/DFA PY 09–07, 200 Constitution Avenue, NW., Room N4716, Washington, DC 20210. For complete "Application and Submission Information," please refer to section IV.

**SUMMARY:** The Employment and Training Administration (ETA), U.S. Department of Labor (DOL, or the Department), announces the availability of approximately $125 million in grant funds for Community-Based Job Training Grants (CBJTGs).

Community-Based Job Training Grants will be awarded through a competitive process to support workforce training for high-growth/high-demand industries through the national system of community, technical, and Tribal colleges. In order to be eligible for consideration under this solicitation, the applicant must be either: (1) An individual Community or Technical College, such as a public community college, a nonprofit community college, a Tribally controlled college, or a Tribally controlled university; (2) a Community College District; (3) a State Community College System; (4) a One-Stop Career Center in partnership with its Local Workforce Investment Board, that specifies one or more community or technical colleges where education/training activities will occur; or (5) an applicant proposing to serve an educationally underserved community without access to community or technical colleges that meet the requirements in section III.A.5. *See* section III.A for additional information related to eligible applicants.

It is anticipated that awards will range generally from $1 million to $3 million. The exception is that applicants that include three or more community, technical, or Tribal colleges will be considered "consortium applications," and may request an award ranging from $1 million to $5 million. *See* section III.B for additional information related to consortium applications. ETA expects to allot up to $50 million of the total designated funds to organizations that have never received a grant through a CBJTG SGA.

This Solicitation provides background information and describes the application submission requirements, outlines the process that eligible entities must use to apply for funds covered by this Solicitation, and details how grantees will be selected. Applicants should read the entire SGA and note specific sections that contain required information, such as in section II.A, section III.B, and section IV. B, where failure to comply will be considered non-responsive and those applicants will then not be considered for funding.

The Department of Labor is committed to providing the public with an open and transparent grant selection process and to providing useful information to assist prospective applicants with developing quality proposals. One way to achieve these goals is through public access to selected and non-selected grant applications. Applicants are advised that the information they submit in response to this solicitation may be posted on a publicly accessible Web site or may otherwise be made available to the public.

**SUPPLEMENTARY INFORMATION:**

**I. Funding Opportunity Description**

The Community-Based Job Training Grants (CBJTGs) are designed to support workforce training for high-growth/high-demand industries through the national system of community and technical colleges. Grants under this SGA will fund projects that provide workers with education/training that will prepare them to enter and advance in high growth and emerging industries.

Successful education/training programs funded through this SGA will prepare participants for employment in high growth and emerging industries, and will: (1) Target skills and competencies in demand by the industries described in section I.B of this SGA; (2) provide education/training for jobs currently available or job openings that are anticipated during the life of the grant; (3) educate individuals about opportunities for career advancement and wage growth within the targeted industry and/or occupation, and provide comprehensive coaching to help individuals take advantage of those opportunities; and (4) result in an employer- or industry-recognized credential (which can include an educational certificate or degree, an occupational license, an industry-sponsored certificate or certification, as well as a Registered Apprenticeship certificate or degree). Applicants must propose projects that target incumbent workers, dislocated workers, and/or unemployed workers. Further, applicants may serve individuals at different education levels and stages within their career. ETA also encourages applicants to provide supportive services and leverage Workforce Investment Act (WIA) core and/or intensive services to help participants

overcome barriers to employment, as appropriate. For more information on targeted populations, *see* section III.F of this SGA.

To ensure quality education/training within a limited timeframe, applicants are strongly encouraged to use existing curricula and strategies to deliver education/training. Where appropriate, applicants may modify existing curricula. Recognizing the long-term needs of workers, it is strongly recommended that education/training lead to portable and/or stackable industry-recognized credentials.

The next two sections describe key elements of the SGA.

*A. Good Jobs for Everyone*

As a key component of the workforce system, community colleges are critical stakeholders in meeting President Barack Obama's call for Americans to complete at least one year of post-secondary school or career training. Community colleges also help advance the Department's goal of "Good Jobs for Everyone" by increasing opportunities for America's workers to acquire the skills to succeed in a knowledge-based economy and strengthen the nation's economy through a highly skilled workforce. Good jobs are jobs that can support a family by increasing incomes; jobs that are safe and secure, and give people a voice in the workplace; jobs that provide good benefits and workplace flexibility for family and personal care-giving; jobs that are sustainable, such as green jobs; and jobs that maintain and preserve a strong middle-class.

Community colleges also serve a key role in promoting and advancing the nation's economic recovery efforts by assisting those most impacted by the recession through opportunities for training, skill upgrades, and preparation for a career in high growth and emerging industries. This program will help participants find and retain employment, while leveraging WIA funds and other investments funded by the American Recovery and Reinvestment Act (Recovery Act) intended to create jobs and promote economic growth.

*B. Industry Focus*

Projects funded through this SGA will teach workers necessary skills for and help them pursue careers in high growth and emerging industry sectors.

1. High Growth and Emerging Industries

ETA encourages applicants to define high growth or emerging industries in the context of their local or regional economy. An industry targeted by applicants must benefit from expanded education/training or a better skilled workforce, and meet one or more of the following criteria to be considered a high growth or emerging industry in a local area for the purposes of this SGA: (1) It is projected to add substantial numbers of new jobs to the economy; (2) it is being transformed by technology and innovation requiring new skill sets for workers; (3) it has a significant impact on the economy or the growth of other industries; or (4) it is a new and emerging industry projected to grow. Applicants may draw from a variety of resources for supporting data that demonstrates that an industry is high growth or emerging, including: Traditional labor market information, such as industry and occupational projections; industry data from trade or industry associations, labor organizations, or direct information from the local employers or industry; information on the local and/or regional economy from economic development agencies; and other transactional data, such as job vacancies. Applications must include strong supporting evidence and data that are current, relevant, and specific to the local areas or communities where grant-funded education/training and placement activities will be conducted, and that discussions with local employers indicate that the proposed training is responsive to their needs.

A wide range of industries may meet the criteria above in local and regional areas around the country, such as health care, transportation, and advanced manufacturing. As applicants consider the high growth and emerging industry on which their application will focus, ETA encourages applicants to consider targeting high growth or emerging green industries.

2. Proposed Training Activities

The purpose of this SGA is to fund projects that provide training, education, and job placement assistance to prepare workers for employment in high growth and other emerging industries as described in section I.B of this SGA. A community college, Tribally controlled college or university, or technical college must be the primary training provider through the grant (unless the applicant is applying under the criterion described in section III.A.5 and is a public, accredited institution of higher education or an alternate educational entity), and in addition to the required partners described in section III.C.2 applicants may partner with additional organizations as described in section III.C.3 to provide specific types of training services. All projects must lead to employment for program participants, and must incorporate education/training activities that:

- Address skills and competencies demanded by the industries targeted through this SGA and described in section I.B, Industry Focus;
- Provide education/training for jobs currently available or job openings that are anticipated during the life of the grant;
- Educate individuals about opportunities for career advancement and wage growth within the targeted industry and/or occupation, and provide comprehensive coaching to help individuals take advantage of those opportunities;
- Result in an employer- or industry-recognized credential during the period of performance. Credentials can include an educational certificate or degree, an occupational license, an industry-sponsored certificate or certification, as well as a Registered Apprenticeship certificate or degree (*see* definition of "credential" in section VI.B.2.ii), that indicates a level of mastery and competence in a given field or function. The credential awarded to participants should be based on the type of education/training provided through the grant and the requirements of the targeted occupation, and should be selected based on consultations with employer and labor partners, as appropriate;
- Take place at times and locations that are convenient and easily accessible for the targeted populations; and,
- Integrate occupational training with basic skills training, as appropriate, to ensure that participants have the foundational skills necessary to attain and retain employment.

Applicants may propose a wide range of activities in implementing projects that meet the requirements outlined above. When designing the proposed activities, applicants must propose projects that primarily focus on providing services to workers in one or more of the following three targeted categories: Unemployed workers, dislocated workers, and incumbent workers. Further, applicants may serve individuals at different education levels and stages within their career. ETA also encourages applicants to provide supportive services and to leverage WIA core and/or intensive services to help participants overcome barriers to employment, as appropriate. Examples of WIA core services may include but are not limited to job search assistance such as access to job banks, listing of available jobs, or referrals to employers with job openings; resume development;

networking skills workshops; and interviewing techniques. Examples of WIA intensive services may include but are not limited to comprehensive assessments of skills and service needs; intensive career counseling; case management; and referring individuals who may be eligible for training services offered by the CBJT grant. Further, we encourage applicants to use program models with demonstrated success in serving the target populations, especially those with strong program evaluations showing positive impacts on participants. Promising models include the following:

- Strategies that integrate academic instruction with occupational skills training in a specific career field have shown promising employment and earnings outcomes. Applicants should consider program models that strongly link opportunities to improve basic literacy and mathematics skills with work-based learning in the targeted industries.
- Providing on-the-job training with a specific employer who agrees to hire individuals upon successful completion of the training has been an effective way for some programs to place disadvantaged individuals into employment. Registered Apprenticeship, with the combination of on-the-job training, related technical instruction, a mentoring component and incremental wage increases, has been highly successful in training a range of participants that may include but are not limited to veterans, older workers, and the unemployed.

## II. Award Information

### *A. Award Amount*

Under this SGA, ETA intends to award approximately $125 million in grant funds. In order to ensure that Federal funds reach areas and individuals that have not previously benefited from earlier CBJTG grant awards, ETA expects to allot up to $50 million of the total designated funds to organizations that have never received a grant through a CBJTG SGA (this refers to projects awarded through the following SGAs: SGA/DFA PY 04–10, SGA/DFA PY 05–11, SGA/DFA PY 07–01, and SGA/DFA PY 08–02). However, ETA reserves the right to change this amount depending on the quantity and quality of applications submitted under this SGA. Organizations that received a grant through previous CBJTG SGAs may submit proposals for funding through this SGA, but may only propose projects that focus on different industries and occupations than they targeted through their previous grants that were funded through a CBJTG SGA. ETA does not intend to award grants to sustain projects previously funded under CBJTG SGAs.

ETA intends to fund approximately 40 to 60 grants generally ranging from $1 million to $3 million. The exception to this range is that consortium applicants that include three or more community colleges, technical colleges, or Tribally controlled colleges or universities in their proposal may request an award ranging from $1 million to $5 million; the specific criteria that applicants must meet to be considered a consortium are defined in section III.B. ETA does not expect to fund any project for less than $1 million. However, this does not preclude funding grants at a lower amount based on the type and number of quality submissions. *ETA will consider requests for greater than $3 million non-responsive, and such applicants will not be considered for funding unless those requests meet the definition of consortium, as defined in section III.B.* ETA will consider requests exceeding $5 million submitted on behalf of a consortium non-responsive, and such applicants will not be considered for funding. Within the funding ranges specified above, applicants are encouraged to submit proposals for quality projects at a funding level that is appropriate to the project.

### *B. Period of Performance*

ETA expects to make awards by June 30, 2010. The period of grant performance for these awards will be up to 36 months from the date of execution of the grant documents. This performance period includes all necessary grant activities; the completion of education/training activities and the award of employer- or industry-recognized credentials; placement activities; and participant follow-up for performance outcomes. ETA also expects that the grant start date will be July 1, 2010, and start-up activities, such as hiring appropriate program staff, curriculum modification or development, and specialized equipment purchases, will begin immediately. The Department also expects that education and training activities will begin no later than January 15, 2011. We strongly encourage grantees to develop their project work plans and timelines accordingly. In addition, the Department intends that all grantees complete appropriate equipment purchases and curriculum development within the first year of the grant. Further, applicants should plan to fully expend grant funds during the period of performance, while ensuring full transparency and accountability for all expenditures. Therefore, applicants are encouraged to carefully consider their ability to spend the level of funding requested.

## III. Eligibility Information

### *A. Eligible Applicants*

In order to be eligible for consideration under this solicitation, the applicant must be either: (1) An individual Community or Technical College, including a Tribally Controlled College or University; (2) a Community College District; (3) a State Community College System; (4) a One-Stop Career Center in partnership with its Local Workforce Investment Board, that specifies one or more community or technical college(s) where all education/training activities will occur under the grant; or (5) an applicant proposing to serve an educationally underserved community without access to community or technical colleges that meet the requirements in section III.A.5. Requirements for each of these applicant types are provided below. Further, eligible applicants are encouraged to collaborate and submit an application together as a consortium. Organizations may not submit more than one application in response to this SGA, either as a single lead organization or as the lead among a consortium. However, organizations are not precluded from participating as a partner in a separate application submitted in response to this SGA.

1. Individual Community or Technical College, Including a Tribally Controlled College or University

Applicants under this criterion must demonstrate that they: (1) Admit as regular students only persons having a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate; (2) are legally authorized within the State to provide a program of education beyond secondary education; (3) provide an educational program for which the institution predominantly awards Associate's Degrees; (4) are a public or nonprofit institution; and (5) are accredited by a nationally recognized accrediting agency or association. ETA has determined that for the purposes of this SGA Tribally controlled colleges and universities are considered Individual Community or Technical Colleges, and do not have to demonstrate that they meet the five parameters listed above. For the purposes of this paragraph, an "Individual Community or Technical

College" is defined as an entity that has its own Federal Tax Identification Number. Entities that do not meet the above criteria may be eligible to apply under the criterion in section III.A.5, if the conditions of that section are met. However, private for-profit institutions of higher education are not eligible to apply under this Solicitation.

2. Community College District

Applicants under this criterion must demonstrate that they are a community college education district created by the State for the purpose of carrying out a common objective on behalf of a group of community or technical colleges. The community college district must serve as the programmatic and fiscal agent for the grant, having ultimate responsibility for implementing the grant's statement of work, meeting all fiscal and administrative requirements as required by the grant, and ensuring the grant adheres to all other requirements of the grant agreement. The applicant must specify one or more community or technical colleges within the district where education/training activities will occur under the grant, and identify the specific role the college(s) will play in the project.

3. State Community College System

Applicants under this criterion must demonstrate that their office is the agency primarily responsible for the State supervision of a unified statewide system of community and technical colleges. The State community college system must serve as the programmatic and fiscal agent for the grant, having ultimate responsibility for implementing the grant's statement of work, meeting all fiscal and administrative requirements as required by the grant, and ensuring the grant adheres to all other requirements of the grant agreement. State system applications must specify one or more community college(s) within the State where education/training activities will occur under the grant.

For the purposes of this solicitation, a "State" is defined as the States of the United States, Commonwealth of Puerto Rico, District of Columbia, Guam, American Samoa, United States Virgin Islands, Commonwealth of the Northern Mariana Islands, Republic of the Marshall Islands, Federated States of Micronesia, and Republic of Palau.

4. One-Stop Career Centers

Under this criterion, the eligible applicant for One-Stop Career Centers must be the One-Stop Operator, as defined under Section 121 of the Workforce Investment Act of 1998 (29 U.S.C. 2841), on behalf of the One-Stop Career Center. One-Stop Career Center applications must specify one or more community or technical college(s) where all education/training activities will occur under the grant. The applicant must: (1) Demonstrate that the proposed activities are consistent with the State and local strategic WIA plan; (2) demonstrate that the Local Workforce Investment Board, or its designated fiscal agent, will serve as the fiscal agent for the grant by clearly providing the legal name and Federal Tax Identification Number of the fiscal agent; and (3) have a letter of concurrence from the Local Workforce Investment Board. The Local Workforce Investment Board's support and involvement in the project must be detailed in the letter of concurrence, and must also address the above requirements (1) and (2). Applications from One-Stop Career Centers without a letter of concurrence from their Local Workforce Investment Board will be considered non-responsive and will not be reviewed.

5. Educationally Underserved Communities

ETA recognizes that some communities, particularly those in rural areas, may lack access to community or technical college training because physical college facilities are not reasonably close and technology-based and distance learning options are limited or not available. Educationally underserved communities that lack this access may submit proposals under the parameters detailed in this criterion. In such cases, the applicant will be required to clearly state it is applying under this criterion and must fully demonstrate as part of its statement of need that community college training is not reasonably available within commuting distance of the community in which grant activities will take place and that there are no viable technology-based or distance learning options available. Applicants may use mileage, population, and access to classrooms, Internet and other technology, public transportation and other services, as factors to support their demonstration of the lack of access to and availability of community college training. Applications submitted under the criterion must still meet all other requirements set forth in this Solicitation. Applicants must clearly note in the abstract that they are applying under this criterion.

Under this criterion, the additional eligible applicants and requirements on education/training are listed below.

- Public, accredited Institutions of Higher Education that award certificates and both two-year and four-year degrees, and satellite campuses of such Institutions, are eligible to apply under this criterion. However, the emphasis for education/training activities under the grant must be at the level of a certificate, two-year Associate's Degree, or other credential as defined in section VI.B.2.ii. The public institution of higher education applicant is also required to be the education/training provider for applications submitted under this criterion.
- Alternate Educational Entities that are governmental or not-for-profit organizations that directly deliver, or broker for delivery, post-secondary education opportunities in educationally underserved communities that lack access to community colleges are eligible to apply under this criterion. Alternate Educational Entity applicants must demonstrate that: (1) The emphasis for education/training activities under the grant must be on training that leads to a certificate, two-year Associate's Degree, or other credential as defined in section VI.B.2.ii; and (2) the training is offered in partnership with a community college outside the underserved area and is acceptable for credit at or a credential from the partner community college. Additionally, applications must specify one or more community college(s) where education/training activities will occur under the grant.

*B. Additional Eligibility Information*

Any of the eligible applicant types noted in section III.A.1, III.A.2, III.A.3, and III.A.4 may submit a proposal on behalf of a consortium of community or technical colleges. Entities applying under section III.A.5 may not submit a proposal on behalf of a consortium of community or technical colleges. To be eligible as a consortium, applicants must:

- Identify at least three individual community colleges, technical colleges, or Tribally controlled colleges or universities within the region, State, or interstate area where education/training activities will occur through the consortium and specify the role that each will play in the project;
- Demonstrate that each of the participating community and technical colleges and Tribally controlled colleges and universities meets the definition of an "individual community and technical college" as stated in section III.A.1. Each community or technical college participating in the consortium must (1) admit as regular students only persons having a certificate of graduation from a

school providing secondary education, or the recognized equivalent of such a certificate; (2) be legally authorized within the State to provide a program of education beyond secondary education; (3) provide an educational program for which the institution predominantly awards Associate's Degrees; (4) be a public or nonprofit institution; and (5) be accredited by a nationally recognized accrediting agency or association (as noted earlier, Tribally controlled colleges and universities do not have to demonstrate that they meet the five parameters listed above). For the purposes of this paragraph, an "individual community or technical college" is defined as an entity that has its own Federal Tax Identification Number;

• Clearly indicate in the required abstract if the application is a consortium proposal. A consortium application must also clearly designate that the lead applicant will serve as both the programmatic and fiscal agent for the grant; and

• Include a letter of commitment from each partner college within the consortium, indicating their support for the project and identifying the specific role they will play. The letters of commitment from each partner college within the consortium must include that institution's unique Federal Tax Identification Number. Applicants that fail to provide the unique Federal Tax Identification Number of each partner college within the consortium will be considered non-responsive and those applicants will not be considered for funding.

Examples of consortium applications include, but are not limited to, the following:

• A proposal submitted by an individual community or technical college that meets the definition of "individual community or technical colleges" as stated in section III.A.1 and includes at least two more individual community colleges, technical colleges, or Tribally controlled colleges that meet the definition of "individual community and technical colleges" in section III.A.1;

• A proposal submitted by an individual Community College District that includes three individual community or technical colleges that all meet the definition of "individual community and technical colleges" as defined in section III.A.1; and

• A proposal submitted by an individual State Community College System that includes three individual community or technical colleges that all meet the definition of "individual community and technical colleges" as defined in section III.A.1.

Organizations may not submit more than one application in response to this SGA. However, organizations are not precluded from participating as a partner in a separate application submitted in response to this SGA. Applicants that submit requests for more than $3 million that do not meet the requirements to be considered a consortium will be considered non-responsive. Applicants that meet the requirements to be considered a consortium noted above that request more than $5 million will be considered non-responsive.

*C. Strategic Planning and Partnerships*

1. Strategic Planning

Applicants are strongly encouraged to engage in a concise and thorough strategic planning process before submitting an application for this SGA. If the applicant already has completed a similar strategic planning process, that process should be reviewed and evaluated, as appropriate. DOL expects the public workforce system and other required and suggested partners listed in section III.C.2 and 3, to have a strong voice and integral role in the strategic planning process. In order to effectively engage in planning and fulfill the requirements of this SGA, applicants may incorporate the following as part of their planning efforts: review and analyze the local workforce investment system's workforce vision and goals; review and analyze other State and local planning documents, and applicable State and local policies, to align the technical proposal with overall workforce development, education, and economic development strategies; establish a collaborative strategic vision to prepare an educated and skilled workforce to meet the current and emerging needs of high growth and emerging industries in the local and/or regional area; analyze and determine the sectors where investments are or will be made and the occupations and skill needs within the high growth emerging industries that will be targeted; and analyze and determine the populations that will be targeted, and identify those population specific workforce challenges and the specific education/training activities that address the needs and demands of those targeted sectors and target populations.

The results of a strategic planning process will be valuable in informing the development of the technical proposal. Applicants should be aware they may not charge any strategic planning or other pre-award activities to the grant.

2. Required Partners and Their Roles

To be eligible for funding under this SGA, applicants must demonstrate that the proposed project will be implemented by a robust strategic partnership. By including the types of organizations referenced below in a comprehensive partnership, applicants can ensure they are maximizing available resources and organizational expertise for each project, and that individual participants within the project have all of the support they need to successfully complete education/training, overcome barriers to employment, and obtain jobs and advance in their careers. These partners can contribute a wide array of knowledge and activities to each project, and must work together to ensure that they leverage each other's expertise and resources.

The strategic partnership must include at least one entity from each of the following required organizational categories (a labor organization partner is only required for certain applicants, identified in section III.C.2.iii). Consortium applicants are encouraged to include more than one representative of the required and suggested partners, as needed, in order to ensure geographic representation.

i. Local Workforce Investment Boards and Their One Stop Systems

ETA requires that Local Workforce Investment Boards and their One Stop systems serve as partners in the proposed project. Further, either the Local Workforce Investment Board or their One Stop System must serve as a funded partner in the applicants' overall strategy and project work plan (applicants may also choose to fund both the Local Workforce Investment Board and the One Stop System). The role of the workforce system may include but is not limited to the following activities: (1) Understanding and analyzing the need for education/training and employment in the local area including identifying targeted industries, occupations, and hiring needs, as well as populations to be served, and connecting the applicant to relevant sources of data including the workforce investment board's strategic plan, Bureau of Labor Statistics (BLS) reports, and other relevant State tools or reports; (2) assessing potential participants for the CBJTG program; (3) identifying and referring candidates for education/training in the CBJTG program; (4) connecting and placing participants with employers that have

job openings; (5) collecting, tracking, and reporting participant data to ETA; and (6) providing information on potential eligibility for Pell Grants. In addition, ETA strongly encourages the workforce system to leverage, where possible, WIA core and/or intensive services. This could involve making referrals for participants in the CBJT program, if eligible, who are in need of supportive services in order to overcome barriers to education/training and employment and ensure successful outcomes.

ii. Employers and/or Labor-Management Organizations

These organizations should be actively engaged in the project and may contribute to many aspects of grant activities, such as defining the program strategy and goals, identifying necessary skills and competencies, providing resources to support education/training (equipment, instructors, funding, internships, or other work-based learning activities or situations, *etc.*), and where appropriate, hiring qualified program participants. Applicants that include a labor-management organization will satisfy both this requirement and the requirement that they have a labor organization partner, noted below. A labor-management organization is a nonprofit entity, such as a training fund, training trust fund, or an education trust fund, with joint participation of one or more employers and one or more labor organizations on its executive board or comparable governing body. This entity must have a formalized agreement between the employer(s) and labor organization(s) to operate a joint labor-management training program(s) affiliated with the nonprofit entity.

iii. Labor Organizations (where applicable)

Labor organizations may contribute to many aspects of grant activities, including identifying skills and competencies; developing new or modifying existing curricula; conducting occupation and skills training; and issuing industry-recognized credentials. This requirement applies only to applicants that propose to partner with employers that have a formal collective bargaining/employment agreement with a labor union or labor related-organization. As not all employers have a formal collective bargaining/employment agreement with a labor union or labor related-organization, applicants that do not propose partnerships with such employers are not subject to this requirement.

3. Other Partners

In addition to the required partners listed in section III.C.2, we strongly encourage applicants to include other partners to further assist the project. Other partner organizations can offer additional resources and expertise such as on-the-job training activities that lead to permanent employment; development and implementation of Registered Apprenticeship and pre-apprenticeship programs; contextualized learning; internship programs; basic skills training, such as adult basic education, English as a Second Language (ESL), and job readiness training; initial assessment of skill levels, aptitudes, abilities, competencies, and supportive service needs; career counseling; case management services; and comprehensive retention strategies.

These organizations could include, but are not limited to:

i. The education and training community, including secondary schools, other community and technical colleges, four-year colleges and universities, apprenticeship programs, adult education providers, technical and vocational training institutions, and other education and training entities;

ii. Nonprofit organizations, such as community or faith-based organizations, or intermediaries, that have direct access to the target populations;

iii. State Apprenticeship Agencies (SAAs) or the Department of Labor's Office of Apprenticeship (OA), in those States where OA is the registration agency for registered apprenticeship programs. Applicants who may have included apprenticeship as a partner should note that the DOL Office of Apprenticeship is the registration agency for apprenticeship programs in 25 States and is available to partner in States with any grantee who requests to do so;

iv. Local veterans' agencies and local veterans service organizations;

v. Economic Development organizations;

vi. Industry employer associations that represent member companies within an industry or sector; and

vii. Labor organizations, such as unions, for applicants for whom these organizations are not required partners.

*D. Cost Sharing*

Cost sharing or matching funds are not required as a condition for application, but leveraged resources are strongly encouraged and may affect the applicant's score in section V.A.3 of the evaluation criteria.

*E. Allowable Activities*

The intent of this Solicitation is to fund projects that train and prepare workers for employment in high growth and other emerging industries. Allowable education/training costs include, but are not limited to the following types of costs: Faculty/instructors, including salaries and fringe benefits; in-house training staff; support staff such as lab or teaching assistants; classroom space; and books, materials, and supplies used in the training course, including specialized equipment.

Allowable activities under this SGA include:

- Classroom occupational training;
- On-the-job training activities that lead to permanent employment;
- Development and implementation of Registered Apprenticeship and pre-apprenticeship programs;
- Implementing and utilizing existing articulation agreements with universities and other educational partners;
- Training activities that help participants progress along career pathways;
- Contextualized learning;
- Distance learning;
- Internship programs;
- Customized training;
- Basic skills training, such as adult basic education, ESL, and job readiness training;
- Initial assessment of skill levels, aptitudes, abilities, competencies, and supportive service needs;
- Job search assistance, and career counseling;
- Job placement assistance;
- Case management services;
- Comprehensive retention strategies;
- Supportive services that will allow individuals to participate in grant activities; and
- Updating curriculum or replicating existing curriculum to support direct education/training provided through the grant. Grants funded under this SGA may produce tangible products and deliverables, such as updates to existing curriculum. Curriculum development is not encouraged and only appropriate if new curriculum is essential to support direct education/training activities provided through this grant and is necessary to achieve the training and employment outcomes proposed for the grant. As stated in section II.B Period of Performance, curriculum development should be completed within the first year of the grant, as it is the Department's intent that education and training activities begin no later than January 15, 2011.

Activities that are not directly related to education/training are not allowable activities under this grant. These types of unallowable activities could include, but are not limited to, developing and disseminating career awareness information, and developing adequate numbers of qualified instructors, such as through train-the-trainer and professional development activities, if they are not directly related to grant-funded training. As with all costs charged to the grant, the costs of equipment must meet the standards in the applicable Federal cost principles, including that the costs are reasonable and necessary to achieve grant outcomes. While grant funds may be used to purchase equipment that is used for training and education activities provided through the proposed project, applicants are strongly encouraged to use leveraged resources to support these costs to maximize the use of their grant funds. For additional information on costs related to equipment purchases and curriculum development, please *see* section II.B.

*F. Other Grant Specifications*

1. Participants Eligible To Receive Training

The intent of this SGA is to fund projects that provide education/training services to low and medium skill and/or low and medium income individuals to help them pursue or advance in full-time employment within the grant period of performance.

Applicants must propose projects that primarily focus on providing services to workers in one or more of the following three targeted categories: Unemployed workers, dislocated workers, and incumbent workers. Within these categories, grantees may serve a wide range of individuals, such as individuals receiving public assistance, high school dropouts, individuals with disabilities, veterans, Indian and Native Americans, and individuals with Limited English Proficiency. These three targeted categories of workers are defined as follows:

i. *Unemployed workers:* For the purposes of this SGA, ETA defines "unemployed worker" as an individual who is without a job and who wants and is available to work. This can include the long-term unemployed, such as individuals who have been unemployed for six months or more, and youth who have dropped out of school and are seeking their first full-time job.

ii. *Dislocated workers:* For the purposes of this SGA, this term refers to individuals who were terminated or laid-off or have received a notice of termination or lay-off from employment; or were self-employed but are now unemployed.

iii. *Incumbent workers:* For the purposes of this SGA, this term refers to individuals who are employed but need training to secure full-time employment, advance in their careers, or retain their current occupations. This includes low-wage and medium-wage workers who need to upgrade their skills to retain employment or advance in their careers, and workers who are currently working part-time.

Applicants may also propose projects that could include some services for individuals who do not fall into one of the three targeted categories listed above, as long as services for these individuals align with the primary intent and focus of the proposed project and support employment within the grant period of performance. While this is permissible, applicants should note that they may only provide services to a limited number of individuals who do not fall into one of the three targeted categories listed above, and that their project must still primarily focus on providing services to workers in one or more of those three targeted categories.

2. Veterans Priority

The Jobs for Veterans Act (Pub. L. 107–288) requires priority of service to veterans and spouses of certain veterans for the receipt of employment, training, and placement services in any job training program directly funded, in whole or in part, by DOL. The regulations implementing this priority of service can be found at 20 CFR part 1010. In circumstances where a grant recipient must choose between two qualified candidates for training, one of whom is a veteran or eligible spouse, the Veterans Priority of Service provisions require that the grant recipient give the veteran or eligible spouse priority of service by admitting him or her into the training program. To obtain priority of service a veteran or spouse must meet the program's eligibility requirements. Grantees must comply with DOL guidance on veterans' priority. Employment and Training Administration ("ETA") Training and Employment Guidance Letter (TEGL) No. 10–09 (issued November 10, 2009) provides guidance on implementing priority of service for veterans and eligible spouses in all qualified job training programs funded in whole or in part by DOL. TEGL No. 10–09 is available at *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816.*

3. Grantee Training

Grantees are required to participate in all ETA training activities related to orientation, financial management and reporting, performance reporting, product dissemination, and other technical assistance training as appropriate during the life of the grant. These trainings may occur via conference calls, through virtual events such as webinars, and in-person meetings.

4. CBJTGs Evaluation

ETA is interested in determining if training provided through the CBJTGs impacts students' future labor force outcomes. To that end, ETA expects to select grantees awarded funds through this SGA to participate in an evaluation. Applicants must be prepared to share with the evaluation contractor individual information on demographics, participant characteristics, services received, and outcomes and must be prepared to provide access to program operating personnel and participants, including after the expiration date of the grant.

## IV. Application and Submission Information

*A. How To Obtain an Application Package*

This SGA contains all of the information and links to forms needed to apply for grant funding.

*B. Content and Form of Application Submission*

The proposal will consist of three separate and distinct parts: (I) A cost proposal; (II) a technical proposal; and (III) attachments to the technical proposal. Applications must include the following or will be considered non-responsive and will not be considered: (1) The Standard Form (SF) 424, "Application for Federal Assistance;" (2) The SF 424A Budget Information Form; (3) Data Universal Numbering System (D–U–N–S®) Number; (4) Budget Narrative; (5) Requests grant funds within the appropriate funding range noted in section II.A; and (6) Abstract. In addition, consortium applicants must include letters of commitment from each partner college within the consortium, identifying each institution's unique Federal Tax Identification Number. Applications that fail to adhere to the instructions in this section will be considered non-responsive and will not be considered. The applicant must ensure that the funding amount requested is consistent across all parts and sub-parts of the application. If inconsistencies are

found, the funding amount included on the SF 424 "Application for Federal Assistance" will be considered the official funding amount requested.

*Part I. The Cost Proposal.* The Cost Proposal must include the following items:

• SF 424, "Application for Federal Assistance" (available at *http://www07.grants.gov/agencies/forms_repository_information.jsp* and *http://www.doleta.gov/grants/find_grants.cfm*). The SF 424 must clearly identify the applicant and must be signed by an individual with authority to enter into a grant agreement. Upon confirmation of an award, the individual signing the SF 424 on behalf of the applicant shall be considered the authorized representative of the applicant. Applicants must supply their D–U–N–S® Number on the SF 424. If submitting a hard copy application, the SF 424 must be signed by the authorized representative. All applicants for Federal grant and funding opportunities are required to have a D–U–N–S® Number. *See* Office of Management and Budget (OMB) Notice of Final Policy Issuance, 68 FR 38402, Jun. 27, 2003. The D–U–N–S® Number is a non-indicative, nine-digit number assigned to each business location in the Dun & Bradstreet (D&B) database having a unique, separate, and distinct operation, and is maintained solely by D&B. The D&B D–U–N–S® Number is used by industries and organizations around the world as a global standard for business identification and tracking. If you do not have a D–U–N–S® Number, you can get one for free through the D&B site: *http://smallbusiness.dnb.com/webapp/wcs/stores/servlet/Glossary?fLink=glossary&footerflag=y&storeId=10001&indicator=7.*

• The SF 424A Budget Information Form (available at *http://www07.grants.gov/agencies/forms_repository_information.jsp* and *http://www.doleta.gov/grants/find_grants.cfm*). In preparing the Budget Information Form, the applicant must provide a concise narrative explanation to support the budget request, explained in detail below.

• *Budget Narrative:* The budget narrative must provide a description of costs associated with each line item on the SF–424A. It should also include a description of leveraged resources provided to support grant activities. In addition, the applicant should address precisely how the administrative costs support the project goals. The entire Federal grant amount requested (not just one year) should be included on both the SF 424 and SF 424A. No leveraged resources should be shown on the SF 424 and SF 424A.

Applications that fail to provide an SF 424, SF 424A, a D–U–N–S® Number, and a budget narrative will be considered non-responsive and not reviewed.

• Applicants are also encouraged, but not required, to submit OMB Survey N. 1890–0014: Survey on Ensuring Equal Opportunity for Applicants, which can be found under the Grants.gov, Tips and Resources From Grantors, Department of Labor section at *http://www07.grants.gov/applicants/tips_resources_from_grantors.jsp#13* (also referred to as Faith Based EEO Survey PDF Form).

*Part II. The Technical Proposal.* The Technical Proposal demonstrates the applicant's capability to implement the grant project in accordance with the provisions of this solicitation. The guidelines for the content of the Technical Proposal are provided in section V.A of this SGA. The Technical Proposal is limited to 20 double-spaced single-sided 8.5 x 11 inch pages with 12 point text font and 1 inch margins. *Any materials beyond the 20-page limit will not be read.* Further, any tables or charts contained in the Technical Proposal are included in the 20 page limit and should be single-spaced single-sided 8.5 x 11 inch pages with 12 point text font and 1 inch margins. Applicants should number the Technical Proposal beginning with page number 1. Applications that do not include Part II, the Technical Proposal, will be considered non-responsive.

*Part III. Attachments to the Technical Proposal.* In addition to the 20-page Technical Proposal, the applicant must submit one letter of commitment that is co-signed by all required partners and other partners, as appropriate, that describes the roles and responsibilities of each partner. Electronic signatures are permissible in the letter of commitment. The exception to this is that in addition to the single letter of commitment from partners, consortium applicants are also required to include a letter of commitment from each partner college within the consortium partnership, indicating their support for the project, identifying the specific role they will play, and providing each institution's unique Federal Tax Identification Number.

Applicants who may have included an apprenticeship program or State apprenticeship agency as a partner should note that the DOL Office of Apprenticeship is the registration agency for apprenticeship programs in 25 States. In the other 25 States, the District of Columbia, and U.S. Territories, the registration agency is a recognized State Apprenticeship Agency that has responsibility for registering apprenticeship programs and providing technical assistance for registered apprenticeship programs. In the 25 States where DOL's Office of Apprenticeship is the registration agency, a signature is not required in the letter of commitment from the DOL Office of Apprenticeship. A signature is required in the letter of commitment where the registration agency is a recognized State Apprenticeship Agency. Applicants should visit the DOL Office of Apprenticeship's Web site (*http://www.doleta.gov/oa/stateoffices.cfm* and *http://www.doleta.gov/oa/stateagencies.cfm*) to identify the appropriate State apprenticeship director representative.

Applicants should not send letters of commitment separately to ETA, because letters received separately will be tracked through a different system and will not be attached to the application for review. ETA does not permit general letters of support submitted by organizations or individuals that are not partners in the proposed project and that do not directly identify the specific commitment or roles of the project partners. Support letters of this nature will not be included in the evaluation review process.

Applicants that identify a project manager for their proposed project in the Technical Proposal should include a resume for that individual as an attachment.

The applicant also must provide an Abstract, not to exceed two pages and must include the following sections: (1) Summary of the proposed project, including applicant name; (2) applicant type as referenced in section III.A, and identifying if the lead applicant has previously been funded through a CBJT SGA or has never received a grant funded through a CBJT SGA (if applying as a consortium, clearly designate that the lead applicant will serve as both the programmatic and fiscal agent for the grant in this section); (3) targeted industry and/or occupations; (4) project title; (5) key partners; (6) identification of the community or communities to be served, including whether the community(ies) are located in urban, suburban, or rural areas; (7) target populations to be served; (8) projected training and placement outcomes; and (9) funding level requested. Failure to provide this information in the Abstract may have an impact on selection as a grantee. These additional materials (commitment letter, resume for the project manager if applicable, and two-page abstract) do not count against the 20-page limit for the Technical

Proposal, but may not exceed 12 pages. Any additional materials beyond the 12-page limit will not be read. Applications that do not include the abstract will be considered non-responsive and will not be considered.

Applications may be submitted electronically on Grants.gov or in hard copy by mail or hand delivery. These processes are described in further detail in section IV.C. Applicants submitting proposals in hard copy must submit an original signed application (including the SF 424) and one (1) "copy-ready" version free of bindings, staples or protruding tabs to ease in the reproduction of the proposal by DOL. Applicants submitting proposals in hard copy are also required to provide an identical electronic copy of the proposal on compact disc (CD). If discrepancies between the hard copy submission and CD copy are identified, the application on the CD will be considered the official applicant submission for evaluation purposes. Failure to provide identical applications in hardcopy and CD format may have an impact on the overall evaluation.

*C. Submission Process, Date, Times, and Addresses*

The closing date for receipt of applications under this announcement is April 29, 2010. Applications must be received at the address below no later than 4 p.m. Eastern Time. Applications sent by e-mail, telegram, or facsimile (FAX) will not be accepted. If an application is submitted by both hard-copy and through *http://www.grants.gov* a letter must accompany the hard-copy application stating why two applications were submitted and the differences between the two submissions. If no letter accompanies the hard-copy, we will review the copy submitted through *http://www.grants.gov.* For multiple applications submitted through *http://www.grants.gov,* we will review the latest submittal. Applications that do not meet the conditions set forth in this notice will be considered non-responsive. No exceptions to the mailing and delivery requirements set forth in this notice will be granted. Further, documents submitted separately from the application, before or after the deadline, will not be accepted.

Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: Donna Kelly, Grant Officer, Reference SGA/DFA, PY 09–07, 200 Constitution Avenue, NW., Room N4716, Washington, DC 20210. Applicants are advised that mail delivery in the Washington area may be delayed due to mail decontamination procedures. Hand-delivered proposals will be received at the above address. All overnight mail will be considered to be hand-delivered and must be received at the designated place by the specified closing date and time.

Applications that are submitted through Grants.gov must be successfully submitted at *http://www.grants.gov* no later than 4 p.m. Eastern Time on the closing date, and then subsequently validated by Grants.gov. The submission and validation process is described in more detail below. The process can be complicated and time-consuming. Applicants are strongly advised to initiate the process as soon as possible and to plan for time to resolve technical problems if necessary.

The Department strongly recommends that before the applicant begins to write the proposal, applicants should immediately initiate and complete the "Get Registered" registration steps at *http://www.grants.gov/applicants/get_registered.jsp.* Applicants should read through the registration process carefully before registering. These steps may take as much as four weeks to complete, and this time should be factored into plans for electronic submission in order to avoid unexpected delays that could result in the rejection of an application. The site also contains registration checklists to help you walk through the process. The Department strongly recommends that applicants download the "Organization Registration Checklist" at *http://www.grants.gov/assets/Organization_Steps_Complete_Registration.pdf* and prepare the information requested before beginning the registration process. Reviewing and assembling required information before beginning the registration process will alleviate last minute searches for required information and save time.

In addition to having a D–U–N–S® Number, applicants applying electronically through Grants.gov must register with the Federal Central Contractor Registry (CCR). Step-by-step instructions for registering with CCR can be found at *http://www.grants.gov/applicants/org_step2.jsp.* All applicants must register with CCR in order to apply online. Failure to register with the CCR will result in your application being rejected by Grants.gov during the submission process.

The next step in the registration process is creating a username and password with Grants.gov to become an Authorized Organizational Representative (AOR). AORs will need to know the D–U–N–S® Number of the organization for which they will be submitting applications to complete this process. To read more detailed instructions for creating a profile on Grants.gov visit: *http://www.grants.gov/applicants/org_step3.jsp.*

After creating a profile on Grants.gov, the E–Biz Point of Contact (E–Biz POC)—a representative from your organization who is the contact listed for CCR—will receive an e-mail to grant the AOR permission to submit applications on behalf of their organization. The E–Biz POC will then log in to Grants.gov and approve an applicant as the AOR, thereby giving him or her permission to submit applications. To learn more about AOR Authorization visit: *http://www.grants.gov/applicants/org_step5.jsp,* or to track AOR status visit: *http://www.grants.gov/applicants/org_step6.jsp.*

An application submitted through Grants.gov constitutes a submission as an electronically signed application. The registration and account creation with Grants.gov, with E–Biz POC approval, establishes an AOR. When you submit the application through Grants.gov, the name of your AOR on file will be inserted into the signature line of the application. Applicants must register the individual who is able to make legally binding commitments for the applicant organization as the AOR; this step is often missed and it is crucial for valid submissions.

An electronic time stamp is generated within the system when the application is successfully received by Grants.gov. The applicant will receive acknowledgement of receipt and a tracking number from Grants.gov with the successful transmission of the application. Only applications that are successfully submitted no later than 4 p.m. Eastern Time on the closing date and subsequently successfully validated will be considered. While it is not required that an application be successfully validated before the deadline for submission, it is prudent to reserve time before the deadline in case it is necessary to resubmit an application that has not been successfully validated. It is important to note that if sufficient time is not allotted and a rejection notice is received after the due date and time, the application will not be considered. Applications received by Grants.gov after the established due date and time will be considered late and will not be considered.

To ensure consideration, the components of the application must be saved as either .doc, .xls or .pdf files. If

submitted in any other format, the applicant bears the risk that compatibility or other issues will prevent our ability to consider the application. ETA will attempt to open the document but will not take any additional measures in the event of issues with opening. In such cases, the non-conforming application will not be considered for funding.

We strongly advise applicants to use the plethora of tools and documents, including FAQs, that are available on the "Applicant Resources" page at *http://www.grants.gov/applicants/resources.jsp.* To receive updated information about critical issues, new tips for users and other time sensitive updates as information is available, applicants may subscribe to "Grants.gov Updates" at *http://www.grants.gov/applicants/email_subscription_signup.jsp.*

If applicants encounter a problem with Grants.gov and do not find an answer in any of the other resources, call 1–800–518–4726 to speak to a Customer Support Representative or e-mail *support@grants.gov.* The Contact Center is open 24 hours a day, seven days a week. They are closed on Federal holidays.

*Late Applications:* For applications submitted on Grants.gov, only applications that have been successfully submitted no later than 4 p.m. Eastern Time on the closing date and subsequently successfully validated will be considered. Applicants take a significant risk by waiting to the last day to submit by Grants.gov.

Any application received after the exact date and time specified for receipt at the office designated in this notice will not be considered, unless it is received before awards are made, it was properly addressed, and it was: (a) Sent by U.S. Postal Service mail, postmarked not later than the fifth calendar day before the date specified for receipt of applications (*e.g.,* an application required to be received by the 20th of the month must be postmarked by the 15th of that month); or (b) sent by professional overnight delivery service to the addressee not later than one working day before the date specified for receipt of applications. "Postmarked" means a printed, stamped or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable, without further action, as having been supplied or affixed on the date of mailing by an employee of the U.S. Postal Service. Therefore, applicants should request the postal clerk to place a legible hand cancellation "bull's eye" postmark on both the receipt and the package. Failure to adhere to these instructions will be a basis for a determination that the application was not filed timely and will not be considered. Evidence of timely submission by a professional overnight delivery service must be demonstrated by equally reliable evidence created by the delivery service provider indicating the time and place of receipt.

*D. Intergovernmental Review*

This funding opportunity is not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

*E. Funding Restrictions*

Determinations of allowable costs will be made in accordance with the applicable Federal cost principles. Disallowed costs are those charges to a grant that the grantor agency or its representative determines not to be allowed in accordance with the applicable Federal cost principles or other conditions contained in the grant.

Successful and unsuccessful applicants will not be entitled to reimbursement of pre-award costs.

1. Indirect Costs

As specified in OMB Circular Cost Principles, indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. In order to use grant funds for indirect costs incurred, the applicant must obtain an Indirect Cost Rate Agreement with its cognizant Federal agency either before or shortly after grant award.

2. Administrative Costs

Under this SGA, an entity that receives a grant to carry out a project or program may not use more than 10 percent of the amount of the grant to pay administrative costs associated with the program or project. Administrative costs could be direct or indirect costs, and are defined at 20 CFR 667.220. Administrative costs do not need to be identified separately from program costs on the SF 424A Budget Information Form. However, they must be discussed in the budget narrative and tracked through the grantee's accounting system. To claim any administrative costs that are also indirect costs, the applicant must obtain an Indirect Cost Rate Agreement from its cognizant Federal agency.

3. Salary and Bonus Limitations

Under Public Law 109–234, none of the funds appropriated in Public Law 109–149 or prior Acts under the heading "Employment and Training Administration" that are available for expenditure on or after June 15, 2006, shall be used by a recipient or sub-recipient of such funds to pay the salary and bonuses of an individual, either as direct costs or indirect costs, at a rate in excess of Executive Level II. Public Laws 111–8 and 111–117 contain the same limitations with respect to funds appropriated under each of these Laws. These limitations also apply to grants funded under this SGA. The salary and bonus limitation does not apply to vendors providing goods and services as defined in OMB Circular A–133 (codified with 29 CFR Parts 96 and 99). *See* Training and Employment Guidance Letter number 5–06 for further clarification: *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2262.*

4. Use of Grant Funds for Wages

Organizations that receive grants through this SGA may not use grant funds to pay for the wages of participants. Further, the provision of stipends to training enrollees for the purposes of wage replacement is not an allowable cost under this SGA.

However, while grant funds may not be used to pay for wages, grant funds may be used to support the costs associated with providing on-the-job training to participants, which can include the extraordinary costs of providing on-the-job training and additional supervision. Please refer to section VI.B for more information.

5. Tuition and Other Costs of Training

Organizations that receive grants through this SGA may use grant funds to pay for the costs of tuition, as well as other training related expenses, associated with the specific education and training activities provided through these grants. Organizations may pay for these tuition and other training-related expenses directly, or may provide participants with scholarships to pay for these costs. Grantees should ensure that their use of grant funds to pay for the costs of tuition and other training related expenses are in accordance with applicable Federal cost principles.

6. Intellectual Property Rights

The Federal Government reserves a paid-up, nonexclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use for Federal purposes: (1) The copyright in all products developed under the grant, including a subgrant or contract under the grant or subgrant; and (2) any rights of copyright to which the grantee, subgrantee or a contractor purchases ownership under an award

(including but not limited to curricula, training models, technical assistance products, and any related materials). Such uses include, but are not limited to, the right to modify and distribute such products worldwide by any means, electronically or otherwise. Federal funds may not be used to pay any royalty or licensing fee associated with such copyrighted material, although they may be used to pay costs for obtaining a copy which are limited to the developer/seller costs of copying and shipping. If revenues are generated through selling products developed with grant funds, including intellectual property, these revenues are program income. Program income is added to the grant and must be expended for allowable grant activities.

If applicable, grantees must include the following language on all products developed in whole or in part with grant funds:

"This workforce solution was funded by a grant awarded by the U.S. Department of Labor's Employment and Training Administration. The solution was created by the grantee and does not necessarily reflect the official position of the U.S. Department of Labor. The Department of Labor makes no guarantees, warranties, or assurances of any kind, express or implied, with respect to such information, including any information on linked sites and including, but not limited to, accuracy of the information or its completeness, timeliness, usefulness, adequacy, continued availability, or ownership. This solution is copyrighted by the institution that created it. Internal use by an organization and/or personal use by an individual for non-commercial purposes is permissible. All other uses require the prior authorization of the copyright owner."

*F. Use of Funds for Supportive Services*

Supportive services for adults and dislocated workers are defined at WIA Sections 101(46) and 134(e)(2). They include services such as transportation, child care, dependent care, and housing that are necessary to enable an individual to participate in activities funded through this grant. Further, under WIA Section 134(e)(3), supportive services can include needs-related payments (NRPs) that are necessary to enable individuals to participate in training activities funded through this grant. For the purposes of this SGA, grantees may use grant funds to provide supportive services only to individuals who are participating in activities provided through the grant (or in the case of NRPs, participating in training), who are unable to obtain such services through other programs, and when such services are necessary to enable individuals to participate in activities. Grantees should ensure that their use of grant funds on supportive services is consistent with their established written policy regarding the provision of supportive services. Grantees may use no more than 10 percent of their grant funds on these services. However, to support the employment and training needs of the targeted populations, ETA encourages grantees to leverage other sources of funding for supportive services, including WIA Adult formula funds.

*G. Other Submission Requirements*

*Withdrawal of Applications:* Applications may be withdrawn by written notice to the Grant Officer at any time before an award is made.

## V. Application Review Information

*A. Evaluation Criteria*

This section identifies and describes the criteria that will be used to evaluate the grant proposals. These criteria and point values are:

| Criterion | Points |
|---|---|
| 1. Statement of Need | 20 |
| 2. Project Management and Organizational Capacity | 20 |
| 3. Strategy and Project Work Plan | 40 |
| 4. Outcomes and Deliverables | 20 |
| Total | 100 |

1. Statement of Need (20 Points)

Applicants must fully demonstrate a clear and specific need for the Federal investment in the proposed activities. It is critical throughout this section that applicants are explicit and specific as possible in citing the most up-to-date, accurate sources of data and analysis. Applicants should use all relevant data from a wide variety of traditional resources (*e.g.,* BLS reports, and State surveys) and non-traditional information sources including consultation with industry associations, or tracking private sector and government infrastructure investments, building permits, job postings, and business hiring trends. Points for this section will be based on the relevance, completeness, and quality of data and analysis which should serve as the foundation for the Strategy and Project Work Plan as follows:

i. (10 points) Data and analysis of the local or regional workforce including the unemployment rate; demonstration that the local or regional workforce has a high number of long-term unemployed individuals, such as individuals that have been unemployed for six months or more; discussion of any potential or actual layoffs; information on demographics, education, skill levels, and potential barriers to employment for the specific populations that will be targeted through the proposed project (unemployed workers, dislocated workers, and/or incumbent workers); and the skill gaps currently existing and those projected for the pipeline of future workers in the local and regional area.

ii. (5 points) Data and analysis of the current and projected employment opportunities by industry and occupation and identification of the job skills necessary to obtain those employment opportunities. Specific employers that need or will need skilled workers should be identified if they are employers likely to be hiring within the grant period of performance.

iii. (5 points) A brief inventory of training for the industries and occupations being targeted that is available in the community, and why current education and training offerings are not sufficient to address job seeker and employer needs. Provide a full description of the specific types of education and training available for targeted industries and occupations, including specific providers and their current capacity (*e.g.,* number of slots per year), and why that capacity is not sufficient to address the needs of job seekers and employers.

2. Project Management and Organizational Capacity (20 Points)

The applicant must fully describe its capacity and its partners' capacity to effectively staff the proposed initiative. The application must also fully demonstrate the applicant's fiscal, administrative, and performance management capacity to implement the key components of this project, and the track record of the applicant and its partners in implementing projects of similar focus, size, and scope.

Scoring under this criterion will be based on the extent to which applicants provide evidence of the following:

i. Staff, Fiscal, Administrative, and Performance Management Capacity (15 points)

Strong evidence that the applicant and its partners have the staff capacity to implement the proposed initiative and have the fiscal, administrative, and performance management capacity to effectively administer this grant. Discussion should include:

- The proposed staffing pattern for the project, including program management and administrative staff and program staff, which demonstrates

that the role(s) and time commitment of the proposed staff are sufficient to ensure proper direction, management, implementation, and timely completion of each project.

• Where a project manager is identified, the applicant must demonstrate that the qualifications and level of experience of the proposed project manager are sufficient to ensure proper management of the project, and should include the resume of this individual as an attachment. Where no project manager is identified, the applicant should discuss the minimum qualifications and level of experience that will be required for the position.

• A full description of the applicant's capacity, including its systems, processes, and administrative controls that will enable it to comply with Federal rules and regulations related to the grant's fiscal and administrative requirements.

• A full description of the applicant's capacity, including its systems and processes, that will support the grant's performance management requirements through effective tracking of participant status and performance outcomes including both participant-level data and aggregate outcomes. The applicant must include an explanation of the applicant's processes and systems for tracking participants while protecting individual privacy, as well as collecting and managing data in a way that allows for accurate and timely reporting of performance outcomes. The applicant may cite relationships with the public workforce system, as appropriate, to assist with client tracking and performance reporting, and should describe access to specific data management software for client tracking and performance reporting. The applicant should be aware that ETA will provide grantees with an existing software system to help them collect and report the performance data that is required by this grant, and will make this system available to grantees at no cost. This ETA-provided software system is an Access-based management information system than can support grantees in the tracking of participant information for required performance reporting elements. However, grantees should note that this system is not a case management system. The applicant's response to this section of the evaluation criteria could reference the use of this software system.

ii. Applicant's Experience (5 points)

The applicant must demonstrate its experience leading or participating significantly in a comprehensive partnership, and the experience of the applicant and its partners in effectively implementing and operating training, education, and job placement initiatives of similar focus, size and scope. The discussion must include:

• Specific examples of the applicant's experience in leading or participating significantly in a partnership that focused on education and training and included a wide range of stakeholders, including a description of the programmatic goals of the project, and a demonstration of the results achieved by that project.

• Specific examples of the applicant's track record administering Federal, State, or local grants. Applicants that have not received grants before should provide specific examples of their program management experiences, or other relevant experiences administering Federal, State, or local funds. Examples should include the programmatic goals and programmatic, fiscal, and administrative results from these projects.

• A description of the applicant's and its partners' experience in projects providing education, training, and placement services to the specific populations noted in section III.F.1 including the programmatic goals and results of the projects.

3. Strategy and Project Work Plan (40 Points)

The applicant must provide a complete and very clear explanation of its proposed strategy and its implementation plans. The applicant must describe the proposed workforce development strategy in full; explain how the proposed education/training addresses the applicant's statement of need; and, demonstrate how the proposed project will effectively deliver education/training. ETA is interested in applicants describing any evidence-based research that they considered in designing the strategy. The applicant must present a comprehensive work plan for the project, following the format provided later in this section. Points for this criterion will be awarded for the following factors:

i. Roles and Commitment of Project Partners (5 points)

Scoring on this section will be based on the extent to which the applicant fully demonstrates the breadth and depth of their partners' commitment to the proposed project, by addressing the following factors:

• Applicants must fully demonstrate they have assembled a comprehensive and representative partnership of both the target industries and of the organizations that can address gaps in education and training offerings identified in the statement of need in their local or regional area. If appropriate, applicants should include a clear description of partner involvement in the suggested strategic planning process outlined in section III.C.1 to support the development of the technical proposal. The applicant should fully describe the specific roles and level of participation of each of the project partners, including education/training, supportive services, expertise, and/or other activities that partners will contribute to the project.

• The applicant must also demonstrate a strong commitment from its partners by providing a letter of commitment signed by all partners, as well as letters of commitment from partner colleges if the applicant is applying on behalf of a consortium of community or technical colleges. (*See* section IV.B for instructions on submitting a required letter of commitment). ii. Proposed Recruitment and Pre-Training Activities, Education/Training, Placement, and Retention Strategies (15 points)

• *Recruitment and Pre-Training Activities:* The applicant must provide a comprehensive outreach and recruitment strategy that is inclusive of diverse populations as defined in the statement of need, that defines a clear process for finding and referring workers to the education/training programs, and describes pre-training activities such as case management services and assessment services, if applicable. The applicant must clearly identify how the proposed strategy will enable the project to effectively recruit those populations and identify any potential barriers to employment.

• *Training:* DOL encourages applicants to base their education/training strategies on program models that have shown promising outcomes for serving the populations targeted through this SGA. The applicant must provide a detailed explanation of the proposed education/training activities that describes how the project will comprehensively address the education/training needs of the targeted populations (unemployed workers, dislocated workers, and/or incumbent workers), and other populations to be served (if applicable), including a discussion of how the design of the education/training activities will accommodate the current skill and education level, age, language barriers, and level of work experience of the targeted populations. The applicant must also describe how the project will address barriers to employment by combining education/training services

with supportive services, such as child care or transportation, as appropriate for each targeted population. The applicant must demonstrate that education/training will focus on the specific industries and occupations it has proposed to target and focuses on skills and competencies demanded by the selected industries and occupations; that the project will integrate basic skills training where appropriate; and that the education/training will lead to an appropriate employer- or industry-recognized credential (which can include an educational certificate or degree, an occupational license, an industry-sponsored certificate or certification, as well as a Registered Apprenticeship certificate or degree) and to employment; take place at times and locations that are convenient and easily accessible for the target populations; provide education/training for jobs currently available or job openings that are anticipated during the life of the grant; educate individuals about opportunities for career advancement and wage growth within the targeted industry and/or occupation; provide comprehensive coaching to help individuals take advantage of those opportunities; and describe how participant education/training costs will be paid, such as directly through the grant or through other resources.

- *Placement:* The applicant must provide a clear strategy for placing individuals into employment. The applicant must describe the specific employers and methods for engaging employers, identifying specific job needs, and referring participants to employers. Wherever possible, the applicant should identify specific employers that indicate plans to hire project participants that complete education/training. Applicants serving incumbent workers should include a clear strategy for working with employers to support incumbent worker career advancement, if applicable.
- *Retention:* The applicant must provide a clear strategy for job retention, identifying specific activities and partners that are important to help participants retain employment. This should include strategies for engaging employers, as well as for identifying the barriers to retention that participants face after placement and for providing them with supportive services to address these barriers.

iii. Leveraged Resources (5 points)

The applicant clearly and fully describes any funds and other resources that will be leveraged to support grant activities and how these funds and other resources will be used to contribute to the proposed outcomes for the project, including any leveraged resources related to the provision of supportive services for program participants. This includes funds and other resources leveraged from businesses, labor organizations, education and training providers, WIA core and/or intensive services, and/or Federal, State, and local government programs. Examples of leveraged resources include the costs of personnel, supplies, and equipment provided by the applicant and/or its partners that will support grant activities. Applicants will be scored based on the extent to which they fully demonstrate the resources provided, including the source(s) and type(s) of leveraged resources provided, the strength of commitment to provide these resources (such as in a commitment letter), the breadth and depth of the resources provided, and how well these resources support the proposed grant activities.

iv. Project Work Plan (15 points)

The applicant must provide a comprehensive project work plan. Factors considered in evaluating the project work plan will include: (1) The presentation of a coherent plan that demonstrates the applicant's complete understanding of all the activities, responsibilities, and costs required to implement each phase of the project and achieve projected outcomes within the timeframe of the grant; (2) the demonstrated feasibility and reasonableness of the timeline for accomplishing all necessary start-up and education/training activities, including the ability to begin start-up activities immediate following the grant start date of no later than July 1, 2010, and to begin education and training activities no later than January 15, 2011; and, (3) the extent to which the budget aligns with the proposed work plan and is justified with respect to the adequacy and reasonableness of resources requested. Applicants must present this work plan in a table that includes the following categories:

- *Project Phase:* Lay out the timeline in six phases—Startup, Recruitment and Pre-Training Activities, Training, Placement, Retention, and Deliverables.
- *Activities:* Identify the major activities required to implement each phase of the project. For each activity, include the following information: (a) Start Date; (b) End Date; (c) Project partner(s) that will be primarily responsible for performing each activity; (d) Key tasks associated with each activity; (e) Key project milestones, with a list of the target dates and associated outcomes projected for recruitment, education/training, placement, and retention activities; and (f) As accurately as possible, list the sub-total budget dollar amount associated with each activity.

The Project Work Plan must also include a plan for developing a sustainability strategy and any other specific deliverables which applicants propose to develop, such as curriculum. It must include adequate time throughout the life of the grant to conduct sustainability planning that involves the public workforce system, employers, and other key partners, where appropriate, to help ensure that strategic partnerships and core education/training, placement, and retention activities are sustained after the grant ends. Applicants must build in specific meetings or activities and deliverables in the Project Work Plan that will focus on sustainability planning and the development of a written sustainability plan, which will be a required document submitted to ETA at the end of the grant. It is ETA's expectation that grantees will develop a robust plan for sustainability that leverages a variety of partnerships and funding streams to sustain all or a portion of their project.

4. Outcomes and Deliverables (20 Points)

The applicant must demonstrate a results-oriented approach to managing and operating its project by providing projections for all outcome categories relevant to measuring the success or impact of the project, providing an estimated cost per participant, describing the products and deliverables that will be produced as a result of the grant activities, and fully demonstrating the appropriateness and feasibility of achieving these results within the grant period of performance. The applicant must include projected outcomes, which will be used as goals for the grant. The applicant must comprehensively address each of the areas outlined below.

i. Projected Performance Outcomes (10 points)

The applicant must provide projections and track outcomes for each of the following outcome categories for all participants served with grant funds:

- Total participants served;
- Total number of participants beginning education/training activities;
- Total number of participants completing education/training activities;
- Total number of participants who complete education/training activities

that receive a degree, certificate, or other type of credential;

• For participants who complete education/training activities that receive a degree, certificate, or other type of credential, identify the type(s) of credentials to be received and the total number of credentials to be received for each type identified;

• Total number of participants who complete education/training activities who enter employment. This outcome refers to placement into unsubsidized employment and includes individuals who are employed when they begin education/training and enter a new position of employment after completion of education/training activities, even if the new position is with the same employer, as long as the individuals use the competency or competencies they acquired through education/training in their new position;

• Total number of participants who complete education/training activities who are placed into unsubsidized employment, as noted in the bullet above, who retain an employed status in the first and second quarters following initial placement; and

• Total number of participants who complete education/training activities who enter training-related unsubsidized employment. This outcome refers to placement into unsubsidized employment and includes individuals who are employed when they begin education/training and enter a new position of employment after completion of education/training activities, even if the new position is with the same employer, as long as the individuals use the competency or competencies they acquired through education/training in their new position and their new position is in the industry or occupation on which the grant-funded education/training focused.

The applicant must collect participant-level data on individuals who receive education/training and other services provided through the grant. These data should be the basis for reporting against the outcomes listed above, and may be required for reporting on other employment-related outcomes in the future.

An applicant must collect and report participant-level data from the following categories:

• Demographic and socioeconomic characteristics;

• Services provided; and

• Outcomes achieved.

ii. Appropriateness and Feasibility, Degrees, Certificates, or Other Credentials Resulting From Training, and Deliverables (10 points)

• The applicant must fully demonstrate the appropriateness and feasibility of its projections of the project outcomes by addressing four factors: (1) The extent to which the expected project outcomes are realistic and consistent with the objectives of the project and the needs of the community; (2) the ability of the applicant to achieve the stated outcomes and report results within the timeframe of the grant; (3) the appropriateness of the outcomes with respect to the requested level of funding; and (4) the cost per participant and the appropriateness of these costs in relation to the nature of the education/training, the targeted populations served, and similar education/training in the community(ies).

• Project activities must lead to an employer- or industry-recognized credential (which can include an educational certificate or degree, an occupational license, an industry-sponsored certificate or certification, as well as a Registered Apprenticeship certificate or degree), and the applicant must identify the credential that participants will earn as a result of the proposed education/training, and the employer-, industry-, or State-defined standards associated with the credential. If the credential targeted by the education/training project is performance-based, applicants should either: (a) Demonstrate employer engagement in the curriculum development process; or (b) demonstrate that the credential will translate into concrete job opportunities with an employer.

• If applicable, the applicant must provide a comprehensive list of expected deliverables consistent with the project work plan and timeline (required in section V.A.3.iv) that includes a brief description of the deliverable (such as updated curriculum), the anticipated completion date, and an estimated timeframe and method for electronic delivery to ETA. Electronic delivery may include e-mail for smaller documents, DVDs or other electronic media for transmission of larger files.

• Applicants must describe their process for identifying subject matter experts and conducting reviews of the deliverables produced through the grant activity. Applicants should allot funds in their budget for the independent review of their deliverables by subject matter experts. Subject matter experts are individuals with demonstrated experience in developing and/or implementing similar deliverables. These experts could include applicants' peers, such as representatives from neighboring education and training providers. The applicant must provide ETA with the results of the review and the qualifications of the reviewer(s) at the time the deliverable is provided to ETA.

*B. Review and Selection Process*

Applications for grants under this solicitation will be accepted after the publication of this announcement and until the closing date. A technical review panel will carefully evaluate applications against the selection criteria. These criteria are based on the policy goals, priorities, and emphases set forth in this SGA. Up to 100 points may be awarded to an application, depending on the quality of the responses to the required information described in section V.A. The ranked scores will serve as the primary basis for selection of applications for funding, in conjunction with other factors such as urban, rural, and geographic balance; representation among eligible organizations that have never received a CBJT grant; representation among the high growth and emerging industries targeted through this SGA; the availability of funds; and which proposals are most advantageous to the government. The panel results are advisory in nature and not binding on the Grant Officer. The Grant Officer may consider any information that comes to his/her attention. The government may elect to award the grant(s) with or without discussions with the applicant. Should a grant be awarded without discussions, the award will be based on the applicant's signature on the SF 424, including electronic signature via E-Authentication on *http://www.grants.gov,* which constitutes a binding offer by the applicant.

**VI. Award Administration Information**

*A. Award Notices*

All award notifications will be posted on the ETA Homepage (*http://www.doleta.gov*). Applicants selected for award will be contacted directly before the grant's execution and non-selected applicants will be notified by mail. Selection of an organization as a grantee does not constitute approval of the grant application as submitted. Before the actual grant is awarded, ETA may enter into negotiations about such items as program components, staffing and funding levels, and administrative systems in place to support grant implementation. If the negotiations do

not result in a mutually acceptable submission, the Grant Officer reserves the right to terminate the negotiation and decline to fund the application.

*B. Administrative and National Policy Requirements*

1. Administrative Program Requirements

All grantees will be subject to all applicable Federal laws, regulations, and the applicable OMB Circulars. The grant(s) awarded under this SGA will be subject to the following administrative standards and provisions:

i. *Non-Profit Organizations*—OMB Circulars A–122 (Cost Principles) and 29 CFR part 95 (Administrative Requirements).

ii. *Educational Institutions*—OMB Circulars A–21 (Cost Principles) and 29 CFR part 95 (Administrative Requirements).

iii. *State and Local Governments*—OMB Circulars A–87 (Cost Principles) and 29 CFR part 97 (Administrative Requirements).

iv. *Profit Making Commercial Firms*—Federal Acquisition Regulation (FAR)—48 CFR part 31 (Cost Principles), and 29 CFR part 95 (Administrative Requirements).

v. All entities must comply with 29 CFR parts 93 (New Restrictions on Lobbying) and 98 (Governmentwide Debarment and Suspension), and, where applicable, 29 CFR parts 96 and 99 (Audit Requirements).

vi. *29 CFR part 2, subpart D*—Equal Treatment in Department of Labor Programs for Religious Organizations, Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries.

vii. *29 CFR part 31*—Nondiscrimination in Federally Assisted Programs of the Department of Labor—Effectuation of Title VI of the Civil Rights Act of 1964.

viii. *29 CFR part 32*—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

ix. *29 CFR part 33*—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor.

x. *29 CFR part 35*—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from the Department of Labor.

xi. *29 CFR part 36*—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

The following administrative standards and provisions may be applicable:

i. The Workforce Investment Act of 1998, Public Law 105–220, 112 Stat. 936 (codified as amended at 29 U.S.C. 2801 *et seq.*) and 20 CFR part 667 (General Fiscal and Administrative Rules).

ii. *29 CFR part 29 and 30*—Apprenticeship and Equal Employment Opportunity in Apprenticeship and Training; and

iii. *29 CFR part 37*—Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998. The Department notes that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. section 2000bb, applies to all Federal law and its implementation. If your organization is a faith-based organization that makes hiring decisions on the basis of religious belief, it may be entitled to receive Federal financial assistance under Title I of WIA and maintain that hiring practice even though Section 188 of WIA contains a general ban on religious discrimination in employment. If you are awarded a grant, you will be provided with information on how to request such an exemption.

iv. Under WIA section 181(b)(4), health and safety standards established under Federal and State law otherwise applicable to working conditions of employees are equally applicable to working conditions of participants engaged in training and other activities. Applicants that are awarded grants through this SGA are reminded that these health and safety standards apply to participants in these grants.

In accordance with section 18 of the Lobbying Disclosure Act of 1995 (Pub. L. 104–65) (2 U.S.C. 1611), non-profit entities incorporated under Internal Revenue Service Code Section 501(c)(4) that engage in lobbying activities are not eligible to receive Federal funds and grants.

Except as specifically provided in this SGA, DOL/ETA's acceptance of a proposal and an award of Federal funds to sponsor any programs(s) does not provide a waiver of any grant requirements and/or procedures. For example, the OMB Circulars require that an entity's procurement procedures must ensure that all procurement transactions are conducted, as much as practical, to provide open and free competition. If a proposal identifies a specific entity to provide services, the DOL's award does not provide the justification or basis to sole source the procurement, *i.e.,* avoid competition, unless the activity is regarded as the primary work of an official partner to the application.

2. Special Program Requirements

i. Evaluation

DOL may require that the program or project participate in an evaluation of overall performance of CBJTGs, as described in section III.F.4.

ii. Definition of Credential

A credential is awarded in recognition of an individual's attainment of measurable technical or occupational skills necessary to gain employment or advance within an occupation. These technical or occupational skills are based on standards developed or endorsed by employers. Certificates awarded by workforce investment boards are not included in this definition. Work readiness certificates are also not included in this definition. A credential is awarded in recognition of an individual's attainment of technical or occupational skills by:

- A State educational agency or a State agency responsible for administering vocational and technical education within a State;
- An institution of higher education described in Section 102 of the Higher Education Act (20 U.S.C. 1002) that is qualified to participate in the student financial assistance programs authorized by title IV of that Act. This includes community colleges, proprietary schools, and all other institutions of higher education that are eligible to participate in Federal student financial aid programs;
- A professional, industry, or employer organization (*e.g.,* National Institute for Automotive Service Excellence certification, National Institute for Metalworking Skills, Inc., Machining Level I credential) or a product manufacturer or developer (*e.g.,* Microsoft Certified Database Administrator, Certified Novell Engineer, Sun Certified Java Programmer) using a valid and reliable assessment of an individual's knowledge, skills, and abilities;
- A Registered Apprenticeship program;
- A public regulatory agency, upon an individual's fulfillment of educational, work experience, or skill requirements that are legally necessary for an individual to use an occupational or professional title or to practice an occupation or profession (*e.g.,* FAA aviation mechanic certification, State certified asbestos inspector);
- A program that has been approved by the Department of Veterans Affairs to offer education benefits to veterans and other eligible persons;

• Job Corps centers that issue certificates or other credentials;

• Institutions of higher education which are formally controlled, or have been formally sanctioned, or chartered, by the governing body of an Indian Tribe or Tribes.

*C. Reporting*

Quarterly financial reports, quarterly progress reports, and MIS data will be submitted by the grantee electronically. The grantee is required to provide the reports and documents listed below:

1. Quarterly Financial Reports

A Quarterly Financial Status Report (ETA 9130) is required until such time as all funds have been expended or the grant period has expired. Quarterly reports are due 45 days after the end of each calendar year quarter. Grantees must use DOL's On-Line Electronic Reporting System and information and instructions will be provided to grantees.

2. Quarterly Performance Reports

The grantee must submit a quarterly progress report within 45 days after the end of each calendar year quarter. In order to submit these quarterly reports, the grantee will be expected to track participant-level data on the individuals who are involved in education/training and other services provided through the grant and report on participant status in a variety of fields and outcome categories, as well as provide narrative information on the status of the grant. The last quarterly progress report that grantees submit will serve as the grant's Final Performance Report. This report should provide both quarterly and cumulative information on the grant's activities. It must summarize project activities, employment outcomes and other deliverables, and related results of the project, and should thoroughly document the training or labor market information approaches utilized by the grantee. DOL will provide grantees with formal guidance about the data and other information that is required to be collected and reported on either a regular basis or special request basis. Grantees must agree to meet DOL reporting requirements.

3. Record Retention

Applicants must be prepared to follow Federal guidelines on record retention, which require grantees to maintain all records pertaining to grant activities for a period of not less than three years from the time of final grant close-out.

## VII. Agency Contacts

For further information regarding this SGA, please contact Janice Sheelor, Grants Management Specialist, Division of Federal Assistance, at (202) 693–3538 (This is not a toll-free number). Applicants should e-mail all technical questions to *Sheelor.Janice@dol.gov* and must specifically reference SGA/DFA PY 09–07, and along with question(s), include a contact name, fax and phone number. This announcement is being made available on the ETA Web site at *http://www.doleta.gov/grants* and at *http://www.grants.gov.*

## VIII. Additional Resources of Interest to Applicants

*A. Web-Based Resources*

DOL maintains a number of Web-based resources that may be of assistance to applicants. For example, the 2009 State Workforce Investment Act Plan modifications (*http://www.doleta.gov/usworkforce/WIA/planstatus.cfm)* and America's Service Locator (*http://www.servicelocator.org*), which provides a directory of our nation's One-Stop Career Centers.

*B. Industry Competency Models and Career Clusters*

ETA supports an Industry Competency Model Initiative to promote an understanding of the skill sets and competencies that are essential to an educated and skilled workforce. A competency model is a collection of competencies that, taken together, define successful performance in a particular work setting. Competency models serve as a starting point for the design and implementation of workforce and talent development programs. To learn about the industry-validated models visit the Competency Model Clearinghouse (CMC) at *http://www.careeronestop.org/CompetencyModel.* The CMC site also provides tools to build or customize industry models, as well as tools to build career ladders and career lattices.

Career Clusters and Industry Competency Models both identify foundational and technical competencies, but their efforts are not duplicative. The Career Clusters link to specific career pathways in sixteen career cluster areas and place greater emphasis on elements needed for curriculum performance objectives; measurement criteria; scope and sequence of courses in a program of study; and development of assessments. Information about the sixteen career cluster areas can be found by accessing: *http://www.careerclusters.org.*

*C. Promising Training Approaches*

ETA encourages applicants to research promising training approaches in order to inform their proposals. The following list of Web sites provides a starting place for this research, but by no means should be considered a complete list:

• ETA's Web site (*http://www.doleta.gov*) and the ETA Research Publication Database (*http://wdr.doleta.gov/research/keyword.cfm*);

• ETA's knowledge sharing site (*http://www.workforce3one.org*), including the "workforce solutions" section that contains over 6,000 additional resources applicants may find valuable in developing workforce strategies and solutions;

• The National Governors Association Center for Best Practices (*http://www.nga.org*);

• The National Association of State Workforce Agencies (*http://www.workforceatm.org*); and

• The National Association of Workforce Boards (*http://www.nawb.org*).

## IX. Other Information

*OMB Information Collection No. 1225–0086, Expires November 30, 2012*

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this collection of information is estimated to average 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimated or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, to the attention of Darrin A. King, Departmental Clearance Officer, 200 Constitution Avenue, NW, Room N1301, Washington, DC 20210. Comments may also be e-mailed to *DOL_PRA_PUBLIC@dol.gov.* Please do not return the completed application to this address. Send it to the sponsoring agency as specified in this solicitation.

This information is being collected for the purpose of awarding a grant. The information collected through this SGA will be used by DOL to ensure that grants are awarded to the applicant best suited to perform the functions of the grant. Submission of this information is required in order for the applicant to be considered for award of this grant.

Unless otherwise specifically noted in this announcement, information submitted in the application is not considered to be confidential.

Signed at Washington, DC, this 10th day of March 2010.

**Donna Kelly,**

*Grant Officer,Employment and Training Administration.*

[FR Doc. 2010–5609 Filed 3–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employment and Training Administration

### American Recovery and Reinvestment Act of 2009; Notice of Availability of Funds and Solicitation for Grant Applications for Trade Adjustment Assistance Technical Assistance and Outreach Partnership Grants

**AGENCY:** Employment and Training Administration (ETA), Labor.

**ACTION:** Notice of Solicitation for Grant Applications (SGA).

*Funding Opportunity Number:* SGA/DFA PY 09–06.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 17.260.

**SUMMARY:** The Department of Labor (DOL, or the Department) announces the availability of approximately $1.2 million in grant funds authorized by the American Recovery and Reinvestment Act of 2009 (the Recovery Act) from the dislocated workers assistance national reserve to provide technical assistance and outreach to dislocated workers impacted by foreign trade. Proposed projects must be developed and implemented through strategic partnerships.

This SGA or solicitation provides background information on the grant opportunity and critical elements required of projects funded under this grant. It also describes the application submission requirements, the process that eligible applicants must use to apply for funds covered by this solicitation, and how grantees will be selected. The eligible applicants for this SGA are National Employer Associations, National Labor Union Organizations, other Labor Union Affiliates, Non-profit Organizations and National Associations with connections to the Trade Adjustment Assistance for Workers (TAA) program or TAA-certified workers. Additional specific eligibility guidance is included in Section III.A under "Eligibility Information."

**DATES:** The closing date for receipt of applications under this announcement is April 14, 2010. Applications must be received no later than 4 p.m. (Eastern Time), or submitted electronically by the deadline and in accordance with the instructions in Section IV. C. of this solicitation.

**ADDRESSES:** Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: James Stockton, Grant Officer, Reference SGA/DFA PY–09–06, 200 Constitution Avenue, NW., Room N4716, Washington, DC 20210.

For complete "Application and Submission Information" please refer to Section IV of the solicitation.

**FOR FURTHER INFORMATION CONTACT:** Rahel Bizuayene, Grants Management Specialist, Division of Federal Assistance, at (202)–693–3256 (this is not a toll-free number). Applicants should e-mail all technical questions to *Bizuayene.Rahel@dol.gov* and must specifically reference SGA/DFA PY 09–06, and along with question(s), include a contact name, fax and phone number.

**SUPPLEMENTARY INFORMATION:**

#### Background

*Summary*

The Department of Labor (DOL or the Department) announces the availability of approximately $1.2 million in grant funds authorized by the American Recovery and Reinvestment Act of 2009 (the Recovery Act) from the dislocated workers assistance national reserve to provide technical assistance and outreach to dislocated workers impacted by foreign trade. Proposed projects must be developed and implemented through strategic partnerships.

This SGA or solicitation provides background information on the grant opportunity and describes the critical elements required of projects funded under this grant. It also describes the application submission requirements, the process that eligible applicants must use to apply for funds covered by this solicitation, and how grantees will be selected. The eligible applicants for this SGA are National Employer Associations, National Labor Union Organizations, other Labor Union Affiliates, Non-profit Organizations and National Associations with connections to the TAA program or TAA-certified workers. Additional specific eligibility guidance is included in Section III.A under "Eligibility Information."

*Supplementary Information*

The Department's Employment and Training Administration (ETA is responsible for administering programs to assist dislocated workers under the Workforce Investment Act of 1998 (WIA). This includes workers dislocated because of foreign trade and who are therefore potentially eligible for benefits under the TAA program authorized by the Trade Act of 1974, as amended, a partner in the WIA One-stop delivery system. The Recovery Act expanded the TAA program to help trade-affected workers in the services sector of the economy as well as even greater numbers of workers in the manufacturing sector who have lost their jobs or who are threatened with job losses. The TAA program makes available to these dislocated workers a variety of benefits either before or after their job loss, including employment and case management services, job training, income support, job search and relocation allowances, a tax credit to help pay the costs of health insurance, and a wage supplement to certain reemployed trade-affected workers 50 years of age and older. Under WIA, individuals are able to access services tailored to their employment and training needs through the One-stop delivery system, such as: Assessment of skills and interests, job development, job placement, counseling, training, and supportive services to enable individuals who need such assistance to participate in training for reemployment or to find new employment without enrolling in a training program. While these services may also be available to trade-affected workers through WIA-funded staff, the Recovery Act expanded the TAA program to include additional funding to provide such employment and case management services to this pool of dislocated workers.

The ETA is seeking to better assess State needs and to gauge effective practices that assist workers in specific trade industry sectors in an effort to address high unemployment levels as a result of trade competition, and also to heighten public awareness of services, training, and other benefits available through the TAA program. The Secretary of Labor has made it a priority to "Ensure Good Jobs for Everyone" and to "Help Protect Middle-class and Working Family Incomes." Therefore, the intent of this SGA is for grantees to provide additional technical assistance and outreach to the dislocated worker populations hardest hit by foreign trade to ensure that workers receive the benefits of the TAA program to achieve this reemployment goal.

The Recovery Act expanded the TAA program to include trade-affected workers in the services sector of the economy. The broadened pool of

dislocated workers eligible for TAA under the Recovery Act amendments presents new and unique service delivery challenges for States. For example, identifying and serving service sector workers who work remotely when those workers are not localized in or near the State in which the trade affected employer is based. To better understand the specific TAA challenges, grantees should identify service delivery issues from the industries they intend to target and address how these challenges can be met in order to better serve TAA workers. Applicants for this SGA should determine which manufacturing or services industry or industries will be the focus for this grant. DOL is particularly interested in projects which target the steady increase in unemployment in hard-hit industries, such as the automotive industry, and other sectors of the economy with large numbers of workers covered by TAA certifications (TAA-certified workers), workers in services sector industries who work at one or more remote or fixed locations, and workers who face issues about how TAA eligibility and program requirements interact with benefits available to them through their employers, such as severance packages.

The Department expects that grant funds will be used to provide outreach and direct technical assistance to trade-affected workers and their representatives on the new provisions of the TAA program. Grantees will work with union representatives, State and local officials, company officials, and union and non-union workers to help them to better understand the TAA program. This includes educating the public, and in particular, trade-affected dislocated worker populations in targeted industries who may not understand the TAA petition process and benefit eligibility requirements and/or what it means to be covered by a TAA certification. Further, grant funds may be used to help train those filing petitions to submit more complete and accurate petition information to the ETA. This is essential in helping the Department ensure timely and efficient TAA petition processing. Authorized petitioners include groups of workers, employers, unions and other duly authorized worker representatives, and WIA One-stop delivery system and State workforce agency staff. Successful applicants must be able to demonstrate a unique connection to a large number of workers or other authorized petitioners representing trade-affected populations in the targeted industries, and also have the ability to connect with dislocated workers in these targeted industries. Where possible, the ETA encourages applicants to partner with other workforce development programs in addition to the State agency operating the TAA program and/or the WIA One-stop delivery system and fully describe how the project intends to incorporate these linkages in its service delivery strategy and overall project plan.

Grantees will be expected to describe outcomes and measures by which to determine the success of the project and will be required to report "best practices" or lessons learned as a result of grant activities. Outcomes may include such things as educational materials used to inform employers, union representatives or other worker representatives of the interaction between severance packages and eligibility for TAA benefits, or demonstrated strategies for identifying and serving service sector workers who work remotely and therefore may be more difficult to identify and serve than workers who physically report to a single location. Best practices and/or developed materials must be replicable and serve as a model for the TAA program and similar programs for dislocated workers such as WIA.

## I. Funding Opportunity Description

Competitive grants under this SGA will fund one (1) to four (4) projects for a combined total amount of $1.2 million to:

A. Provide direct training or technical assistance to ensure complete and accurate TAA petition information submissions by petitioners, which is the first step for workers to obtain TAA benefits. Direct training or technical assistance means educating the public, union representatives, State and local officials, company officials, and/or workers on eligibility criteria and the petition filing process, including providing information to union and company officials so they can help TAA-eligible workers apply for and receive the benefits to which they are entitled.

B. Improve the service delivery of Rapid Response activities under the WIA to trade-affected workers, assist States to better identify early threats of worker layoffs, and help the State agency operating the TAA program and/or the WIA One-stop delivery system quickly identify workers covered by certified TAA petitions.

C. Help identify and address specific challenges to TAA-certified workers in targeted industries, such as issues related to the interaction of certain employee severance packages with TAA eligibility and program benefits or challenges States have in effectively providing outreach to workers of services sector firms who work remotely, along with any other identified challenges.

D. Establish partnerships with States to develop services and/or service delivery strategies, including the use of National Emergency Grants, for more effective employment and case management in States with large numbers of TAA certifications, in particular manufacturing industries such as automobile manufacturing, or service sector industries that were not covered by the TAA program before enactment of the Recovery Act.

E. Develop and propose outcomes and measures by which to determine the success of the grantee's efforts and report on any "best practices" developed or lessons learned as a result of the grant project. Best practices must be replicable and serve as a model for the TAA program and similar programs for dislocated workers such as WIA.

## II. Award Information

### *A. Award Amount*

ETA has approximately $1.2 million available under this competition and expects to fund approximately one (1) to four (4) grants. Individual grant amounts will not exceed $1.2 million. Any grant application with a proposed value greater than $1.2 million will be deemed non-responsive and will not be considered. ETA reserves the right to fund applicants at an amount different from the amount proposed in the applicant's budget based on the availability of funds.

### *B. Period of Performance*

The period of grant performance will be up to 18 months from the date of execution of the grant documents. This performance period includes all necessary implementation and start-up activities. Applicants should plan to fully expend grant funds during the period of performance while ensuring full transparency and accountability for all expenditures.

## III. Eligibility Information

### *A. Eligible Organizations*

Eligible applicants under this SGA must demonstrate the capacity to successfully perform the activities specified in Section I of this SGA. Further, the ETA believes that by establishing strong partnerships grantees will ensure that the specific targeted dislocated worker populations are reached for this grant. For this solicitation, the ETA recognizes that National Employer Associations, National Labor Union Organizations or

other Union Affiliates, and Non-profit Organizations or National Associations with direct relations to trade-affected populations may be uniquely qualified and may have the established networks to reach specific labor pools in these targeted industries. The ETA is particularly interested in organizations that can communicate directly with large numbers of workers in the different sectors of the economy on which their applications focus. Eligibility is restricted to the following types of entities under this solicitation:

- National Employer Associations;
- National Labor Union Organizations;
- Other Labor Union Affiliates;
- Non-profit Organizations and National Associations with connections to the TAA program or trade-affected workers.

*Strategic Partnerships.* To be eligible for funding under this solicitation, applicants must demonstrate that the proposed project will be planned and operated through effective strategic partnerships with other organizations that have established connections to trade-affected populations. The strategic partnership(s) must include the State agency operating the TAA program and/or the WIA One-stop delivery system. In addition, the strategic partnership(s) may include at one or more entity(ies) from the following three categories:

- Non-profit Organizations, such as Community Organizations which have direct access to the targeted population;
- Public and Private Employers and Industry-related Organizations;
- Labor Organizations, including but not limited to Labor Unions and Labor-Management Organizations representing the interests of workers in the chosen sectors or industries.

By including these types of organizations in a comprehensive partnership, applicants can ensure that they are maximizing available resources and organizational expertise for the project, and that individual participants in the project have all of the support that they need to successfully meet the goals of the grant. These partners can contribute a wide array of knowledge and help develop activities for the project, and should work in collaboration to ensure appropriate leveraged resources.

*B. Cost Sharing*

Although cost sharing or matching funds are not required as a condition for this grant, leveraged resources are strongly encouraged and can increase the applicant's score in Section V. A., the evaluation criteria.

*C. Veterans Priority*

The Jobs for Veterans Act (Pub. L. 107–288) requires priority of service to veterans and spouses of certain veterans for the receipt of employment, training, and placement services in any job training program directly funded, in whole or in part, by DOL. The regulations implementing this priority of service can be found at 20 CFR part 1010. In circumstances where a grant recipient must choose between two qualified candidates for a service, one of whom is a veteran or eligible spouse, the veterans priority of service provisions require that the grant recipient give the veteran or eligible spouse priority of service by first providing him or her that service. To obtain priority of service a veteran or spouse must meet the program's eligibility requirements. Grantees must comply with DOL guidance on veterans' priority. ETA's Training and Employment Guidance Letter (TEGL) No. 10–09 (issued November 10, 2009) provides guidance on implementing priority of service for veterans and eligible spouses in all qualified job training programs funded in whole or in part by DOL. TEGL No. 10–09 is available at *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816.*

**IV. Application and Submission Information**

*A. How To Obtain an Application Package*

This SGA contains all of the information and links to forms needed to apply for grant funding.

*B. Content and Form of Application Submission*

The proposal consists of three separate and distinct parts—(1) The cost proposal, (2) the technical proposal, and (3) attachments to the technical proposal. Applications that do not contain all of the three parts or that fail to adhere to the instructions in this section will be considered non-responsive and will not be considered. It is the applicant's responsibility to ensure that the funding amount requested is consistent across all parts and sub-parts of the application.

(1) The Cost Proposal

The Cost Proposal must include the following four items:

- The Standard Form (SF) 424, "Application for Federal Assistance" (available at *http://www07.grants.gov/agencies/forms_repository_information.jsp* and *http://www.doleta.gov/grants/find_grants.cfm*). The SF–424 must clearly identify the applicant and be signed by an individual with authority to enter into a grant agreement. Upon confirmation of an award, the individual signing the SF–424 on behalf of the applicant will be considered the authorized representative of the applicant.
- Applicants must supply their D-U-N-S® number in item 5 on the SF–424. All applicants for Federal grant and funding opportunities are required to have a Data Universal Numbering System (D-U-N-S®) number. *See* Office of Management and Budget (OMB) Notice of Final Policy Issuance, 68 FR 38402, June 27, 2003. The D-U-N-S® number is a nine-digit identification number that uniquely identifies business entities. Obtaining a D-U-N-S® number is easy and there is no charge. To obtain a D-U-N-S® number, applicants can access this Web site: *http://www.dunandbradstreet.com* or call 1–866–705–5711.
- The SF–424A Budget Information Form is available at: *http://www07.grants.gov/agencies/forms_repository_information.jsp* and *http://www.doleta.gov/grants/find_grants.cfm.* In preparing the Budget Information Form, the applicant must provide a concise narrative explanation to support the request, explained in detail below.

*Budget Narrative:* The budget narrative must provide a description of costs associated with each line item on the SF–424A. It should also include any leveraged resources provided to support grant activities; however, no leveraged resources should be shown on the SF–424 and SF–424A. In addition, the applicant should address precisely how the administrative costs support the project goals. The entire Federal grant amount requested should be included on both the SF–424 and SF–424A. Applicants that fail to provide an SF–424, SF–424A, a D-U-N-S® number, and a budget narrative will be removed from consideration prior to the technical review process.

- Applicants are also encouraged, but not required, to submit OMB Survey N. 1890–0014: Survey on Ensuring Equal Opportunity for Applicants, which can be found under the Grants.gov, Tips and Resources from Grantors, Department of Labor section at *http://www07.grants.gov/applicants/tips_resources_from_grantors.jsp#13* (also referred to as Faith Based EEO Survey PDF Form).

(2) The Technical Proposal

The Technical Proposal must demonstrate the applicant's capability to implement the grant project in

accordance with the provisions of this solicitation. The guidelines for the content of the Technical Proposal are provided in Section V.A. of this solicitation. The Technical Proposal is limited to 20 double-spaced single-sided pages with 12 point text font and 1 inch margins. Any materials beyond the 20-page limit will not be read. Applicants should number the pages of the Technical Proposal beginning with page number 1. Applicants that do not provide a Technical Proposal in their application will be considered non-responsive and the application will not be considered.

Applications may be submitted electronically on Grants.gov or in hardcopy by mail or hand delivery. These processes are described in further detail below in Section IV.C.

(3) Attachments to the Technical Proposal

In addition to the 20-page Technical Proposal, the applicant must submit attachments to the technical proposal, which include a one-page abstract and a letter of commitment from each project partner. Each letter of commitment must be signed by the respective partner and should describe its roles and responsibilities. The abstract, not to exceed one page, must summarize the proposed project and include applicant name, project title, a description of the area and population to be served, the funding level requested, and a brief description of the grant outcomes. Applicants should not send letters of commitment separately to ETA because letters are tracked through a different system and will not be attached to the application for review. The ETA will not accept or review general letters of support submitted by organizations or individuals.

These additional materials (commitment letters and abstract) do not count against the 20-page limit for the Technical Proposal, but may not exceed 15 pages. Any additional materials beyond the 15-page limit will not be read.

*C. Submission Process, Date, Times, and Addresses*

The closing date for receipt of applications under this announcement is April 14, 2010. Applications must be received at the address below no later than 4 p.m. (Eastern Time). Applications sent by e-mail, telegram, or facsimile (FAX) will not be accepted.

Applicants submitting proposals in hardcopy must submit an application including an original signed SF–424 and one (1) "copy-ready" version of all other materials required in Section IV.B. above, free of bindings, staples or protruding tabs to ease in the reproduction of the proposal by DOL. Applicants submitting proposals in hard copy also must provide an identical electronic copy of the proposal on compact disc (CD).

Applications that do not meet the conditions set forth in this notice will not be considered. No exceptions to the mailing and delivery requirements set forth in this notice will be granted.

Mailed applications must be addressed to the U.S. Department of Labor, Employment and Training Administration, Division of Federal Assistance, Attention: James Stockton, Grant Officer, Reference SGA/DFA, PY 09–06, 200 Constitution Avenue, NW., Room N4716, Washington, DC 20210. Applicants are advised that mail delivery in the Washington area may be delayed due to mail decontamination procedures. Hand-delivered proposals will be received at the above address. All professional overnight delivery service will be considered to be hand-delivered and must be received at the designated place by the specified closing date and time.

Applicants may apply online through Grants.gov (*http://www.grants.gov*), however, due to the expected increase in system activity, applicants are encouraged to use an alternate method to submit grant applications during this heightened period of demand. While not mandatory, DOL encourages the submission of applications thru professional overnight delivery service.

Applications that are submitted through Grants.gov must be successfully submitted at *http://www.grants.gov* no later than 4 p.m. (Eastern Time) on April 14, 2010, and then subsequently validated by Grants.gov. The submission and validation process is described in more detail below. The process can be complicated and time-consuming. Applicants are strongly advised to initiate the process as soon as possible and to plan for time to resolve technical problems, if necessary.

The ETA strongly recommends that before the applicant begins to write the proposal, applicants should immediately initiate and complete the "Get Registered" registration steps at *http://www.grants.gov/applicants/get_registered.jsp.* These steps may take multiple days or weeks to complete, and this time should be factored into plans for electronic submission in order to avoid unexpected delays that could result in the rejection of an application. It is strongly recommended that applicants use the "Organization Registration Checklist" at *http://www.grants.gov/assets/Organization_Steps_Complete_Registration.pdf* to ensure the registration process is complete.

Within two business days of application submission, Grants.gov will send the applicant two e-mail messages to provide the status of application progress through the system. The first e-mail, almost immediate, will confirm receipt of the application by Grants.gov. The second e-mail will indicate the application has either been successfully validated or has been rejected due to errors. Only applications that have been successfully submitted by the deadline and subsequently successfully validated will be considered. It is the sole responsibility of the applicant to ensure a timely submission. While it is not required that an application be successfully validated before the deadline for submission, it is prudent to reserve time before the deadline in case it is necessary to resubmit an application that has not been successfully validated. Therefore, sufficient time should be allotted for submission (two business days) and, if applicable, subsequent time to address errors and receive validation upon resubmission (an additional two business days for each ensuing submission). It is important to note that if sufficient time is not allotted and a rejection notice is received after the due date and time, the application will not be considered.

To ensure consideration, the components of the application must be saved as either .doc, .xls or .pdf files. If submitted in any other format, the applicant bears the risk that compatibility or other issues may limit the ETA's ability to consider the application. The ETA will attempt to open the document but will not take any additional measures in the event of issues with opening. In such cases, the non-conforming application will not be considered for funding.

Applicants are strongly advised to use the plethora of tools and documents, including FAQs, which are available on the "Applicant Resources" page at *http://www.grants.gov/applicants/app_help_reso.jsp#faqs.* To receive updated information about critical issues, new tips for users and other time sensitive updates as information is available, applicants may subscribe to "Grants.gov Updates" at *http://www.grants.gov/applicants/email_subscription_signup.jsp.*

If applicants encounter a problem with Grants.gov and do not find an answer in any of the other resources, call 1–800–518–4726 to speak to a Customer Support Representative or e-mail *support@grants.gov.*

*Late Applications:* For applications submitted on Grants.gov, only applications that have been successfully submitted no later than 4 p.m. (Eastern Time) on the closing date and subsequently successfully validated will be considered.

Any application received after the exact date and time specified for receipt at the office designated in this notice will not be considered, unless it is received before awards are made, it was properly addressed, and it was: (a) Sent by U.S. Postal Service mail, postmarked not later than the fifth calendar day before the date specified for receipt of applications (*e.g.,* an application required to be received by the 20th of the month must be postmarked by the 15th of that month); or (b) sent by professional overnight delivery service to the addressee not later than one working day prior to the date specified for receipt of applications. Applicants take a significant risk by waiting to the last day to submit by Grants.gov. "Postmarked" means a printed, stamped or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable, without further action, as having been supplied or affixed on the date of mailing by an employee of the U.S. Postal Service. Therefore, applicants should request the postal clerk to place a legible hand cancellation "bull's eye" postmark on both the receipt and the package. Failure to adhere to the above instructions will be a basis for a determination of non-responsiveness. Evidence of timely submission by a professional overnight delivery service must be demonstrated by equally reliable evidence created by the delivery service provider indicating the time and place of receipt.

*D. Intergovernmental Review*

This funding opportunity is not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

*E. Funding Restrictions*

Determinations of allowable costs will be made in accordance with the applicable Federal cost principles. Disallowed costs are those charges to a grant that the grantor agency or its representative determines not to be allowed in accordance with the applicable Federal cost principles or other conditions contained in the grant. Successful and unsuccessful applicants will not be entitled to reimbursement of pre-award costs.

1. Indirect Costs

As specified in OMB Circular Cost Principles, indirect costs are those that have been incurred for common or joint objectives and cannot be readily identified with a particular final cost objective. In order to use grant funds for indirect costs incurred, the applicant must obtain an Indirect Cost Rate Agreement with its cognizant agency either before or shortly after grant award.

An indirect cost rate (ICR) is required when an organization operates under more than one grant or other activity whether Federally-assisted or not. Organizations must use the ICR supplied by the cognizant agency. If an organization requires a new ICR or has a pending ICR, the Grant Officer will award a temporary billing rate for 90 days until a provisional rate can be issued. This rate is based on the fact that an organization has not established an ICR agreement. Within this 90 day period, the organization must submit an acceptable indirect cost proposal to their cognizant Federal agency to obtain a provisional ICR.

2. Administrative Costs

Under this SGA, an entity that receives a grant to carry out a project or program may not use more than 10 percent of the amount of the grant to pay administrative costs associated with the program or project. Administrative costs could be direct or indirect costs, and are defined at 20 CFR 667.220. Administrative costs do not need to be identified separately from program costs on the SF–424A Budget Information Form. They should be discussed in the budget narrative and tracked through the grantee's accounting system. To claim any administrative costs that are also indirect costs, the applicant must obtain an Indirect Cost Rate Agreement from its cognizant Federal agency.

3. Salary and Bonus Limitations

Under Public Law 109–234 and Public Law 111–8, Section 111, none of the funds appropriated in Public Law 111–5 or prior Acts under the heading "Employment and Training" that are available for expenditure on or after June 15, 2006, shall be used by a recipient or sub-recipient of such funds to pay the salary and bonuses of an individual, either as direct costs or indirect costs, at a rate in excess of Executive Level II. These limitations also apply to grants funded under this SGA. The salary and bonus limitation does not apply to vendors providing goods and services as defined in OMB Circular A–133. *See* TEGL No. 5–06 at *http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2262*.

4. Intellectual Property Rights

The Federal Government reserves a paid-up, nonexclusive and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use for Federal purposes: (i) The copyright in all products developed under the grant, including a subgrant or contract under the grant or subgrant; and (ii) any rights of copyright to which the grantee, subgrantee or a contractor purchases ownership under an award (including but not limited to curricula, training models, technical assistance products, and any related materials). Such uses include, but are not limited to, the right to modify and distribute such products worldwide by any means, electronically or otherwise. Federal funds may not be used to pay any royalty or licensing fee associated with such copyrighted material, although they may be used to pay costs for obtaining a copy which is limited to the developer/seller costs of copying and shipping. If revenues are generated through selling products developed with grant funds, including intellectual property, these revenues are program income. Program income is added to the grant and must be expended for allowable grant activities.

If applicable, the following needs to be on all products developed in whole or in part with grant funds:

"This workforce solution was funded by a grant awarded by the U.S. Department of Labor's Employment and Training Administration. The solution was created by the grantee and does not necessarily reflect the official position of the U.S. Department of Labor. The Department of Labor makes no guarantees, warranties, or assurances of any kind, express or implied, with respect to such information, including any information on linked sites and including, but not limited to, accuracy of the information or its completeness, timeliness, usefulness, adequacy, continued availability, or ownership. This solution is copyrighted by the institution that created it. Internal use by an organization and/or personal use by an individual for non-commercial purposes is permissible. All other uses require the prior authorization of the copyright owner."

*F. Other Submission Requirements*

*Withdrawal of Applications.* Applications may be withdrawn by written notice at any time before an award is made.

## V. Application Review Information

*A. Application Criteria Review Information*

This section identifies and describes the criteria that will be used to evaluate the proposals under this grant solicitation. The criteria and respective point values are:

| Criterion | Points |
|---|---|
| Statement of Need | 10 |
| Project Management and Organizational Capacity | 25 |
| Strategic Partnerships and Work Plan | 40 |
| Outcomes and Deliverables | 25 |
| Bonus—Leveraged Resources | 5 |

1. Statement of Need (10 Points)

The applicant must fully demonstrate a clear understanding of the Trade Act of 1974, as amended, including the provisions added by the Recovery Act, and describe how the scope of the project addresses the stated needs. As such, the project needs to specifically focus on significant worker dislocations in major industries, such as the automotive industry, and clearly demonstrate how the project will target those industries, identify and target relevant stakeholders, and the scope of the project proposed. Given the rapidly changing economic conditions, applicants should use the most current and relevant sources of data available, including TAA certification data, to demonstrate knowledge of layoffs and conditions facing workers in the automotive or other manufacturing and/or service industries. The data should be used to support the intended technical assistance and outreach needs of the trade-affected workers in the targeted industries.

Points for this section will be based on the applicant's comprehensive demonstration of each of the following factors:

a. The applicant must present a clear need for Federal funding of the proposed project for trade-affected workers in the targeted industries by citing data sources and describing the pre-analysis that has been conducted to support the need for the proposed project. (3 points.)

b. Based on the statement of need, the applicant must provide a complete description of the geographic location(s) of the trade-affected populations of the targeted industries and the rationale behind selecting the specific industry or industries for the project. (2 points.)

c. The proposal must briefly describe the problem(s) or issue(s) being faced by trade-affected workers in the targeted industries and the States administering the TAA program for those workers. Examples of specific challenges include, but are not limited to, issues related to the interaction of certain employee severance packages with TAA eligibility and program benefits, or challenges States have in effectively identifying and providing outreach to workers of a services sector firm who work remotely, rather than on the site at a specific facility. The proposal must also show how the applicant intends to: (1) Address the TAA program-related needs of workers in these industries; (2) increase their awareness of the expanded TAA program, and its new eligibility criteria and benefits; and (3) work with and enhance the ability of States to address the identified issue while developing effective service strategies for the trade-affected workers in the targeted industries. (2 points.)

d. The applicant must demonstrate specific knowledge of State unemployment insurance provisions related to trade readjustment allowance eligibility and health coverage tax credit eligibility in the States in which these trade-affected workers in the targeted industries are located. (5 points.)

Applicants may draw from a variety of resources to inform this criterion, including labor market data such as projections, industry data, internal organizational data, and data on the subject population within the context of the national economy.

2. Project Management and Organizational Capacity (25 Points)

The applicant must fully describe its capacity and, if applicable, the capacity of its partners, to effectively staff the proposed project. The application must also fully describe the applicant's fiscal, administrative, and performance management capacity to implement the key components of the project. Scoring under this criterion will be based on the extent to which applicants provide evidence of the following:

a. *Staff Capacity (5 points).* The applicant should provide strong evidence that the applicant, and if applicable, its partners, will have the staff experience and capability to implement the proposed project. The description of staff capacity should include the proposed staffing pattern for the project, including program management and administrative staff, and program staff experience involved in each local project. The applicant must demonstrate that the role(s) and time commitment for the proposed staff are sufficient to ensure proper direction, management, implementation, and timely completion of the project.

b. *Fiscal, Administrative, and Performance Management Capacity (10 points).* The application must provide strong evidence that the applicant, and if applicable, its partners, have the fiscal, administrative, and performance management capacity to effectively administer the grant. Discussion of this capacity should include:

(i) A full description of the applicant's capacity, including its systems, processes, and administrative controls that will enable it to comply with Federal rules and regulations related to the grant's fiscal and administrative requirements; (3 points) and

(ii) A full description of the applicant's capacity, including its systems and processes that will support the grantee's activities and ability to develop a "best practices" report. The applicant may cite relationships with the State agency operating the TAA program and/or the WIA One-stop delivery system along with other public workforce systems, as appropriate. (7 points)

c. *Applicant's Experience (10 points).* The applicant must demonstrate its experience leading or participating significantly in a comprehensive partnership, and the demonstrated experience of the applicant, its required partners, and if applicable, its local affiliates, coalition members, or other established partners, in implementing outreach, technical assistance, and/or best practices initiatives of similar focus, size, and scope. It is important that the applicant relate its experience with the TAA program and identify any interactions with the trade-affected dislocated worker populations. The discussion should include:

i. Specific examples of the applicant's experience in leading or participating significantly in a partnership that included a wide range of stakeholders, including a description of the programmatic goals of the project, and a demonstration of the results achieved by that project. (5 points.)

ii. Specific examples of the applicant's or its partners' knowledge, experience and interaction with the TAA program and TAA-certified workers, and its experience working with State, local, union, employer, or other One-stop delivery system partners. (5 points.)

3. Strategic Partnerships and Work Plan (40 Points)

This criterion is the heart of the proposal, and a successful score in this section will require the applicant to provide a clear explanation of the planned strategy, its strategic use of partnerships, what industries the

proposal targets, and how the plan will be implemented. The applicant must provide a detailed description of its plan to do all of the following:

i. Ensure that eligible petitioners are equipped to submit TAA petitions that contain complete and accurate information, which is the first step for workers to obtain TAA benefits, either through direct training or technical assistance. In part, this means educating workers, union representatives, State and local officials, and company officials on eligibility criteria, and the petition filing process, including providing information to union and company officials so they can help TAA-eligible workers with the next steps toward receiving benefits.

ii. Improve the service delivery of Rapid Response activities under the WIA to trade-affected workers, assist States to better identify early threats of worker layoffs, and help the State agency operating the TAA program and/or WIA One-stop delivery system quickly identify workers covered by certified TAA petitions.

iii. Help identify and address specific challenges to TAA-certified workers in the targeted industries such as issues related to the interaction of certain employee severance packages with TAA eligibility and program benefits or challenges States have in effectively providing outreach to workers of a services sector firm who work remotely along with other identifiable challenges.

iv. Establish partnerships with States to develop services and/or service delivery strategies, including the use of National Emergency Grants, for more effective employment and case management in States with large numbers of TAA certifications in industries that were not covered by the TAA program before enactment of the Recovery Act.

Points for this criterion will be awarded for the following factors.

a. Strategy (10 points)

The applicant must provide a cohesive strategy for convening and aligning partners to achieve the project goals as described above. The applicant should fully demonstrate the following:

i. Describe the specific roles of the applicant and project partners at all levels, including the services, expertise, and activities that partners will contribute to the goals of the grant. (4 points.)

ii. Describe the overall strategy for identifying the challenges workers in targeted industries face in obtaining TAA program benefits and efforts to meet those challenges to make TAA program benefits available to them. (3 points.)

iii. Describe any unique qualifications or established networks that allow the applicant to reach specific labor pools and their authorized representatives in these targeted industries. Explain the organization's capabilities to provide more direct outreach and technical support to a greater number of services sector and manufacturing industry workers through its partnerships. (3 points.)

b. Work Plan (30 points)

i. The Work Plan must include a timeline of planned activities and milestones, with an explanatory narrative (5 points). The applicant should fully demonstrate the following:

- A coherent plan that demonstrates the applicant's complete comprehension of all the activities and responsibilities required to implement each phase of the project and achieve projected outcomes;
- The demonstrated feasibility and reasonableness of the timeline for accomplishing all necessary implementation activities;

ii. The Work Plan must include a table detailing the planned activities required to implement each phase of the project. For each activity, include the start date, end date, project partner(s) with primary responsibility for the activity, and key tasks associated with each activity. At key project milestones, list the target dates and associated outcomes. (5 points.)

iii. The applicant must demonstrate that the outreach and technical assistance activities it proposes, as generally described in the Supplementary Information section of this SGA, will help trade-affected workers become more aware of the new provisions of the TAA program and better educated on how to petition for TAA certification and apply for TAA program benefits and services after obtaining that certification. Further, successful applicants must demonstrate how these efforts will help improve the quality of TAA petitions received by the ETA. (10 points.)

iv. The applicant must demonstrate the ability to identify various challenges related to providing TAA program benefits across the States with targeted industries and present a plan to overcome those challenges. This section may include a discussion of case management and related assessment/counseling services available to TAA-certified workers under the WIA as it relates to the provision of such services funded by the TAA program. (5 points.)

v. The Work Plan must demonstrate the methodology by which successful project outcomes will be measured and/or goals completed. This also includes describing research and fact finding methods to describe best practices and lessons learned from the project. (5 points.)

4. Outcomes and Deliverables (25 Points)

Applicants will be evaluated on a full demonstration of the following:

A. A description of the anticipated outcomes, including how the applicant intends to measure outcomes. (2 points.)

B. The extent to which the project outcomes are realistic and consistent with the objectives of the project and the needs of workers in the target industries. (2 points.)

C. How project outcomes will result in capacity building to enable workers in the targeted industries to seek and more effectively benefit from the receipt of TAA. (8 points.)

D. What percentage of workers in the targeted industries will benefit from technical assistance and outreach and how these efforts will effectively serve as a model for States. (3 points.)

E. The ability of the applicant to achieve the stated outcomes within the period of performance. (5 points.)

F. How the applicant intends to identify issues and challenges and use outcome information to identify lessons learned and make best practices available to a wide range of stakeholders. (5 points.)

5. Leveraged Resources (5 Bonus Points)

Applicants may describe any funds and/or other resources that will be leveraged to support grant activities and how these resources will be used to contribute to the proposed outcomes for the project as described in Section V. A. 4. of this solicitation. This includes funds and other resources leveraged from businesses, labor organizations, education and training providers, and/or Federal, State, and local government programs. Applicants will be awarded bonus points on the extent to which they fully demonstrate the amount of leveraged resources provided, the type(s) of leveraged resources provided, the strength of commitment to provide these resources, the breadth and depth of the resources provided, and how well the resources support the proposed grant activities and outcomes.

*B. Review and Selection Process*

Applications for grants under this solicitation will be accepted after the publication of this announcement until the closing date. A technical review panel will make careful evaluation of applications against the criteria. These criteria are based on the policy goals, priorities, and emphases set forth in this SGA. Up to 105 points may be awarded

to an application, based on the required information described in Section V. A. The ranked scores will serve as the primary basis for selection of applications for funding, in conjunction with other factors such as the availability of funds and which proposals are most advantageous to the government. The panel results are advisory in nature and not binding on the Grant Officer, and the Grant Officer may consider any information that comes to his/her attention. The ETA may elect to award the grant(s) with or without discussions with the applicants. Should a grant be awarded without discussions, the award will be based on the applicant's signature on the SF–424, including electronic signature via E–Authentication on *http://www.grants.gov*, which constitutes a binding offer by the applicant.

**VI. Award Administration Information**

*A. Award Notices*

All award notifications will be posted on the ETA Homepage (*http://www.doleta.gov*). Applicants selected for award will be contacted directly before the grant's execution and non-selected applicants will be notified by mail.

Selection of an organization as a grantee does not constitute approval of the grant application as submitted. Before the actual grant is awarded, DOL/ETA may enter into negotiations about such items as program components, staffing and funding levels, and administrative systems in place to support grant implementation. If the negotiations do not result in a mutually acceptable submission, the Grant Officer reserves the right to terminate the negotiation and decline to fund the application.

*B. Administrative and National Policy Requirements*

1. Administrative Program Requirements

All grantees will be subject to all applicable Federal laws, regulations, and the applicable OMB Circulars. The following statutory and administrative standards and provisions may be applicable to the grants awarded under this SGA:

a. *Non-Profit Organizations*—OMB Circulars A–122 (Cost Principles) and 29 CFR part 95 (Administrative Requirements).

b. *Educational Institutions*—OMB Circulars A–21 (Cost Principles) and 29 CFR part 95 (Administrative Requirements).

c. *State and Local Governments*—OMB Circulars A–87 (Cost Principles) and 29 CFR part 97 (Administrative Requirements).

d. *Profit Making Commercial Firms*—Federal Acquisition Regulation (FAR)–48 CFR part 31 (Cost Principles), and 29 CFR part 95 (Administrative Requirements).

e. All entities must comply with 29 CFR parts 93 (new restrictions on lobbying) and 98 (debarment, suspension and drug-free workplace requirements), and, where applicable, 29 CFR parts 96 (audit requirements) and 99.

f. *29 CFR part 2, subpart D*—Equal Treatment in Department of Labor Programs for Religious Organizations, Protection of Religious Liberty of Department of Labor Social Service Providers and Beneficiaries.

g. *29 CFR part 31*—Nondiscrimination in Federally Assisted Programs of the Department of Labor—Effectuation of Title VI of the Civil Rights Act of 1964.

h. *29 CFR part 32*—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

i. *29 CFR part 33*—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Department of Labor.

j. *29 CFR part 35*—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from the Department of Labor.

k. *29 CFR part 36*—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

l. The American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115, Division A, Title VIII and Division B, Title I, Subtitle I (February 17, 2009).

m. The Trade Act of 1974, Public Law 93–618, as amended (codified at 19 U.S.C. 2271 *et seq.*).

n. The Workforce Investment Act of 1998, Public Law 105–220, 112 Stat. 939 (codified as amended at 29 U.S.C. 2801 *et seq.*) and 20 CFR part 667 (General Fiscal and Administrative Rules).

o. *29 CFR part 29 & 30*—Apprenticeship Equal Employment Opportunity in Apprenticeship and Training.

p. *29 CFR part 37*—Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Investment Act of 1998.

q. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb, applies to all Federal law and its implementation. If your organization is a faith-based organization that makes hiring decisions on the basis of religious belief, it may be entitled to receive Federal financial assistance under Title I of the Workforce Investment Act and maintain that hiring practice even though section 188 of the Workforce Investment Act contains a general ban on religious discrimination in employment. If you are awarded a grant, you will be provided with information on such an exemption upon request.

r. Ensuring the Health and Safety of Participants Under WIA Section 181(a)(4)—Health and safety standards established under Federal and State law otherwise applicable to working conditions of employees are equally applicable to working conditions of participants engaged in providing technical assistance and other activities. Applicants that are awarded grants through this SGA are reminded that these health and safety standards apply to participants in these grants.

s. In accordance with section 18 of the Lobbying Disclosure Act of 1995 (Pub. L. 104–65) (2 U.S.C. 1611) non-profit entities incorporated under Internal Revenue Service Code section 501(c)(4) that engage in lobbying activities are not eligible to receive Federal funds and grants.

Except as specifically provided in this SGA, the ETA's acceptance of a proposal and an award of Federal funds to sponsor any programs(s) does not provide a waiver of any grant requirements and/or procedures. For example, the OMB Circulars require that an entity's procurement procedures must ensure that all procurement transactions are conducted, as much as practical, to provide open and free competition. If a proposal identifies a specific entity to provide services, the DOL/ETA's award does not provide the justification or basis to sole source the procurement, *i.e.*, avoid competition, unless the activity is regarded as the primary work of a partner named in the application.

2. The Following American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) Provisions Apply to Grants Awarded Under This SGA

Prospective applicants are advised that, if they receive an award, they must comply with all requirements of the American Recovery and Reinvestment Act of 2009. Applicants are advised to review the Act and implementing OMB guidance in the development of their proposals. Requirements include, but are not limited to:

a. Adherence to all grant clauses and conditions as they relate to Recovery Act activity.

b. Prohibition on expenditure of funds for activities at any casino or other

gambling establishment, aquarium, zoo, golf course or swimming pool.

c. Compliance with the requirements to obtain a D-U-N-S® number and register with the Central Contractor Registry (CCR). ETA has issued additional guidance related to theses reports which can be found in the TEGL No. 29–08, dated June 10, 2009.

d. Submission of required reports in accordance with Section 1512 of the Recovery Act. These reports will be due quarterly within 10 days of the end of the reporting period and are in addition to the ETA-required reports addressed in Section VI.C of this SGA. The ETA will issue additional guidance related to these reports and their submission requirements shortly.

Implementing OMB guidance may be found at *http://www.recovery.gov*.

*C. Reporting*

Quarterly financial reports, quarterly progress reports, and MIS data will be submitted by the grantee electronically. The grantee is required to provide the reports and documents listed below:

• *Quarterly Financial Reports.* A Quarterly Financial Status Report (ETA 9130) is required until such time as all funds have been expended or the grant period has expired. Quarterly reports are due 45 days after the end of each calendar year quarter. Grantees must use DOL's On-Line Electronic Reporting System. Information and instructions on using the system will be provided to grantees.

• *Quarterly Performance Reports.* The grantee must submit a quarterly progress report within 45 days after the end of each calendar year quarter. In order to submit these quarterly reports, grantees will be expected to track participant-level data on the individuals who are involved in training and other services provided through the grant and report on participant status in a variety of fields and outcome categories, as well as provide narrative information on the status of the grant. The last quarterly progress report that grantees submit will serve as the grant's Final Performance Report. This report should provide both quarterly and cumulative information on the grant's activities. It must summarize project activities, project outcomes, and other deliverables. DOL will provide grantees with formal guidance on the data and other information that is required to be collected and reported on either a regular basis or special request basis. Grantees must agree to meet DOL reporting requirements.

• *Record Retention.* Applicants should be aware of Federal guidelines on record retention, which require grantees to maintain all records pertaining to grant activities for a period of not less than three years from the time of final grant close-out.

**VII. Agency Contacts**

For further information regarding this SGA, please contact Rahel Bizuayene, Grants Management Specialist, Division of Federal Assistance, at (202) 693–3256 (this is not a toll-free number). Applicants should e-mail all technical questions to *Bizuayene.Rahel@dol.gov* and must specifically reference SGA/DFA PY 09–06, and along with question(s), include a contact name, fax and phone number. This announcement is being made available on the ETA Web site at *http://www.doleta.gov/grants* and *at http://www.grants.gov*.

**VIII. Additional Resources of Interest to Applicants**

*A. Other Web-Based Resources*

DOL maintains a number of Web-based resources that may be of assistance to applicants. America's Service Locator (*http://www.servicelocator.org*) provides a directory of our nation's One-Stop Career Centers.

**IX. Other Information**

*OMB Information Collection No. 1225–0086, Expires November 30, 2012*

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this collection of information is estimated to average 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimated or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, to the attention of Darrin A. King, Departmental Clearance Officer, 200 Constitution Avenue NW, Room N1301, Washington, DC 20210. Comments may also be e-mailed to *DOL_PRA_PUBLIC@dol.gov*. Please do not return the completed application to this address. Send it to the sponsoring agency as specified in this solicitation.

This information is being collected for the purpose of awarding a grant. The information collected through this SGA will be used by DOL to ensure that grants are awarded to the applicant best suited to perform the functions of the grant. Submission of this information is required in order for the applicant to be considered for award of this grant. Unless otherwise specifically noted in this announcement, information submitted in the application is not considered to be confidential.

Please be advised that the Grant Officer for this competition is James Stockton.

Signed at Washington, DC, this 9th day of March, 2010.

**Eric Luetkenhaus,**

*Grant Officer, Employment and Training Administration.*

[FR Doc. 2010–5552 Filed 3–12–10; 8:45 am]

**BILLING CODE 4510–FN–P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

### Prohibited Transaction Exemptions and Grant of Individual Exemptions Involving: 2010–04, JPMorgan Chase Bank, N.A. (JPMCB or the Applicants), D–11491; 2010–05, Goldman Sachs & Its Affiliates (Goldman or the Applicants, D–11509; 2010–06, Louis B. Chaykin, M.D., P.A. Cross-Tested Profit Sharing Plan (the Plan), D–11532; and 2010–07, Columbia Management Advisors, LLC (Columbia, or the Applicant) and Its Current and Future Affiliates (Collectively, the Applicants), D–11556

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be

held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

**Statutory Findings**

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

**JPMorgan Chase Bank, N.A. (JPMCB or the Applicant), Located in New York, New York**

*[Prohibited Transaction Exemption 2010–04; Application No. D–11491]*

**Exemption**

*Section I—Transactions*

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective July 1, 2004, to the continued and future provision by JPMCB or by its current or future affiliates of letters of credit to guarantee the commercial lease obligations of unrelated third-party tenants in connection with commercial properties owned by a Fund (as defined below in Section III) or commercial properties for which a Fund has a security interest, where JPMCB is the manager and trustee (Trustee) of such Funds that hold the assets of certain employee benefit plans (the Plans), provided that the conditions set forth below in Section II are satisfied.

*Section II—Conditions*

A. With respect to existing or future letters of credit, each of the Funds is represented by an independent fiduciary to perform the following functions:

(1) Monitor monthly reports of rental payments of tenants utilizing such letters of credit issued by JPMCB, or any current or future affiliate of JPMCB, to guarantee their lease payments;

(2) Confirm whether an event has occurred that calls for a letter of credit to be drawn upon; and

(3) Represent each of the Funds, and the Plans to the extent they are invested in the Funds, as an independent fiduciary in any circumstances with respect to a letter of credit which would present a conflict of interest for the Trustee or otherwise violate section 406(b), including but not limited to: the need to enforce a remedy against JPMCB or a current or future affiliate with respect to its obligations under a letter of credit.

B. With respect to future letters of credit issued by JPMCB, or any current or future affiliate of JPMCB, the following additional conditions are met:

(1) JPMCB, or any current or future affiliate of JPMCB, as the issuer of a letter of credit, has at least an "A" credit rating by at least one nationally recognized statistical rating service at the time of the issuance of the letter of credit;

(2) The letter of credit has objective market drawing conditions and states precisely the documents against which payment is to be made;

(3) JPMCB and its affiliates do not "steer" the Funds' tenants to JPMCB or its affiliates in order to obtain a letter of credit;

(4) Letters of credit are issued only to third-party tenants which are unrelated to JPMCB; and

(5) The terms of any future letters of credit are not more favorable to the tenants than the terms generally available in transactions with other similarly situated unrelated third-party commercial clients of JPMCB or of its current or future affiliates.

C. JPMCB or its affiliates maintain, or cause to be maintained, for a period of six (6) years from the date of any transactions involving letters of credit described in Section I above such records as are necessary to enable the persons, described below in Section II(D), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a Plan whose assets are involved in letter of credit transactions described in Section I above, other than JPMCB or its affiliates, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required below by Section II(D); and

(2) A separate prohibited transaction shall not be considered to have occurred if, due to circumstances beyond the control of JPMCB or its affiliates, such records are lost or destroyed prior to the end of the six-year period.

D. (1) Except as provided below in Section II(D)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in Section II(C) are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, the Securities and Exchange Commission (SEC), and any U.S. banking regulatory agency;

(ii) Any fiduciary of any Plan whose assets are involved in the letter of credit transactions described in Section I above, or any duly authorized employee or representative of such fiduciary; or

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan whose assets are involved in the letter of credit transactions described in Section I above, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a Plan whose assets are involved in the letter of credit transactions described in Section I above, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above in Section II(D)(1)(ii)–(iv) shall be authorized to examine trade secrets of JPMCB or its affiliates, or commercial or financial information which is privileged or confidential; and

(3) Should JPMCB or its affiliates refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(D)(2) above, JPMCB or its affiliates shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Section III—Definitions*

A. The term "independent fiduciary" means Fiduciary Counselors Inc. (Fiduciary Counselors) or any successor Independent Fiduciary, provided that Fiduciary Counselors or its successor is: (1) Independent of, and unrelated to, JPMCB and its affiliates, and (2) appointed to act on behalf of each Fund

for the purposes described in Section II.A and II.B above. For purposes of this exemption, a fiduciary will not be deemed to be independent of, and unrelated to, JPMCB if: (i) Such fiduciary directly or indirectly, controls, is controlled by, or is under common control with JPMCB; (ii) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption, except that it may receive compensation for acting as an independent fiduciary from JPMCB in connection with the transactions described herein, if the amount or payment of such compensation is not contingent upon, or in any way affected by such fiduciary's decision; and (iii) more than 5 percent of such fiduciary's annual gross revenue in its prior tax year will be paid by JPMCB and its affiliates in the fiduciary's current tax year with respect to any particular 12-month tax period.

B. The term "affiliate" means: (1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; (2) any officer, director, or partner, employee, or relative (as defined in section 3(15) of the Act) of such person; and (3) any corporation or partnership of which such person is an officer, director, or partner or employee. For purposes of this definition, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

C. The term "Fund" or "Funds" means "collective investment funds," of JPMCB and its current or future affiliates, within the meaning of Prohibited Transaction Class Exemption 91–38 (PTE 91–38) and "investment funds," of JPMCB and its current or future affiliates, within the meaning of Prohibited Transaction Class Exemption (PTE 84–14) and encompasses the following Funds: (i) The Commingled Pension Trust Fund (Strategic Property) of JPMorgan Chase Bank, N.A. (the Strategic Property Fund); (ii) the Commingled Pension Trust Fund (Special Situation Property) of JPMorgan Chase Bank, N.A. (the Special Situation Property Fund); and (iii) the Commingled Pension Trust Fund (Mortgage Private Placement) of JPMorgan Chase Bank, N.A. (the Mortgage Fund).

**Written Comments**

1. The Notice of Proposed Exemption (the Notice), published in the **Federal Register** on November 16, 2009 beginning at page 58987, invited all interested persons to submit written comments and requests for a hearing to the Department within forty-five (45) days of the date of its publication. On December 29, 2009, the Department received a written comment from the Applicant regarding the content of the Notice. This comment, which was the only one received by the Department in connection with the Notice, suggested several minor editorial adjustments to Sections II and III of the Notice. Specifically, the Applicant requested that the text of Section II.A.(3) of the Notice (located at the first column of page 58988 of the November 16, 2009 issue of the **Federal Register**) be amended in the final grant of exemption by clarifying that each of the Funds, and the Plans *to the extent that they are invested in the Funds,* will be represented by an independent fiduciary in any circumstances with respect to an existing or future letter of credit provided by JPMCB or by its current or future affiliates which would present a conflict of interest for the Trustee or otherwise violate section 406(b) of the Act. In addition, the Applicant also suggested amending the text of Section III.C. of the Notice (beginning at the third column of page 58988 and continuing onto the first column of page 58989 of the same issue of the **Federal Register**) to more precisely describe the official names of the three Funds (the Strategic Property Fund, the Special Situation Property Fund, and the Mortgage Fund) that are parties to the exemption transaction. After due consideration, the Department has adopted each of these amendments suggested by the Applicant.

2. In its written comment, the Applicant also requested that the Department amend the information contained in the first paragraph of Representation 3 of the Notice (located at the second column of page 58989 of the aforementioned issue of the **Federal Register**) to provide a more accurate description of the real estate assets generally held by each of the Funds as of December 31, 2008. Accordingly, the Department notes that the Applicant has revised the text of the first paragraph of Representation 3 of the Notice to read as follows: "As of December 31, 2008, the Strategic Property Fund had net assets of approximately $13.7 billion, which were invested in 152 developed real estate properties, primarily office buildings, industrial parks, residential properties, and retail properties. As of December 31, 2008, the Special Situation Property Fund had net assets of approximately $2.5 billion, which were invested in real estate properties, primarily office buildings, industrial parks, residential properties, hotels and retail properties. As of December 31, 2008, the Mortgage Fund had net assets of approximately $5.4 billion, which were invested primarily in non-recourse secured mortgage loans collateralized by office, industrial, retail, multi-family, residential and senior citizen residential properties."

The Department further notes that it did not receive any requests for a hearing from the Applicant or from any other person during the aforementioned 45-day comment period.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the text of the Notice at 74 FR 58987.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Judge of the Department at (202) 693–8550. (This is not a toll-free number).

**Goldman, Sachs & Co. and Its Affiliates (Goldman or the Applicant); Located in New York, New York**

*[Prohibited Transaction Exemption 2010–05; Exemption Application No. D–11509]*

**Exemption**

*Section I. Sales of Auction Rate Securities From Plans To Goldman: Unrelated to a Settlement Agreement*

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in Section V(e)) of an Auction Rate Security (as defined in Section V(c)) to Goldman, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in Section V(f)), provided that the conditions set forth in Section II have been met.[1]

*Section II. Conditions Applicable to Transactions Described in Section I*

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by Goldman to the Plan;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by Goldman for its own

[1] For purposes of this exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

employees (a Goldman Plan), the Unrelated Sale is made pursuant to a written offer by Goldman (the Offer) containing all of the material terms of the Unrelated Sale. Either the Offer or other materials available to the Plan provide: (1) The identity and par value of the Auction Rate Security; (2) the interest or dividend amounts that are due and unpaid with respect to the Auction Rate Security; and (3) the most recent rate information for the Auction Rate Security (if reliable information is available). Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by Goldman, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a Goldman Plan) receives written notice regarding the Unrelated Sale, where such notice contains the material terms of the Unrelated Sale;

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in Section V(d)) of Goldman. Notwithstanding the foregoing: (1) in the case of an IRA (as defined in Section V(e)) which is beneficially owned by an employee, officer, director or partner of Goldman, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director or partner; or (2) in the case of a Goldman Plan or a pooled fund maintained or advised by Goldman, the decision to accept the Offer may be made by Goldman after Goldman has determined that such purchase is in the best interest of the Goldman Plan or pooled fund; [2]

(h) Except in the case of a Goldman Plan or a pooled fund maintained or advised by Goldman, neither Goldman nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) Goldman and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption, if granted, have been met, except that:

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than Goldman and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Goldman or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission;

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraphs (l)(1)(B)–(C) shall be authorized to examine trade secrets of Goldman, or commercial or financial information which is privileged or confidential; and

(3) Should Goldman refuse to disclose information on the basis that such information is exempt from disclosure, Goldman shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Section III. Sales of Auction Rate Securities From Plans to Goldman: Related to a Settlement Agreement*

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to Goldman, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

*Section IV. Conditions Applicable to Transactions Described in Section III*

(a) The terms and delivery of the Offer are consistent with the requirements set forth in the Settlement Agreement and acceptance of the offer does not constitute a waiver of any claim of the tendering Plan;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

(1) The securities available for purchase under the Offer;

(2) The background of the Offer;

(3) The methods and timing by which Plans may accept the Offer;

(4) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer, if the Offer had any limitation on such dates;

(5) The timing for acceptance by Goldman of tendered Auction Rate Securities, if there were any limitations on such timing;

(6) The timing of payment for Auction Rate Securities accepted by Goldman for payment, if payment was materially delayed beyond the acceptance of the Offer;

(7) The expiration date of the Offer; and

(8) How to obtain additional information concerning the Offer;

[2] The Department notes that the Act's general standards of fiduciary conduct also apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to Goldman for the par value of the Auction Rate Security, plus unpaid interest and dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the transactions, to fully understand the risks associated with this type of transaction following disclosure by Goldman of all relevant information.

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in Section II have been met.

*Section V. Definitions*

For purposes of this exemption:

(a) The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term "Auction Rate Security" means a security: (1) that is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and (2) with an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(d) A person is "independent" of Goldman if the person is: (1) Not Goldman or an affiliate; and (2) not a relative (as defined in section 3(15) of the Act) of the party engaging in the transaction;

(e) The term "Plan" means an individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of the Act; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by section 3(42) of the Act; and

(f) The term "Settlement Agreement" means a legal settlement involving Goldman and a U.S. state or federal authority that provides for the purchase of an ARS by Goldman from a Plan.

**DATES:** *Effective Date:* This exemption is effective as of February 1, 2008.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 22, 2009 at 74 FR 68102.

**FOR FURTHER INFORMATION CONTACT:** Brian Shiker of the Department, telephone (202) 693–8552. (This is not a toll-free number.)

**Louis B. Chaykin, M.D., P.A., Cross-Tested Profit Sharing Plan (the Plan), Located in Lakewood Ranch, Florida**

*[Prohibited Transaction Exemption No. 2010–06; Application Number D–11532]*

**Exemption**

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), through (E) of the Code, shall not apply to the proposed sale (the Sale) at fair market value by the Plan of certain coins (the Collectibles), to Louis B. Chaykin, M.D. (the Applicant), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The Sale is a one-time transaction for cash;

(b) The Plan pays no commissions, fees or other expenses in connection with the Sale;

(c) The terms and conditions of the Sale are at least as favorable as those obtainable in an arm's length transaction with an unrelated third party;

(d) The fair market value of the Collectibles was determined by a qualified, independent appraiser;

(e) The Plan receives no less than the fair market value of the Collectibles at the time of the Sale; and

(f) All of the participants of the Plan, with the exception of the Applicant, have been paid their benefits in full.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the text of the Notice of Proposed Exemption that appears at 74 FR 68105 (December 22, 2009).

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Judge of the Department, telephone (202) 693–8550. (This is not a toll-free number).

**Columbia Management Advisors, LLC (Columbia, or the Applicant) and Its Current and Future Affiliates (collectively, the Applicants); Located in Boston, Massachusetts**

*[Prohibited Transaction Exemption 2010–07; Exemption Application No. D–11556]*

**Exemption**

*Section I—Transactions*

The restrictions of section 406 of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to the purchase of certain securities (the Securities), as defined, below in Section III(i), by an Asset Manager, as defined, below, in Section III(d), from any person other than such Asset Manager, during the existence of an underwriting or selling syndicate with respect to such Securities, where a broker-dealer affiliated with Columbia (the Affiliated Broker-Dealer), as defined, below, in Section III(b), is a manager or member of such syndicate and the Asset Manager purchases such Securities, as a fiduciary:

(a) On behalf of an employee benefit plan or employee benefit plans (Client Plan(s)), as defined, below, in Section III(f); or

(b) On behalf of Client Plans, and/or In-House Plans, as defined, below, in Section III(m), which are invested in a pooled fund or in pooled funds (Pooled Fund(s)), as defined, below, in Section III(g); provided that the conditions as set forth, below, in Section II, are satisfied (An affiliated underwriter transaction (AUT)).[3]

*Section II—Conditions*

The exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following requirements:

(a)(1) The Securities to be purchased are either—

(i) Part of an issue registered under the Securities Act of 1933 (the 1933 Act) (15 U.S.C. 77a *et seq.*). If the Securities to be purchased are part of an issue that is exempt from such registration requirement, such Securities:

(A) Are issued or guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States,

(B) Are issued by a bank,

(C) Are exempt from such registration requirement pursuant to a federal statute other than the 1933 Act, or

(D) Are the subject of a distribution and are of a class which is required to be registered under section 12 of the Securities Exchange Act of 1934 (the 1934 Act) (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such Securities and that has filed all reports required to be filed thereunder with the Securities and Exchange Commission (SEC) during the preceding twelve (12) months; or

(ii) Part of an issue that is an Eligible Rule 144A Offering, as defined in SEC Rule 10f–3 (17 CFR 270.10f–3(a)(4)).[4]

[3] For purposes of this exemption an In-House Plan may engage in AUTs only through investment in a Pooled Fund.

[4] SEC Rule 10f–3(a)(4), 17 CFR 270.10f–3(a)(4), states that the term "Eligible Rule 144A Offering" means an offering of securities that meets the following conditions:

(i) The securities are offered or sold in transactions exempt from registration under section 4(2) of the Securities Act of 1933 [15 U.S.C. 77d(d)], rule 144A thereunder [§ 230.144A of this chapter], or rules 501–508 thereunder [§§ 230.501–230.508 of this chapter];

Where the Eligible Rule 144A Offering of the Securities is of equity securities, the offering syndicate shall obtain a legal opinion regarding the adequacy of the disclosure in the offering memorandum;

(2) The Securities to be purchased are purchased prior to the end of the first day on which any sales are made, pursuant to that offering, at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities, except that—

(i) If such Securities are offered for subscription upon exercise of rights, they may be purchased on or before the fourth day preceding the day on which the rights offering terminates; or

(ii) If such Securities are debt securities, they may be purchased at a price that is not more than the price paid by each other purchaser of the Securities in that offering or in any concurrent offering of the Securities and may be purchased on a day subsequent to the end of the first day on which any sales are made, pursuant to that offering, provided that the interest rates, as of the date of such purchase, on comparable debt securities offered to the public subsequent to the end of the first day on which any sales are made and prior to the purchase date are less than the interest rate of the debt Securities being purchased; and

(3) The Securities to be purchased are offered pursuant to an underwriting or selling agreement under which the members of the syndicate are committed to purchase all of the Securities being offered, except if—

(i) Such Securities are purchased by others pursuant to a rights offering; or

(ii) Such Securities are offered pursuant to an over-allotment option.

(b) The issuer of the Securities to be purchased pursuant to this exemption must have been in continuous operation for not less than three years, including the operation of any predecessors, unless the Securities to be purchased are—

(1) Non-convertible debt securities rated in one of the four highest rating categories by Standard & Poor's Rating Services, Moody's Investors Service, Inc., FitchRatings, Inc., Dominion Bond Rating Service Limited, Dominion Bond Rating Service, Inc., or any successors thereto (collectively, the Rating Organizations), provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(2) Debt securities issued or fully guaranteed by the United States or by any person controlled or supervised by and acting as an instrumentality of the United States pursuant to authority granted by the Congress of the United States; or

(3) Debt securities which are fully guaranteed by a person (the Guarantor) that has been in continuous operation for not less than three years, including the operation of any predecessors, provided that such Guarantor has issued other securities registered under the 1933 Act; or if such Guarantor has issued other securities which are exempt from such registration requirement, such Guarantor has been in continuous operation for not less than three years, including the operation of any predecessors, and such Guarantor is:

(a) A bank; or

(b) An issuer of securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(c) An issuer of securities that are the subject of a distribution and are of a class which is required to be registered under section 12 of the 1934 Act (15 U.S.C. 781), and are issued by an issuer that has been subject to the reporting requirements of section 13 of the 1934 Act (15 U.S.C. 78m) for a period of at least ninety (90) days immediately preceding the sale of such securities and that has filed all reports required to be filed thereunder with the SEC during the preceding twelve (12) months.

(c) The aggregate amount of Securities of an issue purchased, pursuant to this exemption, by the Asset Manager with: (i) The assets of all Client Plans; and (ii) The assets, calculated on a *pro-rata* basis, of all Client Plans and In-House Plans investing in Pooled Funds managed by the Asset Manager; and (iii) The assets of plans to which the Asset Manager renders investment advice within the meaning of 29 CFR 2510.3–21(c) does not exceed:

(1) Ten percent (10%) of the total amount of the Securities being offered in an issue, if such Securities are equity securities;

(2) Thirty-five percent (35%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in one of the four highest rating categories by at least one of the Rating Organizations, provided that none of the Rating Organizations rates such Securities in a category lower than the fourth highest rating category; or

(3) Twenty-five percent (25%) of the total amount of the Securities being offered in an issue, if such Securities are debt securities rated in the fifth or sixth highest rating categories by at least one of the Rating Organizations; provided that none of the Rating Organizations rates such Securities in a category lower than the sixth highest rating category; and

(4) The assets of any single Client Plan (and the assets of any Client Plans and any In-House Plans investing in Pooled Funds) may not be used to purchase any Securities being offered, if such Securities are debt securities rated lower than the sixth highest rating category by any of the Rating Organizations;

(5) Notwithstanding the percentage of Securities of an issue permitted to be acquired, as set forth in Section II(c)(1), (2), and (3), above, of this exemption, the amount of Securities in any issue (whether equity or debt securities) purchased, pursuant to this exemption, by the Asset Manager on behalf of any single Client Plan, either individually or through investment, calculated on a *pro-rata* basis, in a Pooled Fund may not exceed three percent (3%) of the total amount of such Securities being offered in such issue, and;

(6) If purchased in an Eligible Rule 144A Offering, the total amount of the Securities being offered for purposes of determining the percentages, described, above, in Section II(c)(1)–(3) and (5), is the total of:

(i) The principal amount of the offering of such class of Securities sold by underwriters or members of the selling syndicate to "qualified institutional buyers" (QIBs), as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)); plus

(ii) The principal amount of the offering of such class of Securities in any concurrent public offering.

(d) The aggregate amount to be paid by any single Client Plan in purchasing any Securities which are the subject of this exemption, including any amounts paid by any Client Plan or In-House Plan in purchasing such Securities through a Pooled Fund, calculated on a *pro-rata* basis, does not exceed three percent (3%) of the fair market value of the net assets of such Client Plan or In-House Plan, as of the last day of the most recent fiscal quarter of such Client Plan or In-House Plan prior to such transaction.

(e) The covered transactions are not part of an agreement, arrangement, or understanding designed to benefit the Asset Manager or its affiliate.

(ii) The securities are sold to persons that the seller and any person acting on behalf of the seller reasonably believe to include qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter; and

(iii) The seller and any person acting on behalf of the seller reasonably believe that the securities are eligible for resale to other qualified institutional buyers pursuant to § 230.144A of this chapter.

(f) The Affiliated Broker-Dealer does not receive, either directly, indirectly, or through designation, any selling concession, or other compensation or consideration that is based upon the amount of Securities purchased by any single Client Plan, or that is based on the amount of Securities purchased by Client Plans or In-House Plans through Pooled Funds, pursuant to this exemption. In this regard, the Affiliated Broker-Dealer may not receive, either directly or indirectly, any compensation or consideration that is attributable to the fixed designations generated by purchases of the Securities by the Asset Manager on behalf of any single Client Plan or any Client Plan or In-House Plan in Pooled Funds.

(g)(1) The amount the Affiliated Broker-Dealer receives in management, underwriting, or other compensation or consideration is not increased through an agreement, arrangement, or understanding for the purpose of compensating the Affiliated Broker-Dealer for foregoing any selling concessions for those Securities sold pursuant to this exemption. Except as described above, nothing in this Section II(g)(1) shall be construed as precluding the Affiliated Broker-Dealer from receiving management fees for serving as manager of the underwriting or selling syndicate, underwriting fees for assuming the responsibilities of an underwriter in the underwriting or selling syndicate, or other compensation or consideration that is not based upon the amount of Securities purchased by the Asset Manager on behalf of any single Client Plan, or on behalf of any Client Plan or In-House Plan participating in Pooled Funds, pursuant to this exemption; and

(2) The Affiliated Broker-Dealer shall provide to the Asset Manager a written certification, dated and signed by an officer of the Affiliated Broker-Dealer, stating the amount that the Affiliated Broker-Dealer received in compensation or consideration during the past quarter, in connection with any offerings covered by this exemption, was not adjusted in a manner inconsistent with Section II(e), (f), or (g) of this exemption.

(h) The covered transactions are performed under a written authorization executed in advance by an independent fiduciary of each single Client Plan (the Independent Fiduciary), as defined, below, in Section III(h).

(i) Prior to the execution by an Independent Fiduciary of a single Client Plan of the written authorization described, above, in Section II(h), the following information and materials (which may be provided electronically) must be provided by the Asset Manager to such Independent Fiduciary:

(1) A copy of the Notice of Proposed Exemption (the Notice) and a copy of the final exemption (the Grant) as published in the **Federal Register**, provided that the Notice and the Grant are supplied simultaneously; and

(2) Any other reasonably available information regarding the covered transactions that such Independent Fiduciary requests the Asset Manager to provide.

(j) Subsequent to the initial authorization by an Independent Fiduciary of a single Client Plan permitting the Asset Manager to engage in the covered transactions on behalf of such single Client Plan, the Asset Manager will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary requests the Asset Manager to provide.

(k)(1) In the case of an existing employee benefit plan investor (or existing In-House Plan investor, as the case may be) in a Pooled Fund, such Pooled Fund may not engage in any covered transactions pursuant to this exemption, unless the Asset Manager provides the written information, as described, below, and within the time period described, below, in this Section II(k)(2), to the Independent Fiduciary of each such plan participating in such Pooled Fund (and to the fiduciary of each such In-House Plan participating in such Pooled Fund).

(2) The following information and materials (which may be provided electronically) shall be provided by the Asset Manager not less than 45 days prior to such Asset Manager engaging in the covered transactions on behalf of a Pooled Fund, pursuant to this exemption, and provided further that the information described below, in this Section II(k)(2)(i) and (iii) is supplied simultaneously:

(i) A notice of the intent of such Pooled Fund to purchase Securities pursuant to this exemption, a copy of the Notice, and a copy of the Grant, as published in the **Federal Register**;

(ii) Any other reasonably available information regarding the covered transactions that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the Asset Manager to provide; and

(iii) A termination form expressly providing an election for the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund to terminate such plan's (or In-House Plan's) investment in such Pooled Fund without penalty to such plan (or In-House Plan). Such form shall include instructions specifying how to use the form. Specifically, the instructions will explain that such plan (or such In-House Plan) has an opportunity to withdraw its assets from a Pooled Fund for a period of no more than 30 days after such plan's (or such In-House Plan's) receipt of the initial notice of intent, described, above, in Section II(k)(2)(i), and that the failure of the Independent Fiduciary of such plan (or fiduciary of such In-House Plan) to return the termination form to the Asset Manager in the case of a plan (or In-House Plan) participating in a Pooled Fund by the specified date shall be deemed to be an approval by such plan (or such In-House Plan) of its participation in the covered transactions as an investor in such Pooled Fund.

Further, the instructions will identify the Asset Manager and the Affiliated Broker-Dealer and will provide the address of the Asset Manager. The instructions will state that this exemption may be unavailable, unless the fiduciary of each plan participating in the covered transactions as an investor in a Pooled Fund is, in fact, independent of the Asset Manager and the Affiliated Broker-Dealer. The instructions will also state that the fiduciary of each such plan must advise the Asset Manager, in writing, if it is not an "Independent Fiduciary," as that term is defined, below, in Section III(h).

For purposes of this Section II(k), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this exemption for each plan be independent of the Asset Manager shall not apply in the case of an In-House Plan.

(l)(1) In the case of each plan (and in the case of each In-House Plan) whose assets are proposed to be invested in a Pooled Fund after such Pooled Fund has satisfied the conditions set forth in this exemption to engage in the covered transactions, the investment by such plan (or by such In-House Plan) in the Pooled Fund is subject to the prior written authorization of an Independent Fiduciary representing such plan (or the prior written authorization by the fiduciary of such In-House Plan, as the case may be), following the receipt by such Independent Fiduciary of such plan (or by the fiduciary of such In-House Plan, as the case may be) of the written information described, above, in Section II(k)(2)(i) and (ii), provided that the Notice and the Grant, described

above in Section II(k)(2)(i), are provided simultaneously.

(2) For purposes of this Section II(l), the requirement that the fiduciary responsible for the decision to authorize the transactions described, above, in Section I of this exemption for each plan proposing to invest in a Pooled Fund be independent of the Asset Manager and its affiliates shall not apply in the case of an In-House Plan.

(m) Subsequent to the initial authorization by an Independent Fiduciary of a plan (or by a fiduciary of an In-House Plan) to invest in a Pooled Fund that engages in the covered transactions, the Asset Manager will continue to be subject to the requirement to provide within a reasonable period of time any reasonably available information regarding the covered transactions that the Independent Fiduciary of such plan (or the fiduciary of such In-House Plan, as the case may be) requests the Asset Manager to provide.

(n) At least once every three months, and not later than 45 days following the period to which such information relates, the Asset Manager shall furnish:

(1) In the case of each single Client Plan that engages in the covered transactions, the information described, below, in this Section II(n)(3)–(7), to the Independent Fiduciary of each such single Client Plan.

(2) In the case of each Pooled Fund in which a Client Plan (or in which an In-House Plan) invests, the information described, below, in this Section II(n)(3)–(6) and (8), to the Independent Fiduciary of each such Client Plan (and to the fiduciary of each such In-House Plan) invested in such Pooled Fund.

(3) A quarterly report (the Quarterly Report) (which may be provided electronically) which discloses all the Securities purchased pursuant to this exemption during the period to which such report relates on behalf of the Client Plan, In-House Plan, or Pooled Fund to which such report relates, and which discloses the terms of each of the transactions described in such report, including:

(i) The type of Securities (including the rating of any Securities which are debt securities) involved in each transaction;

(ii) The price at which the Securities were purchased in each transaction;

(iii) The first day on which any sale was made during the offering of the Securities;

(iv) The size of the issue of the Securities involved in each transaction;

(v) The number of Securities purchased by the Asset Manager for the Client Plan, In-House Plan, or Pooled Fund to which the transaction relates;

(vi) The identity of the underwriter from whom the Securities were purchased for each transaction;

(vii) The underwriting spread in each transaction (*i.e.,* the difference, between the price at which the underwriter purchases the Securities from the issuer and the price at which the Securities are sold to the public);

(viii) The price at which any of the Securities purchased during the period to which such report relates were sold; and

(ix) The market value at the end of the period to which such report relates of the Securities purchased during such period and not sold;

(4) The Quarterly Report contains:

(i) A representation that the Asset Manager has received a written certification signed by an officer of the Affiliated Broker-Dealer, as described, above, in Section II(g)(2), affirming that, as to each AUT covered by this exemption during the past quarter, the Affiliated Broker-Dealer acted in compliance with Section II(e), (f), and (g) of this exemption, and

(ii) A representation that copies of such certifications will be provided upon request;

(5) A disclosure in the Quarterly Report that states that any other reasonably available information regarding a covered transaction that an Independent Fiduciary (or fiduciary of an In-House Plan) requests will be provided, including, but not limited to:

(i) The date on which the Securities were purchased on behalf of the Client Plan (or the In-House Plan) to which the disclosure relates (including Securities purchased by Pooled Funds in which such Client Plan (or such In-House Plan) invests);

(ii) The percentage of the offering purchased on behalf of all Client Plans (and the *pro-rata* percentage purchased on behalf of Client Plans and In-House Plans investing in Pooled Funds); and

(iii) The identity of all members of the underwriting syndicate;

(6) The Quarterly Report discloses any instance during the past quarter where the Asset Manager was precluded for any period of time from selling Securities purchased under this exemption in that quarter because of its status as an affiliate of an Affiliated Broker-Dealer and the reason for this restriction;

(7) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each single Client Plan that engages in the covered transactions that the authorization to engage in such covered transactions may be terminated, without penalty to such single Client Plan, within five (5) days after the date that the Independent Fiduciary of such single Client Plan informs the person identified in such notification that the authorization to engage in the covered transactions is terminated; and

(8) Explicit notification, prominently displayed in each Quarterly Report sent to the Independent Fiduciary of each Client Plan (and to the fiduciary of each In-House Plan) that engages in the covered transactions through a Pooled Fund that the investment in such Pooled Fund may be terminated, without penalty to such Client Plan (or such In-House Plan), within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the non-withdrawing plans, after the date that that the Independent Fiduciary of such Client Plan (or the fiduciary of such In-House Plan, as the case may be) informs the person identified in such notification that the investment in such Pooled Fund is terminated.

(o) For purposes of engaging in covered transactions, each Client Plan (and each In-House Plan) shall have total net assets with a value of at least $50 million (the $50 Million Net Asset Requirement). For purposes of engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be) (the $100 Million Net Asset Requirement).

For purposes of a Pooled Fund engaging in covered transactions, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets with a value of at least $50 million. Notwithstanding the foregoing, if each such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets with a value of at least $50 million, the $50 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which has total net assets with a value of at least $50 million. For purposes of a Pooled Fund engaging in covered transactions involving an Eligible Rule 144A Offering, each Client Plan (and each In-House Plan) in such Pooled Fund shall have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be). Notwithstanding the foregoing, if each

such Client Plan (and each such In-House Plan) in such Pooled Fund does not have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or In-House Plan, as the case may be), the $100 Million Net Asset Requirement will be met if 50 percent (50%) or more of the units of beneficial interest in such Pooled Fund are held by Client Plans (or by In-House Plans) each of which have total net assets of at least $100 million in securities of issuers that are not affiliated with such Client Plan (or such In-House Plan, as the case may be), and the Pooled Fund itself qualifies as a QIB, as determined pursuant to SEC Rule 144A (17 CFR 230.144A(a)(1)(i)(F)).

For purposes of the net asset requirements described above, in this Section II(o), where a group of Client Plans is maintained by a single employer or controlled group of employers, as defined in section 407(d)(7) of the Act, the $50 Million Net Asset Requirement (or in the case of an Eligible Rule 144A Offering, the $100 Million Net Asset Requirement) may be met by aggregating the assets of such Client Plans, if the assets of such Client Plans are pooled for investment purposes in a single master trust.

(p) The Asset Manager qualifies as a "qualified professional asset manager" (QPAM), as that term is defined under Part V(a) of PTE 84–14. Further, the Asset Manager, which qualifies as a QPAM, must also have total client assets under its management and control in excess of $5 billion, as of the last day of its most recent fiscal year and shareholders' or partners' equity in excess of $1 million.

(q) No more than 20 percent of the assets of a Pooled Fund at the time of a covered transaction are comprised of assets of In-House Plans for which the Asset Manager or the Affiliated Broker-Dealer exercises investment discretion.

(r) The Asset Manager and the Affiliated Broker-Dealer, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons, described, below, in Section II(s), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a plan which engages in the covered transactions, other than the Asset Manager and the Affiliated Broker-Dealer, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by Section II(s); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of the Asset Manager, or the Affiliated Broker-Dealer, as applicable, such records are lost or destroyed prior to the end of the six-year period.

(s)(1) Except as provided, below, in Section II(s)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above, in Section II(r), are unconditionally available at their customary location for examination during normal business hours by—

(i) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the SEC; or

(ii) Any fiduciary of any plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary; or

(iii) Any employer of participants and beneficiaries and any employee organization whose members are covered by a plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(iv) Any participant or beneficiary of a plan that engages in the covered transactions, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described above, in Section II(s)(1)(ii)–(iv), shall be authorized to examine trade secrets of the Asset Manager, or the Affiliated Broker-Dealer, or commercial or financial information which is privileged or confidential; and

(3) Should the Asset Manager or the Affiliated Broker-Dealer refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(s)(2) above, the Asset Manager shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Section III—Definitions*

(a) The term, "the Applicant," means Columbia Management Advisors, LLC.

(b) The term, "Affiliated Broker-Dealer," means any broker-dealer affiliate, as "affiliate" is defined, below, in Section III(c), of the Applicant, as "Applicant" is defined, above, in Section III(a), that meets the requirements of this exemption. Such Affiliated Broker-Dealer may participate in an underwriting or selling syndicate as a manager or member. The term, "manager," with respect to a syndicate, means any member of an underwriting or selling syndicate who, either alone or together with other members of the syndicate, is authorized to act on behalf of the members of the syndicate in connection with the sale and distribution of the Securities, as defined below, in Section III(i), being offered or who receives compensation from the members of the syndicate for its services as a manager of the syndicate.

(c) The term "affiliate" of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee, or relative, as defined in section 3(15) of the Act, of such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

For purposes of this exemption, the definition of "affiliate" shall include any entity that satisfies such definition in the future.

(d) The term "Asset Manager" means Columbia or an affiliate of Columbia as defined above in Section III(c), which entity acts as the fiduciary with respect to Client Plan(s), as defined in Section III(f), below, or Pooled Fund(s), as defined in Section III(g), below.

(e) The term, "control," means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term, "Client Plan(s)," means an employee benefit plan(s) that is subject to the Act and/or the Code, and for which plan(s) an Asset Manager exercises discretionary authority or discretionary control respecting management or disposition of some or all of the assets of such plan(s), but excludes In-House Plans, as defined, below, in Section III(m).

(g) The term, "Pooled Fund(s)," means a common or collective trust fund(s) or a pooled investment fund(s):

(1) In which employee benefit plan(s) subject to the Act and/or Code invest,

(2) Which is maintained by an Asset Manager, and

(3) For which such Asset Manager exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s).

(h)(1) The term, "Independent Fiduciary," means a fiduciary of a plan who is unrelated to, and independent of the Asset Manager and the Affiliated Broker-Dealer. For purposes of this

exemption, a fiduciary of a plan will be deemed to be unrelated to, and independent of the Asset Manager and the Affiliated Broker-Dealer, if such fiduciary represents in writing that neither such fiduciary, nor any individual responsible for the decision to authorize or terminate authorization for the transactions described above, in Section I of this exemption, is an officer, director, or highly compensated employee (within the meaning of Code section 4975(e)(2)(H)) of the Asset Manager and the Affiliated Broker-Dealer, and represents that such fiduciary shall advise the Asset Manager within a reasonable period of time after any change in such facts occur.

(2) Notwithstanding anything to the contrary in this Section III(h), a fiduciary of a plan is not independent:

(i) If such fiduciary directly or indirectly controls, is controlled by, or is under common control with the Asset Manager or the Affiliated Broker Dealer;

(ii) If such fiduciary directly or indirectly receives any compensation or other consideration from the Asset Manager, or the Affiliated Broker-Dealer for his or her own personal account in connection with any transaction described in this exemption;

(iii) If any officer, director, or highly compensated employee (within the meaning of Code section 4975(e)(2)(H)) of the Asset Manager responsible for the transactions described above, in Section I of this exemption, is an officer, director, or highly compensated employee (within the meaning of Code section 4975(e)(2)(H)) of the sponsor of the plan or of the fiduciary responsible for the decision to authorize or terminate authorization for the transactions described above, in Section I. However, if such individual is a director of the sponsor of the plan or of the responsible fiduciary, and if he or she abstains from participation in: (A) The choice of the plan's investment manager/adviser; and (B) the decision to authorize or terminate authorization for transactions described above, in Section I, then this Section III(h)(2)(iii) shall not apply.

(3) The term, "officer," means a president, any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance), or any other officer who performs a policy-making function for Columbia or any affiliate thereof.

(i) The term, "Securities," shall have the same meaning as defined in section 2(36) of the Investment Company Act of 1940 (the 1940 Act), as amended (15 U.S.C. 80a–2(36)(2001)). For purposes of this exemption, mortgage-backed or other asset-backed securities rated by one of the Rating Organizations, as defined, below, in Section III(l), will be treated as debt securities.

(j) The term, "Eligible Rule 144A Offering," shall have the same meaning as defined in SEC Rule 10f–3(a)(4) (17 CFR 270.10f–3(a)(4)) under the 1940 Act).

(k) The term, "qualified institutional buyer," or the term, "QIB," shall have the same meaning as defined in SEC Rule 144A (17 CFR 230.144A(a)(1)) under the 1933 Act.

(l) The term, "Rating Organizations," means Standard & Poor's Rating Services, Moody's Investors Service, Inc., Fitch Ratings, Inc., Dominion Bond Rating Service Limited, and Dominion Bond Rating Service, Inc., or any successors thereto.

(m) The term, "In-House Plan(s)," means an employee benefit plan(s) that is subject to the Act and/or the Code, and that is sponsored by the Applicant as defined, above, in Section III(a), or its affiliate, as defined in Section III(c), for its own employees.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on December 22, 2009 at 74 FR 68110.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of March 2010.

**Ivan Strasfel,**

*Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.*

[FR Doc. 2010–5535 Filed 3–12–10; 8:45 am]

**BILLING CODE 4510–29–P**

## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

### Application Nos. and Proposed Exemptions; D–11500, Carle Foundation Hospital & Affiliates Pension Plan; and Barclays California Corporation (Barcal); et al.

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration

(EBSA), Office of Exemption Determinations, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. _____, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "*moffitt.betty@dol.gov*", or by FAX to (202) 219–0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

*Warning:* If you submit written comments or hearing requests, do not include any personally-identifiable or confidential business information that you do not want to be publicly-disclosed. All comments and hearing requests are posted on the Internet exactly as they are received, and they can be retrieved by most Internet search engines. The Department will make no deletions, modifications or redactions to the comments or hearing requests received, as they are public records.

**Notice to Interested Persons**

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

**Carle Foundation Hospital & Affiliates Pension Plan; Located in Urbana, Illinois**

*[Application No. D–11500]*

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570 subpart B (55 FR 32836, 32847, August 10, 1990).

If the proposed exemption is granted, the restrictions in section 406(a)(1)(A) and (D) and section 406(b)(1) and (b)(2) of the Act, and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply to the sale of a certain limited partnership interest (the LPI) by the Carle Foundation Hospital & Affiliates Pension Plan (the Plan) to Carle Foundation Hospital (the Employer), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The sale is a one-time transaction for cash;

(b) The terms and conditions of the sale are at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated third party;

(c) The sales price is the greater of: (1) The fair market value of the LPI as of the date of the sale, as determined by a qualified, independent appraiser, or (2) the Plan's total capital contributions as of the date of the sale, plus imputed earnings (calculated based upon the applicable one-month Treasury bill rates) from the date of the Plan's acquisition of the LPI to the date of the sale;

(d) The Plan pays no commissions, fees, or other expenses in connection with the sale; and

(e) The Plan fiduciaries review and approve the methodology used by the qualified, independent appraiser, ensure that such methodology is properly applied in determining the fair market value of the LPI, and also determine whether it is prudent to go forward with the proposed transaction.

**Summary of Facts and Representations**

1. The Carle Foundation Hospital & Affiliates Pension Plan (the Plan) is a money purchase pension plan sponsored by Carle Foundation Hospital (the Employer), who is located in Urbana, Illinois. The Plan had approximately 2,361 participants and beneficiaries, as of November 13, 2009, and total net assets of approximately $54,499,485, as of the same date. First Busey Trust & Investment Co. is the Plan's directed trustee.

The Plan historically did not allow participant-directed investments. Since the Plan's initial investment in the subject limited partnership interest (LPI), the Employer determined that it would be appropriate and in the best interests of the participants and beneficiaries to make the Plan a participant-directed plan under section 404(c) of the Act. Thus, the Plan was restructured to permit participant direction, effective March 1, 2008. In order to finalize this conversion to a participant-directed plan, the Plan must liquidate the LPI.

2. The LPI is an interest in the Pantheon USA Fund VII, L.P. (the Fund). The Fund is a limited partnership that invests in private equity funds (*i.e.,* a "fund of funds"). The Fund's objective is to generate superior, risk-adjusted returns for its investors through a diversified portfolio of leveraged buyout, venture capital, and special situation funds. According to the applicant, the Plan made a $1,500,000 commitment to the Fund in December 2006.[1] As of September 14, 2009, the Plan's capital contributions to the Fund totaled $457,500.[2]

Pantheon Ventures, Inc. (Pantheon) is the Fund's investment adviser. It is represented that the fees charged by the Fund are based on a percentage of the capital commitment made by investors to the Fund; the Plan is currently paying a fee of 0.75%. The terms of the Fund provide that the Fund will continue for thirteen years from the date of its first investment, which was made in May 2006, and may be extended for up to three additional years. Furthermore, the Plan may not sell or otherwise transfer its LPI to another investor without the written consent of Pantheon (acting as

[1] The Department expresses no opinion herein as to whether the acquisition and holding of the LPI by the Plan meets the requirements of Part 4 in Title I of the Act.

[2] According to the applicant, the Employer has made a $15,000,000 commitment to the Fund, with capital contributions to the Fund totaling $4,575,000, as of September 14, 2009. It is represented that the decision to purchase an interest in the Fund on behalf of the Plan was a decision made independently of the Employer's decision to purchase its own interest in the Fund; thus, according to the applicant, there was no agreement, arrangement, or understanding that the Plan's investment would be a means of enabling the Employer or any other Plan fiduciary to invest in the Fund or otherwise use the Plan's assets in a manner designed to benefit such fiduciary.

manager of the Fund's General Partner, PUSA VII GP, LLC).

The Plan's investment adviser, Summit Strategies Group (Summit), consulted with Pantheon, and communicated information regarding the limited secondary market for the LPI to the Employer. Therefore, the Employer proposes to purchase the LPI from the Plan.[3] However, the Carle Pension Plan Administrative Committee (the Plan Committee) will make the ultimate determination whether or not to sell the Plan's LPI to the Employer; the Plan Committee is a named fiduciary of the Plan, along with the Employer's Board of Directors, which monitors the Plan Committee.

3. The LPI was appraised for the Plan Committee by Andrew S. Ward, Managing Director, and Mark F. Fournier, Director, of Stout Risius Ross, Inc. (SRR), consistent with the standards of Financial Accounting Standard (FAS) 157, Fair Value Measurements, which is effective for financial statements issued for fiscal years beginning after November 15, 2007.[4] The applicant represents that SRR is a qualified, independent appraiser located in Chicago, Illinois. SRR is a financial advisory firm that specializes in investment banking, valuation and financial opinions, and dispute advisory and forensic services. SRR represents that it has considerable experience providing valuation opinions of private equity funds, hedge funds, and similar private companies. It is represented that SRR is not related to, and has no interest in, the Employer or an affiliate thereof and that less than 1% of SRR's gross annual income is derived from the Employer or an affiliate thereof.

SRR's valuation report of September 11, 2009 states that the principal sources of information used to estimate the fair market value of the LPI included, but were not limited to:

- The Fund's Limited Partnership Agreement, dated April 28, 2006;
- The Fund's financial statements for the year ended December 31, 2008, audited by PriceWaterhouseCoopers;
- The Fund's Investment Adviser's Report for the quarter ending March 31, 2009;
- The Fund's Private Placement Memorandum, dated March 2006;
- Discussions with Pantheon representatives concerning the assets and liabilities held by the Partnership; and
- Public information regarding market evidence of lack of control and lack of marketability discounts.

Regarding SRR's valuation methodology, the report states that several valuation approaches were considered, including a Market Approach, an Income Approach, and an Asset Approach. SRR relied primarily on a Market Approach, a valuation technique whereby the value of the subject company is calculated based on the prices of actual transactions for similar companies. These observations make it possible to determine the value of shares that have no active market. This can be accomplished via either the Guideline Public Company Method or the Merger and Acquisition Method. SRR used the Guideline Public Company Method, a valuation technique whereby the value of a company is estimated by comparing it to similar public companies. SRR states that if the Fund were publicly traded, a Marketable, Non-controlling Interest Value of Equity in the Fund as a whole was estimated to be $440,000,000. They then calculated the Plan's 0.07% interest in the Fund ($440,000,000 × 0.0007 = $308,000) and subtracted a 20% discount for lack of marketability ($308,000 × 0.20 = $62,000) to arrive at a fair market value of $246,000 for the LPI ($308,000 − $62,000 = $246,000), as of August 31, 2009.

4. The Employer proposes to pay the Plan the greater of: (1) The fair market value of the LPI as of the date of the sale, as determined by SRR, or (2) the Plan's total capital contributions, as of the date of the sale, plus imputed earnings (based upon the applicable one-month Treasury bill rates) from the date of the Plan's acquisition of the LPI to the date of the sale. As of September 14, 2009, the Plan's capital contributions totaled $457,500 and imputed earnings were calculated to be $9,241. These amounts will be updated to reflect any additional capital contributions made to the Fund and earnings through the date of the actual sale.

The applicant represents that the sale of the Plan's LPI to the Employer is in the best interests of the Plan because it will enable the Plan to recoup its investment in the LPI, as well as realize a reasonable gain on investment. In addition, the continued holding of the LPI by the Plan following its conversion to a participant-directed Plan imposes a significant recordkeeping burden on the Plan.

The sale of the LPI will be a one-time transaction for cash, and the Plan will incur no fees, commissions, or other expenses in connection with the sale. The Plan Committee will review and approve the methodology used by SRR and ensure that such methodology is properly applied in determining the fair market value of the LPI. The Plan Committee will also make the decision whether or not to proceed with the proposed sale of the LPI to the Employer; if the Plan Committee decides to proceed, it will have SRR update its valuation of the LPI as of the date of the sale.

The Employer is bearing the costs of the exemption application, the appraisal of the LPI, and notification of interested persons.

5. In summary, the applicant represents that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act for the following reasons: (a) The sale will be a one-time transaction for cash; (b) the terms and conditions of the sale will be at least as favorable to the Plan as those that the Plan could obtain in an arm's length transaction with an unrelated third party; (c) the sales price will be the greater of: (1) The fair market value of the LPI as of the date of the sale, as determined by a qualified, independent appraiser, or (2) the Plan's total capital contributions as of the date of the sale, plus imputed earnings (calculated based upon the applicable one-month Treasury bill rates) from the date of the Plan's acquisition of the LPI to the date of the sale; (d) the Plan will pay no commissions, fees, or other expenses in connection with the sale; and (e) the Plan Committee will review and approve the methodology used by SRR, ensure that such methodology is properly applied in determining the fair market value of the LPI, and also determine whether it is prudent to go forward with the proposed transaction.

**FOR FURTHER INFORMATION CONTACT:** Ms. Karin Weng of the Department, telephone (202) 693–8557. (This is not a toll-free number.)

[3] Because the Fund was closed to new investors as of June 29, 2007, Pantheon would need to grant a special waiver of the required $10 million commitment to any unrelated purchaser who is not already invested in the Fund. Pantheon has expressed a strong preference that the purchaser of the Plan's LPI be an investor already invested in the Fund. Summit has not identified any investors, other than the Employer, whose stated investment goals would be consistent with purchasing the Plan's LPI without a discount. The Department notes that no relief is being provided in this proposed exemption beyond the Plan's sale of the LPI to the Employer for any additional prohibited transactions, if any, that may have occurred as a result of co-investing in the same Fund by the Plan and the Employer.

[4] FAS 157 provides guidance for measuring the fair value of assets and liabilities, including hard-to-value alternative investments.

**Barclays California Corporation (Barcal); Located in San Francisco, California**

*Exemption Application Number D–11527*

**Proposed Exemption**

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).[5]

If the proposed exemption is granted, the restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act, section 8477(c)(2) of the Federal Employees' Retirement System Act of 1986, as amended (FERSA), and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective September 4, 2008, to the cash sales (the Sales) by the Barclays Global Investors "Money Market Fund" and "Cash Equivalent Fund II," which are short-term collective investment funds (STIFs) managed or maintained by Barclays Global Investors, N.A. (BGI), of certain short-term debt instruments (the Notes) to Barcal, provided that the following conditions are met:

(a) The Sales were one-time transactions for cash payment made on a delivery versus payment (*i.e.,* same day) basis in the amount described in paragraph (b);

(b) The STIFs received an amount equal to the greater of:

(1) The amortized cost (including accrued and unpaid interest) of the Notes, determined as of the dates of the Sales, or

(2) The fair market value (including accrued and unpaid interest) of the Notes, determined by an independent third party source;

(c) The STIFs did not bear any commissions, transaction costs or other expenses in connection with the Sales;

(d) The terms and conditions of the Sales were at least as favorable to the STIFs as those available in an arm's-length transaction with an unrelated party.

(e) BGI, as fiduciary of the STIFs, determined that the Sales were in the best interest of the STIFs and any employee benefit plans (the Plans) invested in the STIFs as of the dates of the Sales.

(f) BGI took all appropriate actions necessary to safeguard the interests of the STIFs and any Plans invested in the STIFs in connection with the Sales.

(g) If the exercise of any of Barcal's rights, claims, or causes of action in connection with its ownership of the Notes results in Barcal recovering from the issuer of the Notes, or from any third party, an aggregate amount that is more than the sum of:

(1) The purchase price paid for such Notes by Barcal; and

(2) The interest due on the notes from and after the date Barcal purchased the Notes from the STIFs,

Barcal will refund such excess amount promptly to the STIFs (after deducting all reasonable expenses incurred in connection with the recovery).

(h) BGI maintains, or causes to be maintained, for a period of six (6) years from the date of any covered transaction such records as are necessary to enable the persons described below in paragraph (i)(1), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a Plan which engages in the covered transactions, other than BGI and its affiliates, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (i)(1);

(2) A separate prohibited transaction shall not be considered to have occurred solely because due to circumstances beyond the control of BGI, such records are lost or destroyed prior to the end of the six-year period.

(i)(1) Except as provided, below, in paragraph (i)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in paragraph (h) are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the Securities and Exchange Commission; or

(B) Any fiduciary of any Plan that engages in the covered transactions, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a Plan that engages in a covered transaction, or duly authorized employee or representative of such participant or beneficiary;

(2) None of the persons described, above, in paragraph (i)(1)(B)–(D) shall be authorized to examine trade secrets of BGI, or commercial or financial information which is privileged or confidential; and

(3) Should BGI refuse to disclose information on the basis that such information is exempt from disclosure, BGI shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

*Effective Date:* This proposed exemption, if granted, will be effective September 4, 2008.

**Summary of Facts and Representations**

1. BGI is a national banking association headquartered in San Francisco, California. BGI serves as fiduciary investment manager for employee benefit plans invested in separately managed accounts and pooled funds. BGI also manages certain assets for the Federal Thrift Savings Plan established pursuant to the provisions of FERSA. As of June 2008, BGI and its worldwide investment advisory affiliates had over $1.9 trillion in assets under management. BGI is a wholly owned subsidiary of Barcal, and an indirect majority-owned subsidiary of Barclays Bank PLC, a British bank.[6]

2. The pooled funds managed or maintained by BGI include short-term collective investment funds (STIFs). The STIFs generally invest in short-term investments of high quality and low risk, with the goal of protecting capital while securing a return better than a relevant benchmark, such as three-month LIBOR. STIF investments include cash, as well as bank notes, corporate notes, government bills and other relatively safe short-term debt instruments. Employee benefit plans, including the Federal Thrift Savings Plan (collectively, the Plans), may invest in the STIFs.

3. STIFs managed or maintained by BGI purchased notes issued by a structured investment vehicle (SIV) called Whistlejacket Capital Ltd. (Whistlejacket).[7] SIVs are off-balance-

[5] For purposes of this proposed exemption, references to section 406 of ERISA should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[6] As of December 1, 2009, BGI became a wholly-owned subsidiary of BlackRock, Inc.

[7] In June 2007, Whistlejacket Capital, LLC, White Pine Corp. Ltd., and White Pine Finance, LLC

sheet vehicles that issue short and medium-term debt to finance their purchase of longer-term assets, including collateralized debt obligations. Many SIVs, including Whistlejacket, have lost significant value in the current credit crisis because the value of their underlying assets has dropped and investors who have bought their short-term debt have left the market. Whistlejacket is not managed or sponsored by or affiliated with Barcal or BGI or any of their affiliates (collectively, the Applicant).

4. In February 2008, the market value of Whistlejacket's assets less its senior liabilities fell to less than half the amount of its capital, which triggered the appointment of a receiver on February 11, 2008. On February 12, 2008, two nationally-recognized statistical rating organizations downgraded short-term senior debt instruments issued by Whistlejacket (the Notes). On February 21, 2008, Whistlejacket began defaulting on the Notes. The Notes have dropped significantly in value.

5. In September 2008, Barcal purchased the Notes from the STIFs to eliminate the negative impact of the Notes on the STIFs' net asset value. As consideration for the Notes, Barcal paid the greater of: (a) The amortized cost (including accrued and unpaid interest) of the Notes, as of the dates of the Sales, or (b) the fair market value (including accrued and unpaid interest) of the Notes, as of the dates of the Sales, determined by an independent third party source. The Sales were on a "delivery versus payment" (*i.e.,* same day) basis in immediately available United States dollars. The STIFs incurred no commission or transaction costs in connection with the Sales. BGI represents that it determined that the Sales were in the best interest of the STIFs and any employee benefit plans (the Plans) invested in the STIFs, and that it took all appropriate actions necessary to safeguard the interests of the STIFs and the Plans. BGI represents that it will maintain all the records necessary to explain the transactions described herein for at least six years, and will make those records available to the Department and to the named fiduciary of each affected Plan.

6. The Applicant represents that there were three Notes purchased by Barcal from two different STIFs. On September 19, 2008, Barcal purchased $15,000,000 of White Pine Finance LLC debt, CUSIP 96432XKD4 from the Money Market Fund, with an acquisition price of 99.99961824. The maturity date on the Note was September 26, 2008. There were no bids in the market for these securities, and the Applicant's internal committee which prices those assets which cannot otherwise be priced estimated a fair market value for the Note of 93.0539. The Receiver for the Issuer of the Note, which is unrelated to Barcal, valued the Note at 95.1225.

The second STIF that was involved was Cash Equivalent Fund II (CEFII). On September 4, 2008, Barcal purchased $40,000,000 of Whistlejacket Capital, LLC debt, CUSIP 96335WFT5, from CEFII, with an acquisition price of 99.9997822. The maturity date on the Note was September 8, 2008. There were no bids in the market for these securities, and the Applicant's internal committee which prices those assets which cannot otherwise be priced estimated a fair market value for the Note of 93.5312. The Receiver for the Issuer of the Note, which is unrelated to Barcal, valued the Note at 96.2597.

On September 19, 2008, Barcal purchased $135,000,000 of White Pine Finance LLC debt, CUSIP 96432XKD4, from CEFII, with an acquisition price of 99.99961824. The maturity date on the Note was September 26, 2008. There were no bids in the market for these securities, and the Applicant's internal committee which prices those assets which cannot otherwise be priced estimated a fair market value for the Note of 93.0539. The Receiver for the Issuer of the Note, which is unrelated to Barcal, valued the Note at 95.1225.

With respect to all three purchases, the Applicant represents that the price paid by Barcal was the amortized cost of the Note plus accrued interest. The Applicant represents that all three Sales took place within a week of the maturity date of the Notes because, within the judgment of BGI, the timing of the Sales maximized the value for the STIFs and did not result in the STIFs holding a defaulted Note.

7. The Applicant represents that if the exercise of any of Barcal's rights, claims, or causes of action in connection with its ownership of the Notes results in Barcal recovering from the issuer of the Notes, or from any third party, an aggregate amount that is more than the sum of:

(1) The purchase price paid for such Notes by Barcal; and

(2) The interest due on the Notes from and after the date Barcal purchased the Notes from the STIFs,

Barcal will refund such excess amount promptly to the STIFs (after deducting all reasonable expenses incurred in connection with the recovery).

8. In summary, the Applicant represents that the transactions satisfied the statutory criteria of section 408(a) of the Act, section 4975(c)(2) of the Code and section 8477(c)(3) of FERSA because: (a) Each Sale was a one-time transaction for cash; (b) with respect to all three Sales, the price paid by Barcal was the amortized cost of the Note plus accrued interest, which was greater than the fair market value of the Note as determined by the Receiver for the issuer of the Note; (c) no STIF paid any commissions or other transaction expenses with respect to the Sales; (d) BGI took all appropriate actions necessary to safeguard the interests of the STIFs and any Plans invested in the STIFs in connection with the Sales; (e) the terms and conditions of the Sales were at least as favorable to the STIFs as those available in an arm's-length transaction with an unrelated party; (f) BGI determined that the Sales were in the best interest of the STIFs and any Plans invested in the STIFs as of the dates of the Sales; (g) BGI will maintain all the records necessary to explain the transactions described herein for at least six years, and will make those records available to the Department and to the named fiduciary of each affected Plan; and (h) Barcal will promptly refund to the STIFs any amount recovered from the issuer of the Notes or any third party in connection with the exercise of any rights, claims or causes of action resulting from its ownership of the Notes, if such amounts are in excess of:

(1) The purchase price paid for such Notes by Barcal; and

(2) The interest due on the Notes from and after the date Barcal purchased the Notes from the STIFs.

**Notice to Interested Persons**

The Applicant represents that because one of the STIFs was a sweep vehicle in which investing Plans changed over time, hundreds of Plans would need to be notified, at great additional expense to the Applicant, despite the fact that all the details of the Sales were disclosed in the STIFs' financial statements which were made available to all Plan clients at the end of the year of the transactions. Therefore, the only practical means of notifying participants and beneficiaries of such Plans of this proposed exemption is by the publication of this notice in the **Federal Register**. Comments and requests for a hearing must be received by the Department not later than 30 days from the date of publication of this notice of proposed exemption in the **Federal Register**.

merged into Whistlejacket. The applicant requests that the exemption proposed herein apply to the purchase by Barcal of securities issued by Whistlejacket or any of the merged entities or their predecessors.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department, telephone (202) 693–8546. (This is not a toll-free number.)

**General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of March 2010.

**Ivan Strasfeld,**

*Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.*

[FR Doc. 2010–5536 Filed 3–12–10; 8:45 am]

**BILLING CODE 4510–29–P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

**[Notice (10–026)]**

### NASA Advisory Council; Science Committee; Planetary Science Subcommittee; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** The National Aeronautics and Space Administration (NASA) announces a meeting of the Planetary Science Subcommittee of the NASA Advisory Council (NAC). This Subcommittee reports to the Science Committee of the NAC. The meeting will be held for the purpose of soliciting from the scientific community and other persons scientific and technical information relevant to program planning.

**DATES:** Thursday, April 8, 2010, 8 a.m. to 5 p.m., and Friday, April 9, 2010, 8 a.m. to 3 p.m. EDT.

**ADDRESSES:** NASA Headquarters, 300 E Street, SW., Room 9H40, Washington, DC 20546.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marian Norris, Science Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–4452, fax (202) 358–4118, or *mnorris@nasa.gov.*

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public up to the capacity of the room. The agenda for the meeting includes the following topics:

—Planetary Science Division Update
—Mars Exploration Program Update
—Reports From Program Analysis Groups
—Assessment of the Planetary Science Division Research and Analysis/ Supporting Research and Technology Activities
—Update on NRC Decadal Survey in Planetary Science
—Science Mission Directorate Science Plan

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Attendees will be requested to sign a register and to comply with NASA security requirements, including the presentation of a valid picture ID, before receiving an access badge. Foreign nationals attending this meeting will be required to provide a copy of their passport, visa, or green card in addition to providing the following information no less than 10 working days prior to the meeting: Full name; gender; date/ place of birth; citizenship; visa/green card information (number, type, expiration date); passport information (number, country, expiration date); employer/affiliation information (name of institution, address, country, telephone); title/position of attendee. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Marian Norris via e-mail at *mnorris@nasa.gov* or by telephone at (202) 358–4452.

Dated: March 8, 2010.

**P. Diane Rausch,**

*Advisory Committee Management Officer, National Aeronautics and Space Administration.*

[FR Doc. 2010–5502 Filed 3–12–10; 8:45 am]

**BILLING CODE P**

## NATIONAL CREDIT UNION ADMINISTRATION

### Sunshine Act; Notice of Agency Meeting

**TIME AND DATE:** 10 a.m., Thursday, March 18, 2010.

**PLACE:** Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. Proposed Rule—Parts 701, 723 and 742 of NCUA's Rules and Regulations, Regulatory Flexibility Program.

2. Proposed Rule—Parts 701, 708a and 708b of NCUA's Rules and Regulations, Fiduciary Duties at Federal Credit Unions; Mergers and Conversions of Insured Credit Unions.

3. NCUA Strategic Plan 2010–2015 for 60-day Public Comment.

4. Insurance Fund Report.

**RECESS:** 11 a.m.

**TIME AND DATE:** 11:15 a.m., Thursday, March 18, 2010.

**PLACE:** Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Creditor Claim Appeal. Closed pursuant to Exemption (6).

2. Consideration of Supervisory Activities (2). Closed pursuant to Exemptions (8), (9)(A)(ii) and 9(B).

3. Personnel. Closed pursuant to Exemption (6).

**FOR FURTHER INFORMATION CONTACT:** Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

**Mary Rupp,**

*Board Secretary.*

[FR Doc. 2010–5709 Filed 3–11–10; 4:15 pm]

**BILLING CODE P**

## NATIONAL SCIENCE FOUNDATION

### Notice of Permits Issued Under the Antarctic Conservation Act of 1978

**AGENCY:** National Science Foundation.

**ACTION:** Notice of permits issued under the Antarctic Conservation of 1978, Public Law 95–541.

**SUMMARY:** The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

**FOR FURTHER INFORMATION CONTACT:** Nadene G. Kennedy, Permit Office, Office of Polar Programs, Rm. 755, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

**SUPPLEMENTARY INFORMATION:** On February 8, 2010, the National Science Foundation published a notice in the **Federal Register** of permit applications received. A permit was issued on March 10, 2020 to: H. William Detrich, III, Permit No. 2010–023.

**Nadene G. Kennedy,**

*Permit Officer.*

[FR Doc. 2010–5579 Filed 3–12–10; 8:45 am]

**BILLING CODE 7555–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–346]**

### FirstEnergy Nuclear Operating Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing; Correction

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing; Correction.

**SUMMARY:** This document corrects a notice appearing in the **Federal Register** on February 22, 2010 (75 FR 7628), which incorrectly stated a docket number. This action is necessary to correct the docket number.

**FOR FURTHER INFORMATION CONTACT:** Michael Mahoney, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone (301) 415–3867, e-mail *michael.mahoney@nrc.gov*.

**SUPPLEMENTARY INFORMATION:** On page 7628, in the 3rd column under Nuclear Regulatory Commission, first line, it is corrected to read from "Docket No. 50–341" to "Docket No. 50–346."

Dated in Rockville, Maryland, this 5th day of March 2010.

For the Nuclear Regulatory Commission.

**Michael Mahoney,**

*Project Manager, Plant Licensing Branch III–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–5559 Filed 3–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–271; NRC–2010–0100]**

### Entergy Nuclear Operations, Inc; Vermont Yankee Nuclear Power Station Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption, pursuant to Title 10 of the Code of Federal Regulations (10 CFR) section 73.5, "Specific exemptions," from the implementation date for certain new requirements of 10 CFR part 73, "Physical protection of plants and materials," for Facility Operating License No. DPR–28, issued to Entergy Nuclear Operations, Inc. (Entergy or the licensee), for operation of Vermont Yankee Nuclear Power Station (Vermont Yankee), located in Windham County, Vermont. Therefore, as required by 10 CFR 51.21, the NRC prepared an environmental assessment documenting its finding. The NRC concluded that the proposed actions will have no significant impact.

**Environmental Assessment**

*Identification of the Proposed Action*

The proposed action would exempt Vermont Yankee from the required implementation date of March 31, 2010, for several new requirements of 10 CFR part 73. Specifically, Vermont Yankee would be granted an exemption from being in full compliance with certain new requirements contained in 10 CFR 73.55 by the March 31, 2010, deadline. Entergy has proposed an alternate full compliance implementation date of September 20, 2010, approximately 5½ months beyond the date required by 10 CFR part 73. The proposed action, an extension of the schedule for completion of certain actions required by the revised 10 CFR part 73, does not involve any physical changes to the reactor, fuel, plant structures, water, or land at the Vermont Yankee site.

The proposed action is in accordance with the licensee's application dated January 21, 2010, as supplemented by letter dated February 17, 2010.

*The Need for the Proposed Action*

The proposed action is needed to provide the licensee with additional time to perform the required upgrades to the Vermont Yankee security system due to resource and logistical impacts and other factors.

The licensee has requested a scheduler exemption to the compliance date identified in 10 CFR 73.55(a)(1) to implement the specific requirements stated in 10 CFR 73.55(e)(7)(i)(B) and 10 CFR 73.55(i)(4)(i) for Vermont Yankee. The request for an exemption from March 31, 2010, implementation date to September 20, 2010, is based on completion of installation as well as testing and training of security personnel on the new features. This exemption will provide Vermont Yankee sufficient time for installation, testing, and training activities to be completed, considering initial permit delays, inclement winter weather construction delays and procurement delays.

*Environmental Impacts of the Proposed Action*

The NRC has completed its environmental assessment of the proposed exemption. The staff has concluded that the proposed action to extend the implementation deadline would not significantly affect plant safety and would not have a significant adverse effect on the probability of an accident occurring.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the environmental assessment and finding of no significant impact made by the Commission in promulgating its revisions to 10 CFR part 73 as discussed in a **Federal Register** notice dated March 27, 2009 (74 FR 13967). There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed exemption.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Steven's Act are expected. There are no impacts to the air or ambient air quality. There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental impacts are expected as a result of the proposed exemption.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action. In addition, in promulgating its revisions to 10 CFR part 73, the Commission prepared an environmental assessment and published a finding of no significant impact [part 73, Power Reactor Security Requirements, 74 FR 13926, 13967 (March 27, 2009)].

With its request to extend the implementation deadline, the licensee has proposed compensatory measures to be taken in lieu of full compliance with the new requirements specified in 10 CFR part 73. The licensee currently maintains a security system acceptable to the NRC and the proposed compensatory measures will continue to provide acceptable physical protection of the Vermont Yankee in lieu of the new requirements in 10 CFR part 73. Therefore, the extension of the implementation date of the new requirements of 10 CFR part 73 to September 20, 2010, would not have any significant environmental impacts.

The NRC staff 's safety evaluation will be provided in the exemption that will be issued as part of the letter to the licensee approving the exemption to the regulation, if granted.

*Environmental Impacts of the Alternatives to the Proposed Action*

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.,* the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. If the proposed action was denied, the licensee would have to comply with the March 31, 2010, implementation deadline. The environmental impacts of the proposed action and the alternative action are similar.

*Alternative Use of Resources*

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for Vermont Yankee Nuclear Power Station, Docket No. 50–271, dated July 1972, as supplemented through the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Vermont Yankee Nuclear Power Station," published in August 2007. Final Report (NUREG—1437, Supplement 30)."

*Agencies and Persons Consulted*

In accordance with its stated policy, on February 24, 2010, the NRC staff consulted with the Vermont State official of the Vermont Department of Public Service regarding the environmental impact of the proposed action. The State official had no comments.

**Finding of No Significant Impact**

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated January 21, 2010, as supplemented by letter dated February 17, 2010. Portions of the submittal dated January 21, 2010, as supplemented by letter dated February 17, 2010, contain security related sensitive information and, accordingly, are withheld from public disclosure in accordance with 10 CFR 2.390. Publicly available versions of this document are accessible electronically from the Agencywide Documents Access and Management System (ADAMS) with Accession Nos. ML100270294 and ML100100541743, respectively.

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 8th the day of March 2010.

For the Nuclear Regulatory Commission.

**James Kim,**

*Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–5562 Filed 3–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No 50–395; NRC–2010–0077]**

## South Carolina Electric and Gas Company; Virgil C. Summer Nuclear Station, Unit 1; Exemption

### 1.0 Background

The South Carolina Electric and Gas Company (SCE&G, the licensee) is the holder of Facility Operating License No. NPF–12 which authorizes operation of the Virgil C. Summer Nuclear Station, Unit 1 (VCSNS). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in Fairfield County in South Carolina.

### 2.0 Request/Action

Title 10 of the Code of Federal Regulations (10 CFR) Section 50.46, "Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors," requires, among other items, that:

> Each boiling or pressurized light-water nuclear power reactor fueled with uranium oxide pellets within cylindrical zircaloy or ZIRLO cladding must be provided with an emergency core cooling system (ECCS) that must be designed so that its calculated cooling performance following postulated loss-of-coolant accidents [LOCAs] conforms to the criteria set forth in paragraph (b) of this section.

Appendix K to 10 CFR part 50, "ECCS Evaluation Models," requires, among other items, that the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction shall be calculated using the Baker-Just equation. The regulations of 10 CFR 50.46 and 10 CFR part 50, Appendix K, make no provision for use of fuel rods clad in a material other than zircaloy or ZIRLO™. Since the chemical composition of the Optimized ZIRLO™ alloy differs from the specifications for zircaloy or ZIRLO™, a plant-specific exemption is required to allow the use of the Optimized ZIRLO™ alloy as a cladding material at VCSNS. Therefore,

by letter dated June 9, 2009, the licensee requested an exemption that would allow the use of Optimized ZIRLO™ fuel rod cladding at VCSNS.

**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 when (1) the exemptions are authorized by law, will not present an undue risk to public health and safety, and are consistent with the common defense and security; and (2) when special circumstances are present.

*Authorized by Law*

This exemption results in allowing the use of Optimized ZIRLO™ fuel rod cladding material at the VCSNS. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR part 50. The NRC staff has determined that granting of the licensee's proposed 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 50.46 is to establish acceptance criteria for adequate ECCS performance. By letter dated June 10, 2005, the NRC staff issued a safety evaluation (Addendum 1 SE) approving Addendum 1 to Westinghouse Topical Report WCAP–12610–P–A and CENPD–404–P–A, "Optimized ZIRLO™" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML051670408), wherein the NRC staff approved the use of Optimized ZIRLO™ as a fuel cladding material. The NRC staff approved the use of Optimized ZIRLO™ as a fuel cladding material based on: (1) Similarities with standard ZIRLO™, (2) demonstrated material performance, and (3) a commitment to provide irradiated data and validate fuel performance models ahead of burnups achieved in batch application. The NRC staff's safety evaluation for Optimized ZIRLO™ includes 10 conditions and limitations for its use.

As previously documented in that safety evaluation, and subject to compliance with the specific conditions of approval established therein, the NRC staff finds that the applicability of the ECCS acceptance criteria to Optimized ZIRLO™ has been demonstrated by Westinghouse. Ring compression tests performed by Westinghouse on Optimized ZIRLO™ (documented in Appendix B of Addendum1–A to WCAP–12610–P–A and CENPD–404–P–A, "Optimized ZIRLO™," July 2006, ADAMS Accession No. ML062080576) demonstrate an acceptable retention of post-quench ductility up to 10 CFR 50.46 limits of 2200 degrees Fahrenheit (°F) and 17 percent equivalent clad reacted (ECR). Furthermore, the NRC staff concludes that oxidation measurements provided by Westinghouse in a letter to the NRC, "SER [Safety Evaluation Report] Compliance with WCAP–12610–P–A & CENPD–404–P–A Addendum 1–A 'Optimized ZIRLO™' (Proprietary)," LTR–NRC–07–58, November 2007, ADAMS Accession No. ML073130562) illustrate that oxide thickness (and associated hydrogen pickup) for Optimized ZIRLO™ at any given burnup would be less than for both zircaloy-4 and ZIRLO™. Hence, the NRC staff concludes that Optimized ZIRLO™ would be expected to maintain better post-quench ductility than ZIRLO™. This finding is further supported by an ongoing loss-of-coolant accident (LOCA) research program at Argonne National Laboratory, which has identified a strong correlation between cladding hydrogen content (due to in-service corrosion) and post-quench ductility.

In addition, utilizing currently-approved LOCA models and methods, the licensee states that Westinghouse will perform an evaluation to ensure that the Optimized ZIRLO™ fuel rods continue to satisfy 10 CFR 50.46 acceptance criteria. For the reasons stated above, the NRC staff finds that granting the exemption request for the VCSNS will be consistent with the underlying purpose of the regulation.

Paragraph I.A.5 of Appendix K to 10 CFR part 50 states that the rates of energy release, hydrogen concentration, and cladding oxidation from the metal-water reaction shall be calculated using the Baker-Just equation. Since the Baker-Just equation presumes the use of zircaloy clad fuel, strict application of the rule would not permit use of the equation for Optimized ZIRLO™ cladding for determining acceptable fuel performance. However, the NRC staff has found that metal-water reaction tests performed by Westinghouse on Optimized ZIRLO™ (documented in Appendix B of WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A and subject to compliance with the specific conditions of approval established therein) demonstrate conservative reaction rates relative to the Baker-Just equation. Thus, the NRC staff finds that the use of Optimized ZIRLO™ will achieve the underlying purpose of paragraph I.A.5 of Appendix K in this circumstance.

Based on the above, no new accident precursors are created by using Optimized ZIRLO™, thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. In addition, the licensee will use NRC-approved methods for the reload design process for VCSNS reloads with Optimized ZIRLO™. Therefore, there is no undue risk to public health and safety due to using Optimized ZIRLO™.

*Consistent With Common Defense and Security*

This exemption results in allowing the use of Optimized ZIRLO™ fuel rod cladding material at the VCSNS. This change to the plant core configuration 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)(ii), are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule. The underlying purpose of 10 CFR 50.46 and Appendix K to 10 CFR part 50 is to establish acceptance criteria for ECCS performance. Therefore, since the underlying purposes of 10 CFR 50.46 and Appendix K are achieved through the use of Optimized ZIRLO™ fuel rod cladding material, the special circumstances required by 10 CFR 50.12(a)(2)(ii) for granting of an exemption from 10 CFR 50.46 and Appendix K exist.

**4.0 Conclusion**

The NRC staff has reviewed the licensee's request to use Optimized ZIRLO™ for fuel rod cladding material. Based on the NRC staff's evaluation as set forth above, the NRC staff concludes that, pursuant to 10 CFR 50.12(a), 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 SCE&G an exemption from the requirements of 10 CFR 50.46 and Appendix K to 10 CFR part 50, to allow the use of Optimized ZIRLO™ up to a burnup of 62 GWd/MTU for the VCSNS.

Pursuant to 10 CFR 51.32, the Commission has determined that the

granting of this exemption will not have a significant impact on the quality of the human environment as published in the **Federal Register** on March 3, 2010 (75 FR 9619). This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 8th day of March 2010.

For the Nuclear Regulatory Commission.

**Joseph G. Giitter,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–5557 Filed 3–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket Nos. 50–390 and 50–391; NRC–2010–0019]**

## Tennessee Valley Authority: Watts Bar Nuclear Plant, Units 1 and 2 Exemption

### 1.0 Background

Tennessee Valley Authority (TVA, the licensee) is the holder of Facility Operating License Number NPF–90, which authorizes operation of the Watts Bar Nuclear Plant (WBN), Unit 1. TVA obtained construction permit for Unit 2 that is currently being reviewed for a requested operating licensing process; Unit 2 must meet the same requirements as a licensed plant per Title 10 of the Code of Federal Regulations (10 CFR) part 73, "Physical protection of plants and materials," Section 73.55(a)(5).

The facility consists of two Westinghouse pressurized-water reactors (Unit 1 in operation and Unit 2 under construction), located in Rhea County, Tennessee.

### 2.0 Request/Action

Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," of 10 CFR part 73, published March 27, 2009, effective May 6, 2009, with a full implementation date of March 1, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security programs. The amendments to 10 CFR 73.55 published on March 27, 2009, establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post September 11, 2001, security orders. It is from three of these new requirements that WBN, Units 1 and 2 now seeks an exemption from the March 31, 2010, implementation date. All other physical security requirements established by this recent rulemaking have already been or will be implemented by the licensee by March 31, 2010.

By letter dated November 6, 2009, as supplemented by letter dated January 11, 2010, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." Portions of the licensee's November 6, 2009, letter contain safeguards and security sensitive information and, accordingly, are not available to the public. The January 11, 2010, letter is publicly available (Agencywide Documents Access and Management System Accession No. ML100130167). The licensee has requested an exemption from the March 31, 2010, compliance date stating that it must complete a number of significant modifications to the current site security configuration before all requirements can be met. Specifically, the request is for three specific 10 CFR 73.55 requirements that would be in place by September 24, 2012, versus the March 31, 2010, deadline. Being granted this exemption for the three items would allow the licensee to complete the modifications designed to update aging equipment and incorporate state-of-the-art technology to meet or exceed regulatory requirements.

### 3.0 Discussion of Part 73 Schedule Exemptions From the March 31, 2010, Full Implementation Date

Pursuant to 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as 'security plans.'" Pursuant to 10 CFR 73.55(a)(5), the date applies to Unit 2 as well. Pursuant to 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption, as noted above, would allow an extension from March 31, 2010, until September 24, 2012. As stated above, 10 CFR 73.5 allows the NRC to grant exemptions from the requirements of 10 CFR part 73. The NRC staff has determined that granting of the licensee's proposed exemption would not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, NRC approval of the licensee's exemption request is authorized by law.

In the draft final rule provided to the Commission, the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule (74 FR 13926, March 27, 2009). From this, it is clear that the Commission wanted to provide a reasonable timeframe for licensees to achieve full compliance.

As noted in the final power reactor security rule, the Commission also anticipated that licensees would have to conduct site-specific analyses to determine what changes were necessary to implement the rule's requirements, and that these changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected generic industry requests to extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4, 2009, letter from R.W. Borchardt, NRC, to M.S. Fertel, Nuclear Energy Institute). The licensee's request for an exemption is, therefore, consistent with the approach set forth by the Commission and discussed in the June 4, 2009, letter.

*Watts Bar Schedule Exemption Request*

The licensee provided detailed information in its November 6, 2009, letter, as supplemented by letter dated January 11, 2010, requesting an exemption. The NRC staff finds that the licensee has provided an adequate basis for the exemption request as well as appropriate detailed justification that describes the reason additional time is needed. Specifically, the WBN, Units 1 and 2 will be undertaking multiple large scope modifications to the physical protection program through four interrelated projects that require multiple supporting sub-tasks. These sub-tasks must be completed in sequence due to the complex interconnectivity of each project to other program components. The licensee has provided sufficiently

detailed technical information that supports the described solution for meeting the identified requirements. Because of the large scope of the proposed modifications and upgrades, significant engineering analysis, design, and planning are required to ensure system effectiveness upon completion of the four projects. In addition to project-specific tasks and procurement details, the TVA has also identified a variety of site-specific considerations that will impact the final completion date, such as refueling outages, manpower resources, engineering/design changes during construction, and/or weather conditions that may impact completion milestones. As with all construction activities, the licensee must also account for site-specific safety and construction methods regarding the areas in which work is to be performed, the location of existing infrastructure such as buried power lines, and/or unanticipated delays that could significantly impact the project schedules. These site-specific safety and construction methods must be accounted for in the proposed schedule that, in turn, impacts the final compliance date requested. The TVA has contracted a common provider to perform design work at two other TVA sites concurrently with work required at the WBN, Units 1 and 2. The licensee has provided a coordinated/combined schedule for all four projects at WBN, Units 1 and 2 that outlines the sequence in which work must be conducted to ensure effective system connectivity. The required tasks/changes must be completed in sequence at each site to support all program upgrades being performed and to ensure effective connectivity of each project.

The upgrades that the licensee identified within their exemption request support their solution for meeting the three specified requirements, and the proposed schedule is supported by the complexity and scope of the projects described to include tasks and sub-tasks, timing issues, and potential delays.

The proposed implementation schedule depicts the critical activity milestones of the security system upgrades; is consistent with the licensee's solution for meeting the requirements; is consistent with the scope of the modifications and the issues and challenges identified; and is consistent with the licensee's requested compliance date.

Notwithstanding the schedular exemptions for these limited requirements, the licensee will continue to be in compliance with all other applicable physical security requirements as described in 10 CFR 73.55 and reflected in its current NRC approved physical security program. By September 24, 2012, WBN, Units 1 and 2 will be in full compliance with all the regulatory requirements of 10 CFR 73.55, as issued on March 27, 2009.

**4.0 Conclusion for Part 73 Schedule Exemption Request**

The staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the compliance date to September 24, 2012, with regard to three specified requirements of 10 CFR 73.55.

Accordingly, the Commission has determined that pursuant to 10 CFR 73.5, "Specific exemptions," exemption from the March 31, 2010, compliance date is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the Commission hereby grants the requested exemption.

The NRC staff has determined that the long-term benefits that will be realized when the security system upgrades are complete justify exceeding the full compliance date and the proposed implementation schedule is consistent with the scope of the modifications in the case of this particular licensee. The security measures WBN, Units 1 and 2 needs additional time to implement are new requirements imposed by March 27, 2009, amendments to 10 CFR 73.55, and are in addition to those required by the security orders issued in response to the events of September 11, 2001. Therefore, the NRC staff concludes that the licensee's actions are in the best interest of protecting the public health and safety through the security changes that will result from granting this exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption from the March 31, 2010, implementation deadline for the three items specified in Enclosure 1 of the TVA letter dated November 6, 2009, as supplemented by letter dated January 11, 2010, the licensee is required to be in full compliance by September 24, 2012. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (*i.e.,* 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 3945, dated January 25, 2010).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 9th day of March 2010.

For the Nuclear Regulatory Commission.

**Joseph G. Giitter,**

*Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.*

[FR Doc. 2010–5556 Filed 3–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 72–26; NRC–2009–0569]**

## Pacific Gas and Electric Company; Diablo Canyon Independent Spent Fuel Storage Installation; Notice of Issuance of Amendment to Materials License No. SNM–2511

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of Issuance of Amendment to Materials License No. SNM–2511.

**DATES:** A request for a hearing must be filed by May 14, 2010.

**FOR FURTHER INFORMATION CONTACT:** John Goshen, Project Manager, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards, Mail Stop EBB–3D–02M, U.S. Nuclear Regulatory Commission, Washington, DC, 20555–0001. Telephone: (301) 492–3325; e-mail: *john.goshen@nrc.gov.*

**SUPPLEMENTARY INFORMATION:**

### I. Introduction

On March 22, 2004, the U.S. Nuclear Regulatory Commission (NRC) issued NRC Materials License No. SNM–2511 to the Pacific Gas and Electric Company (PG&E) for the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI), located at the Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2 site in San Luis Obispo County, California. The license authorizes PG&E to receive, possess, store, and transfer spent nuclear fuel and associated radioactive materials resulting from the operation of the Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2 in an ISFSI at the power plant site for a term of 20 years. The NRC staff published a Notice of Issuance of Environmental Assessment and Finding of No Significant Impact (EA/FONSI) for the approval of the Diablo Canyon ISFSI license in the **Federal Register** on October 30, 2003 (68 FR 61838), in

accordance with the National Environmental Policy Act, and in conformance with the applicable requirements of 10 CFR Part 51. Additionally, the NRC published a supplement to this EA/FONSI on September 10, 2007 (72 FR 51687), in response to the decision of the United States Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers for Peace* v. *NRC,* 493 F.3d 1016 (9th Cir. 2006), and a related addendum to this supplement on November 15, 2007 (72 FR 64252).

By application dated April 7, 2008, as supplemented September 1, November 23, December 31, 2009, and January 22, 2010, PG&E submitted an application to NRC, in accordance with 10 CFR Part 72, requesting an amendment to NRC Materials License No. SNM–2511. PG&E's application requested that the ISFSI Technical Specifications (TS) be revised as follows:

1. Revise TS 3.1.1, "Multi-Purpose Canister (MPC)," to clarify the required Helium leak rate condition and the leak rate testing requirements;

2. Delete TS 3.1.4, "Spent Fuel Storage Cask (SFSC) Time Limitation in Cask Transfer Facility (CTF)," based on analysis of the thermal performance of the Holtec HI–STORM 100 system which shows there is no need for a required time limitation in the CTF;

3. Revise TS 3.2.1, "Dissolved Boron Concentration," to modify the dissolved boron concentrations required for MPC–32 canisters and, to allow linear interpolation for some enrichments consistent with the Holtec International (Holtec) Certificate of Compliance (CoC) No.1014, Amendment 3, for the HI–STORM 100 system;

4. Add a note to both surveillance requirements of TS 3.2.1 to limit the monitoring requirement consistent with the Holtec CoC No.1014, Amendment 1, for the HI–STORM 100 system;

5. Revise TS 4.1.1.a, b, and c, "Design Features Significant to Safety," to allow use of Metamic Boron-10 as a neutron absorber for each of the specified MPC consistent with Holtec CoC No.1014, Amendment 2, for the HI–STORM 100 system, and add TS 4.1.2, "Design Features Important to Criticality Control," to define the material and testing requirements for the use of Metamic;

6. Change the title of TS 4.3.4.a, "Permanent Load Handling Equipment," to "Weldment and Reinforced Concrete," which more correctly reflect the subject of the TS subparagraphs;

7. Revise TS 4.3.4.b, "Mobile Load Handling Equipment," to replace the term "permanent load handling equipment" with the term "the cask transporter," as the transporter is not considered a mobile load handling equipment within the context of TS 4.3.4.b; and

8. Revise item b of TS 5.1.3, "MPC and SFSC Loading, Unloading, and Preparation Program," to clarify the maintenance of the required conditions in the annular gap between the MPC and the transfer cask depending on which drying process is used and fuel heat load during MPC loading or unloading operations.

In accordance with 10 CFR 72.16, a Notice of Docketing was published in the **Federal Register** on December 28, 2009 (74 FR 68638). Pursuant to 10 CFR 72.46(b)(2), on February 10, 2010, the NRC approved and issued Amendment No. 1 to Materials License No. SNM–2511, held by PG&E for the receipt, possession, transfer, and storage of spent fuel at the Diablo Canyon ISFSI. Amendment No. 1 was effective as of the date of issuance.

Amendment No. 1 complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the NRC's rules and regulations. As required by the Act and the NRC's rules and regulations in 10 CFR Chapter I, the NRC has made appropriate findings, which are set forth in Amendment No. 1 Safety Evaluation Report (SER). The issuance of Amendment No. 1 satisfied the criteria specified in 10 CFR 51.22(c)(11) for a categorical exclusion. Thus, the preparation of an environmental assessment or an environmental impact statement is not required.

## II. Opportunity To Request a Hearing

In accordance with 10 CFR 72.46(b)(2), the staff determined that this license amendment did not present a genuine issue as to whether public health and safety would be significantly affected. Therefore, the publication of a notice of proposed action and an opportunity for hearing or a notice of hearing was not warranted. Notice is hereby given of the right of interested persons to request a hearing on whether the action should be rescinded or modified.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139, August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition

for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E-Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from March 15, 2010. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

**III. Further information**

The NRC has prepared a SER that documents the staff's review and evaluation of the amendment. In accordance with 10 CFR 2.390 of NRC's "Rules of Practice," final NRC records and documents related to this action, including the application for amendment and supporting documentation and the SER, are available electronically at the NRC's Electronic Reading Room, at: *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access NRC's Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. The ADAMS Accession Numbers for the applicable documents are:

| Document | Date | ADAMS Accession No. |
|---|---|---|
| License Amendment Request | April 7, 2008 | ML081070073 |
| Response to First Request for Additional Information | September 1, 2009 | ML092530178 |
| Response to Second Request for Additional Information | November 23, 2009 | ML093270488 |
| Response to Request for Supplemental Information | December 31, 2009 | ML100120650 |
| Response to Request for Supplemental Information | January 22, 2010 | ML100280414 |
| License Amendment No. 1 Issuance Package | February 10, 2010 | ML100360010 |
| Safety Evaluation Report | February 10, 2010 | ML100360046 |

If you do not have access to ADAMS, or if there are problems in accessing the documents located in ADAMS, contact NRC's Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr@nrc.gov.*

These documents may also be viewed electronically on the public computers located at NRC's PDR, O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852. The PDR reproduction contractor will copy documents, for a fee.

Dated at Rockville, Maryland, this 8th day of March, 2010.

For the Nuclear Regulatory Commission.

**John Goshen,**

*P. E., Project Manager, Licensing Branch, Division of Spent Fuel Storage and Transportation, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 2010–5563 Filed 3–12–10; 8:45 am]

**BILLING CODE 7590–01–P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, March 18, 2010 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (6), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, March 18, 2010 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Collection matters;

Consideration of amicus participation; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: March 11, 2010.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5728 Filed 3–11–10; 4:15 pm]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61666; File No. SR–NASDAQ–2010–027]**

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Pricing for Option Orders Routed to Away Markets

March 5, 2010.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) [1], and Rule 19b–4 thereunder,[2] notice is hereby given that on March 2, 2010, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. Pursuant to Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge, which renders the proposed rule change effective upon filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ proposes to modify Rule 7050 governing pricing for NASDAQ members using the NASDAQ Options Market (“NOM”), NASDAQ’s facility for executing and routing standardized equity and index options. NASDAQ will make the proposed rule change effective for transactions settling on or after March 2, 2010.

The text of the proposed rule change is available at *http://nasdaqomx.cchwallstreet.com/,* at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

NASDAQ is proposing to modify Rule 7050 governing the fees assessed for execution of options orders entered into NOM but routed to and executed on away markets (“routing fees”). When NASDAQ began trading standardized options on March 31, 2008, it assessed a routing fee based upon an approximation of the cost to NASDAQ of executing such orders at those markets. NASDAQ later determined that the superior approach for executions on away markets at the time was to pass-through to NASDAQ members the actual fees assessed by away markets plus the clearing fees for the execution of orders routed from NASDAQ.

NASDAQ proposes to simplify Rule 7050 by eliminating entirely all current NOM pass-through fees and replacing those fees with the following new routing fees: (i) A $0.36 per contract side fee for customer orders routed to BATS Exchange, Inc. (“BATS”) in all options, (ii) a $.06 per contract side fee for customer orders routed to the Boston Options Exchange Group LLC (“BOX”) in all options; (iii) a $0.06 per contract side fee for customer orders routed to the Chicago Board Options Exchange, Inc. (“CBOE”) in all options; (iv) a $.06 per contract side fee for customer orders routed to International Securities Exchange, LLC (“ISE”) in all options; (v) a $0.50 per contract side fee for customer orders routed to NYSE Arca, Inc. (“NYSEArca”) in options included in the penny pilot (“penny options”); (vi) a $0.06 per contract side fee for customer orders routed to NYSE Arca non-penny options; (vii) a $0.06 per contract side fee for customer orders routed to NYSE Amex LLC (“NYSE Amex”) in all options; (viii) a $0.30 per contract side fee for customer orders routed to NASDAQ OMX PHLX, Inc. (“Phlx”) in AMZN, C, BAC, DELL, DIA, DRYS, EK, GDX, GE, GS, IWM, MSFT, QCOM, QQQQ, RIMM, SBUX, SKF, SLV, SMH, SPY, UNG, USO, UYG, WYNN, and XLF options; (ix) a $0.06 per contract side fee for customer orders routed to Phlx in all other options; and (x) a $0.55 per contract side fee for all Firm and Market Maker orders routed by the Exchange to away markets.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

Recovery of Transaction and Clearing Costs

NASDAQ Options Services LLC ("NOS"), a member of the Exchange, is the Exchange's exclusive order router. Each time NOS routes to away markets NOS is charged a $0.06 clearing fee and, in the case of BATS, NYSEArca, and Phlx, is charged a transaction fee in certain symbols, which are passed through to the Exchange. The following routing fees are proposed in order to recoup these costs:

- The Exchange is proposing a $.06 per contract routing fee for orders routed to NYSE, AMEX, BOX, CBOE, ISE and NYSEArca in order to recoup clearing charges which are incurred by the Exchange when customer orders are routed to these away markets.
- The Exchange is proposing a $0.36 per contract routing fee for orders routed to BATS in order to recoup transaction and clearing charges incurred by the Exchange when customer orders are routed to BATS.
- The Exchange is proposing a $0.50 per contract routing fee for orders routed to NYSE Arca, Inc. ("NYSEArca") in penny options.
- The Exchange is proposing a $0.30 per contract routing fee for orders routed to Phlx in order to recoup transaction and partial clearing charges incurred by the Exchange when customer orders in the symbols listed above (subject to Phlx "taker" fees), are routed to Phlx.[5]

The Exchange is proposing these fees to recoup the majority of transaction and clearing costs associated with routing customer orders to each destination market. As with all fees, the Exchange may adjust these routing fees by filing a new proposed rule change.

The Exchange has designated this proposal to be operative for trades settling on or after March 2, 2010.

Routing Fees for Firms and Market Makers

The Exchange proposes a fixed routing fee of $0.55 for routing orders for the account(s) of Firms (*i.e.,* an order that clears as "Firm" with the Options Clearing Corporation ("OCC")) and Market Makers to away markets.

The Exchange notes that all U.S options exchanges charge fees for Firm and Market Maker[6] orders and that they are consistently higher than fees for customer orders. Additionally, the pricing on the various U.S options exchanges for such orders varies significantly from exchange to exchange, with much more variation than for customer orders.[7] Accordingly, the Exchange is proposing the $0.55 per contract side routing fee in order to capture the majority of the transaction and clearing fees for Firm and Market Maker orders, while making the Exchange's routing fees easier to calculate and predict for members whose proprietary orders are routed away.

Simply put, fixed routing fees are easier to comprehend by the members whose orders are routed away. There is no uncertainty and it is simpler for members acting as agent for other members to pass-through fees to its customer. Currently, predicting, calculating and charging back "pass-through" fees is an unduly burdensome, expensive and complicated task for Exchange members whose orders are routed away. The fixed routing fees for Firm and Market Maker orders should ease the burden, expense and complexity of this task. Furthermore, fixed fees are easier to manage and maintain for the Exchange, ensuring accurate billing and accounting.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and with Section 6(b)(4) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls.

NASDAQ further believes that the proposed rule change is consistent with Section 6(b)(5) of the Act[10] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

Routing Fees for Customer Orders

The Exchange believes that the proposed routing fees applicable to customer orders provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed routing fees applicable to customer orders are equitable and reasonable, in that they would apply to all customer orders equally on the reasonable basis that the routing fees are approximately equal to the transaction and clearing fees charged to NOS and ultimately to the Exchange.[11]

The routing fees applicable to customer orders are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because, the Exchange believes, they are much easier to follow and calculate, and as stated above, most U.S. options exchanges do not charge transaction fees for customer orders. Therefore, the amount of the routing fees are naturally less than the proposed fees applicable to Firm and Market Maker orders routed to away markets.

Routing Fees for Firm and Market Maker Orders

The Exchange believes its proposed fixed routing fees applicable to Firm and Market Maker orders are equitable, in that they would apply to all such orders equally. Such orders are reasonably distinguished from customer orders because most U.S. options exchanges do not charge transaction fees for customer orders, whereas all U.S. options exchanges assess transaction and clearing charges for Firm and Market Maker orders. The Exchange believes that the proposed routing fees for Firm and Market Maker orders are a reasonable approximation of across-the-board transaction and clearing fees charged to NOS and ultimately to the Exchange for such orders.

The Exchange believes that the fixed routing fee for Firm and Market Maker orders schedule is reasonable and not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because as

[5] Phlx charges a transaction fee of $0.25, together with a clearing charge of $0.06 in the symbols. The Exchange proposes to recoup $0.05 of the $0.06 clearing charge for customer orders.

[6] The Exchange notes that some other options exchanges include Market Maker transaction and clearing fees as "broker-dealer" fees.

[7] There are, in fact, no customer transaction fees applicable on BOX, CBOE, ISE, NYSEArca non-penny options, and Phlx options not subject to the "taker" fee.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

[11] The Exchange notes that it will recoup less than the $0.06 clearing fee for orders routed to Phlx in options subject to the Phlx "taker" fee.

stated above, the away market transaction and clearing fees for customer orders are generally significantly less than such fees for Firm and Market Maker orders. The $0.55 fee is intended to approximate the charges to the Exchange for routing such orders to away markets.

Additionally, the proposed fixed routing fees are intended to simplify the process by which members calculate, predict and account for routing fees. There is no consistent formula among the exchanges for determining such charges. Members routing such orders are faced with the monumental task of determining exactly what charges apply to each exchange, and accounting for such charges relative to routing fees charged by the various exchanges. Simply put, it is easier for members to make such determinations on a real-time basis with one fixed rate instead of seven different, often complicated, rates.

NASDAQ is one of eight options market in the national market system for standardized options. Joining NASDAQ and electing to trade options is entirely voluntary. Under these circumstances, NASDAQ's fees must be competitive and low in order for NASDAQ to attract order flow, execute orders, and grow as a market. NASDAQ thus believes that its fees are fair and reasonable and consistent with the Exchange Act.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

NASDAQ does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [12] and paragraph (f)(2) of Rule 19b–4 [13] thereunder. 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–NASDAQ–2010–027 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–027. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NASDAQ–2010–027 and should be submitted on or before April 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5529 Filed 3–12–10; 8:45 am]

**BILLING CODE 8011–01–P**

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

[14] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61673; File No. SR–OCC–2010–02]**

## Self-Regulatory Organization; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Adjustment Increments Applicable to Stock Futures

March 8, 2010.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on February 26, 2010, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act [2] and Rule 19b–4(f)(4) thereunder [3] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

The proposed rule change will amend the definition of "adjustment increment" applicable to stock futures.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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).

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

The purpose of this rule change is to accommodate a request made by OneChicago LLC ("ONE") to refine the adjustment increment when stock futures are adjusted in response to corporate actions. Currently, the adjustment increment for stock futures is the minimum increment in settlement prices, which is one cent ($.01). ONE desires to change the adjustment increment for stock futures to one hundredth of a cent ($.0001). Daily settlement prices and trade prices would continue to be expressed in pennies on a per-contract basis. This change would affect any corporate action for which settlement prices are adjusted, including cash distributions.[4]

As an example of the intended change, suppose a futures contract settlement price needs to be adjusted to reflect a $0.125 per share cash dividend. If the per-share settlement price is $50.00, the adjusted settlement price would be $50.00 − $0.125 = $49.8750. If the closing settlement price the following day is $50.05, a mark-to-market of $50.05 − $49.875 = $0.1750, or $17.50 per contract, would result. Prior to the change, the adjusted settlement price of $49.875 would have been rounded to $49.88. The resulting next day mark-to-market would have been $50.05 − $49.88 = $0.17, or $17.00 per contract. In that case, $0.50 in mark-to-market value would not have been accounted for.

OCC states that the proposed change is consistent with Section 17A of the Act[5] because it facilitates the clearance and settlement of stock futures transactions by providing a more precise calculation of the impact of certain adjustments. OCC also states that the proposed rule change is not inconsistent with the existing rules of OCC including any other rules proposed to be amended.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

OCC does not believe that the proposed rule change would impose any burden on competition.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

OCC has not solicited or received written comments relating to the proposed rule change. OCC will notify the Commission of any written comments it receives.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[6] and Rule 19b–4(f)(4)[7] thereunder because it effects a change in an existing service of a registered clearing agency that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–OCC–2010–02 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–OCC–2010–02. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed 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 OCC's principal office and on OCC's Web site at *http://www.theocc.com/publications/rules/proposed_changes/proposed_changes.jspU.* 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 submission should refer to File No. SR–OCC–2010–02 and should be submitted on or before April 5, 2010.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[8]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5534 Filed 3–12–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61672; File No. SR–NYSE–2010–16]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC To Adopt a Reservation Fee for Next Generation Trading Floor Booth Space

March 8, 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 March 4, 2010, New York Stock Exchange LLC (the "NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the

[4] See OCC Article XII, Section 3(a), for a description of the general rules applicable to adjustments to stock futures.

[5] 15 U.S.C. 78q–1.

[6] 15 U.S.C. 78s(b)(3)(A)(iii).

[7] 17 CFR 240.19b–4(f)(4).

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b–4.

proposed rule changes 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 changes 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 2010 Price List to establish a fee in connection with the reservation of booth space as part of its Next Generation Trading Floor renovation. The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NYSE has prepared summaries, set forth in Sections A, B and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange is in the process of creating its "Next Generation Trading Floor" by renovating Floor broker booths that will utilize cutting edge technology and will enable member organizations to conduct all of their trading activities (including non-NYSE trading) on the Exchange's trading floor. The first phase of the Next Generation Trading Floor has been completed and the first member organization will occupy its new booth space on March 8, 2010. This new construction will allow member organizations to blend the advantages of an NYSE floor presence with those of an upstairs trading desk. To defray a portion of the costs of constructing the Next Generation Trading Floor, the Exchange proposes to permit member organizations to reserve Next Generation Trading Floor booth trading positions on a first-come, first-served basis for a reservation fee of $12,000 per position, subject to a cap of $240,000 per member organization. There is no limit on the amount of Next Generation Trading Floor booth space a member organization may occupy, subject to availability. The reservation fee is the only new fee that member organizations will be required to pay in connection with their occupancy of Next Generation Trading Floor booth space. However, member organizations will continue to be subject to the equipment and other fees that are currently set forth in the Exchange Price List.

The Exchange reserves the right to establish a booth space rental fee at some future date.[1] If, in future, the Exchange establishes a rental fee for such booth space, a member organization will be exempt from the payment of rent with respect to any trading position for which it has paid a reservation fee until the third anniversary of the date on which it took possession of that trading position.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6[2] of the Act in general and furthers the objectives of Section 6(b)(4)[3] in particular, in that it is designed provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposal does not constitute an inequitable allocation of dues, fees and other charges, as all member organizations will be able to reserve Next Generation Trading Floor trading positions on the same terms, on a first-come, first-served basis.

*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 purpose of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[4] of the Act and Rule 19b–4(f)(2)[5] thereunder.

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–NYSE–2010–16 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2010–16. 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,[6] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at

[1] The Exchange will submit a rule filing to the SEC prior to the adoption of any rental charge.

[2] 15 U.S.C. 78f.

[3] 15 U.S.C. 78f(b)(4).

[4] 15 U.S.C. 78s(b)(3)(A).

[5] 17 CFR 240.19b–4(f)(2).

[6] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2010–16 and should be submitted on or before April 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5533 Filed 3–12–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61668; File No. SR–NASDAQ–2010–028]**

## Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Routing of Orders From NASDAQ Options Market to an Affiliated Exchange

March 5, 2010.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 26, 2010, The NASDAQ Stock Market LLC ("Nasdaq") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by Nasdaq. Nasdaq has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b–4(f)(6) under the Act,[3] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend Chapter VI, Sections 1(e)(7) and 11(b) of the Rules of the NASDAQ Options Market ("NOM") to modify the restriction on routing of certain orders to an exchange that is an affiliate of NOM.

The text of the proposed rule change is below. Proposed new language is *italicized;* proposed deletions are in [brackets].

Options Rules

Chapter VI Trading System

* * * * *

Sec. 1 Definitions

The following definitions apply to Chapter VI for the trading of options listed on NOM.

(a)–(d) No change.

(e) The term "Order Type" shall mean the unique processing prescribed for designated orders that are eligible for entry into the System, and shall include:

(1)–(6) No change.

(7) "Exchange Direct Orders" are orders that are directed to an exchange other than NOM as directed by the entering party without checking the NOM book. If unexecuted, the order (or unexecuted portion thereof) shall be returned to the entering party. This order type may only be used for orders with time-in-force parameters of IOC.

*Exchange* Direct[ed] Orders may not be directed to a facility of an exchange that is an affiliate of Nasdaq other than the Boston Options Exchange *or NASDAQ OMX PHLX.*

(8) No change.

(f)–(h) No change.

Sec. 11 Order Routing

(a) No change.

(b) For Non-System securities, the order routing process shall be available to Participants from 9:30 a.m. Eastern Time until market close and shall route orders based on the participant's instructions. Notwithstanding the foregoing, the order routing process will not be available to route Non-System Securities to a facility of an exchange that is an affiliate of Nasdaq other than the Boston Options Exchange *or NASDAQ OMX PHLX.*

(c)–(e) No change.

* * * * *

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. *Purpose*

a. Background

NASDAQ OMX PHLX, Inc. ("PHLX") is a wholly-owned subsidiary of The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), a Delaware corporation. NASDAQ OMX also indirectly owns NASDAQ Options Services, LLC ("NOS" or the "Routing Facility"), a registered broker-dealer and a PHLX member. Thus, NOS is deemed an affiliate of PHLX.

b. Affiliation and Order Routing

Nasdaq is proposing that NOS be permitted to route Exchange Direct Orders in System Securities[4] to PHLX without checking the NOM book prior to routing. Exchange Direct Orders are orders that route directly to other options markets on an immediate-or cancel basis without first checking the NOM book for liquidity.[5] In addition, the proposed rule change would permit the routing by NOS of orders (including Exchange Direct Orders) in Non-System Securities from NOM to PHLX.

NOS is the approved outbound routing facility of Nasdaq for NOM. Under NOM Rule Chapter VI, Section 11: (1) NOM routes orders in options via NOS, which serves as the sole "Routing Facility" of NOM; (2) the sole function of the Routing Facility is to route orders in options to away markets pursuant to NOM rules, solely on behalf of NOM; (3) NOS is a member of an unaffiliated self-regulatory organization, which is the designated examining authority for the broker-dealer; (4) the Routing Facility is subject to regulation as a facility of Nasdaq, including the requirement to file proposed rule changes under Section 19 of the Act; (5) NOM must establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between Nasdaq and its facilities (including the Routing Facility), and any other entity; and (6) the books, records, premises, officers, directors, agents, and employees of the Routing Facility, as a facility of Nasdaq, shall be deemed to be the books, records, premises, officers, directors, agents, and employees of Nasdaq for

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

[4] Pursuant to Chapter VI, Section 1(b), "System Securities" are all options that are currently trading on NOM pursuant to Chapter IV of the NOM rules. All other options are "Non-System Securities."

[5] *See* Chapter VI, Section 1(e)(7) of the NOM Rules.

purposes of and subject to oversight pursuant to the Act, and the books and records of the Routing Facility, as a facility of Nasdaq, shall be subject at all times to inspection and copying by Nasdaq and the Commission.

The Commission has approved NOS's affiliation with PHLX subject to the conditions that: (1) NOS remains a facility of Nasdaq; (2) use of NOS's routing function by Nasdaq members continues to be optional [6] and (3) NOS does not provide routing of orders in options from NOM to PHLX or any trading facilities thereof, unless such orders first attempt to access any liquidity on the NOM book.[7]

Currently, Chapter VI, Section 1(e)(7) of the NOM rules prohibits the routing of Exchange Direct Orders to a facility of an exchange that is an affiliate of Nasdaq, with the exception of Exchange Direct Orders routed to the Boston Options Exchange ("BOX"), a facility of BX, which is an affiliate of Nasdaq. In order to modify the conditions noted above regarding the operation of NOS and allow NOS to route Exchange Direct Orders directly to PHLX, Nasdaq is proposing to amend Chapter VI, Section 1(e)(7) of the NOM Rules to expand the exception for routing to affiliates to permit routing by NOS to PHLX. Under the proposed rule change, an Options Participant could enter an order into NOM designated as an "Exchange Direct Order" with instructions to route that order directly to PHLX without first checking the NOM book.

In addition, Nasdaq is proposing to amend Chapter VI, Section 11(b) of the NOM Rules to permit the routing of orders in Non-System Securities via NOS from NOM to PHLX. As a result, orders in Non-System Securities that are routed to away markets under normal procedures could be routed to PHLX, as well as those that are entered as Exchange Direct Orders with instructions to route directly to PHLX.

Nasdaq and other exchanges previously have adopted rules that permit exchanges to accept routing of inbound orders from affiliates, subject to certain limitations and conditions intended to address the Commission's concerns regarding affiliation.[8] Specifically, the proposed rule change to Chapter VI, Section 1(e)(7) is consistent with: (i) Nasdaq adopting rule changes to permit NOS, in its operation as a routing facility for NOM, to route orders from NOM to BOX, a facility of BX, which is an affiliate of Nasdaq, and (ii) in the equities markets, by Nasdaq in adopting rule changes to permit NASDAQ Execution Services, Inc., in its operation as the routing facility of Nasdaq, to route orders from Nasdaq to BX.[9]

In the orders approving the above-mentioned rule changes, the Commission noted its concerns about potential informational advantages and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, but determined that the proposed limitations and conditions were sufficient to mitigate its concerns.

With respect to concerns identified by the Commission regarding the potential for informational advantages favoring NOS vis-à-vis other non-affiliated PHLX members, these concerns are addressed by: (i) Existing NOM Rule Chapter VI, Section 11(e) which requires NOS to establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between Nasdaq and its facilities (including NOS) and any other entity and (ii) existing PHLX Rule 1080(m)(iii)(C) which requires PHLX to establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between PHLX and NOS and any other entity, including any affiliate of NOS.

In addition, PHLX is proposing a rule change and certain undertakings intended to manage the flow of confidential and proprietary information between NOS and PHLX and to minimize potential conflicts of interest.[10]

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Section 6(b)(5) of the Act,[12] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The proposed rule changes would permit routing of Exchange Direct Orders from NOM to PHLX through NOS while minimizing the potential for conflicts of interest and informational advantages involved where a broker-dealer is affiliated with an exchange facility to which it is routing orders.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6) thereunder.[14]

[6] Because only Nasdaq members who are Options Participants may enter orders into NOM, it also follows that routing by NOS is available only to Nasdaq members who are Options Participants. Pursuant to Chapter I, Section 1(a)(40) of the NOM Rules, the term "Options Participant" means a firm, or organization that is registered with Nasdaq for purposes of participating in options trading on NOM as a "Nasdaq Options Order Entry Firm" or "Nasdaq Options Market Maker".

[7] *See* Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008).

[8] *See* Securities Exchange Act Release Nos. 60354 (July 21, 2009), 74 FR 37074 (July 27, 2009)(SR–NASDAQ–2009–065); 60349 (July 20, 2009), 74 FR 37071 (July 27, 2009)(SR–BX–2009–035); 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008)(SR–NASDAQ–2008–098); 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008)(SR–BSE–2008–48); 59010 (November 24, 2008), 73 FR 73373 (December 2, 2008) (SR–NYSEArca–2008–130); 58681 (September 29, 2008), 73 FR 58285 (October 6, 2008)(SR–NYSEArca–2008–90); 58680 (September 29, 2008), 73 FR 58283 (October 6, 2008)(SR–NYSE–2008–76); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008)(SR–Amex–2008–62) (collectively, the "Affiliation Orders").

[9] *See* Securities Exchange Act Release Nos. 60354 (July 21, 2009), 74 FR 37074 (July 27, 2009)(SR–NASDAQ–2009–065); 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008)(SR–NASDAQ–2008–098).

[10] *See* SR–Phlx–2010–036.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(5).

[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6).

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[15] However, Rule 19b–4(f)(6)(iii) [16] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. Nasdaq has requested that the Commission waive the 30-day operative delay. The Commission notes that Nasdaq's proposal is consistent with its rules regarding order routing to BOX [17] and the rules of other national securities exchanges and does not raise any new substantive issues.[18] For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, and designates the proposed rule change to be operative upon filing with the Commission.[19]

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–NASDAQ–2010–028 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–028. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2010–028 and should be submitted on or before April 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5530 Filed 3–12–10; 8:45 am]

**BILLING CODE 8011–01–P**

[15] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. Nasdaq has satisfied this requirement.

[16] *Id.*

[17] *See supra* note 9.

[18] *See* Affiliation Orders, *supra* note 8.

[19] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61670; File No. SR–NYSEAmex–2010–19]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC To Increase the Monthly ATP Fee for All Options Market Makers and To Reduce the Per-Contract Transaction Fee for Non-Directed Options Market Makers

March 5, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on February 26, 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 (the "Schedule") effective March 1, 2010. 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 aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Currently, the Exchange charges a monthly fee of $1,000 per Amex Trading Permit ("ATP") for options Market Makers. Effective March 1, 2010 the Exchange proposes to raise the monthly cost of an ATP for Market Makers to $5,000. This purpose of this new rate, which applies equally to all Market Maker ATP Holders, is to accurately reflect the current value of participating on the NYSE Amex options marketplace. The Exchange was purchased by NYSE Euronext on October 1, 2008. Following the Exchange's purchase by NYSE Euronext, the Exchange underwent a number of important changes. These changes include: the migration of the trading, connectivity, and routing technologies onto NYSE Group platforms; a new state of the art trading facility located at 11 Wall Street; and the adoption of a Trading License model to access the marketplace. The Exchange believes these changes brought significant benefits to participation in the NYSE Amex options marketplace. Among other indicia of the enhanced benefits to market participation, the Exchange's equity option market share increased from 6.3% to 12.8% during the period starting January 2009 to January 2010. Consequently, the Exchange believes the amended pricing is designed to accurately reflect the current benefits to ATP Holders.

The Exchange is also proposing to decrease the per contract rate paid by Non-Directed Market Makers from $.18 to $.17 per contract. This reverses the change implemented on February 1, 2010 that increased that fee from $.17 to $.18 per contract.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the "Act"),[3] in general, and Section 6(b)(4) of the Act,[4] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The proposed fees are reasonable and apply equally to all similarly situated ATP Holders.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received 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 the 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:

*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–2010–19 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–2010–19. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2010–19 and should be submitted on or before April 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5531 Filed 3–12–10; 8:45 am]

**BILLING CODE 8011–01–P**

[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).

[7] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–61671; File No. SR–CHX–2010–05]**

## Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase the Provide Credit for Transactions Involving Issues Priced Less Than One Dollar

March 8, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 3, 2010, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

below, which Items have been prepared by the Exchange. CHX filed the proposal pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The CHX proposes to amend its Schedule of Participant Fees and Assessments (the "Fee Schedule"), effective March 3, 2010, to change its transaction fees and rebates to Exchange Participants for transactions involving issues priced less than one dollar that occur within the Exchange's Matching System. The text of the proposed rule change is available on the Exchange's Web site at *http://www.chx.com/rules/proposed_rules.htm,* on the Commission's Web site at *http://www.sec.gov,* at CHX, 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 CHX included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The CHX has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Through this filing, the Exchange would amend its Fee Schedule to increase the provide credit to Exchange Participants for transactions involving issues priced less than one dollar that occur within the Exchange's Matching System.

The Exchange proposes to increase the provide credit in the transactions described above from 0.15% to 0.25% of the trade value.[5] Due to this increased provide credit and the fact that tiered pricing does not apply to transactions in issues priced under $1, the Exchange proposes to exclude transactions in issues priced under $1 from the calculation of a Participant's average daily volume ("ADV") for monthly tiered pricing purposes. The Exchange believes that the increased rebate will help attract additional orders to be displayed and executed on our trading facilities. The Exchange notes that some of our competitors have recently raised their provide rebates for securities priced under $1, and that our proposed increase will help us remain competitive with these entities.[6]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act[7] in general, and furthers the objectives of Section 6(b)(4) of the Act[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members. Among other things, the change to the fee schedule would provide incentives to Participants to increase the amount of liquidity provided on our trading facilities for securities priced less than $1, which may contribute to an increase in trading volume on the Exchange and in the income derived therefrom.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(B)(3)(A)(ii) of the Act[9] and subparagraph (f)(2) of Rule 19b–4 thereunder[10] because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. At any time within 60 days of the filing of such 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 purpose of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CHX–2010–05 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CHX–2010–05. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also 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

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] "Trade value" is defined in our Fee Schedule as "a dollar amount equal to the price per share multiplied by the number of shares executed."

[6] The National Stock Exchange raised its provide credit to 0.25% for transactions under $1 in Tape A, B and C securities beginning in the month of February 2010.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 240.19b–4(f)(2).

available publicly. All submissions should refer to File No. SR–CHX–2010–05 and should be submitted on or before April 5, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010–5532 Filed 3–12–10; 8:45 am]

**BILLING CODE 8011–01–P**

## DEPARTMENT OF STATE

**[Public Notice: 6922]**

### Determination Under the Foreign Assistance Act and the Department of State, Foreign Operations, and Related Programs Appropriations Acts

Pursuant to section 654(c) of the Foreign Assistance Act of 1961, as amended, notice is hereby given that the Deputy Secretary of State has made a determination pursuant to section 620H of the Foreign Assistance Act, and Section 7021 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010 (Div. F, Pub. L. 111–117), and similar provisions in prior-year appropriations acts, and has concluded that publication of the determination would be harmful to the national security of the United States.

Dated: March 9, 2010.

**Vann H. Van Diepen,**

*Acting Assistant Secretary of State for International Security and Nonproliferation, Department of State.*

[FR Doc. 2010–5600 Filed 3–12–10; 8:45 am]

**BILLING CODE 4710–27–P**

## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### Application of Charter Air Transport, Inc. for Commuter Authority

**AGENCY:** Department of Transportation.

**ACTION:** Notice of Order to Show Cause (Order 2010–3–8); Docket DOT–OST–2009–0187.

**SUMMARY:** The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Charter Air Transport, Inc., fit, willing, and able, and awarding it Commuter Air Carrier Authorization.

**DATES:** Persons wishing to file objections should do so no later than (insert date 5 business days from publication).

**ADDRESSES:** Objections and answers to objections should be filed in Docket DOT–OST–2009–0187 and addressed to U.S. Department of Transportation, Docket Operations, (M–30, Room W12–140), 1200 New Jersey Avenue, SE., West Building Ground Floor, Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

**FOR FURTHER INFORMATION CONTACT:** Vanessa Balgobin, Air Carrier Fitness Division (X–56, Room W86–467), U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–9721.

**Susan L. Kurland,**

*Assistant Secretary for Aviation and International Affairs.*

[FR Doc. 2010–5555 Filed 3–12–10; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### Notice of Intent To Rule on Passenger Facility Charge (PFC) Application 10–07–C–00–LAX, To Impose and Use PFC Revenue at Los Angeles International Airport, Los Angeles, CA

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

**ACTION:** Notice of Intent to rule on application.

**SUMMARY:** The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Los Angeles International Airport, under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

**DATES:** Comments must be received on or before April 14, 2010.

**ADDRESSES:** Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261. In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Steve Martin, Chief Operating Officer, Los Angeles World Airports, at the following address: One World Way, P.O. Box 92216, Los Angeles, CA 90009. Air carriers and foreign air carriers may submit copies of written comments previously provided to the Los Angeles World Airports under section 158.23 of Part 158.

**FOR FURTHER INFORMATION CONTACT:** Darlene Williams, Airport Planner/PFC Specialist, Los Angeles Airports District Office, 15000 Aviation Blvd., Room 3000, Lawndale, CA 90261, Telephone: (310) 725–3625. The application may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the application to impose and use PFC revenue at Los Angeles International Airport under the provisions of the 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR part 158). On March 1, 2010, the FAA determined that the application to impose and use PFC submitted by the Los Angeles World Airports was substantially complete within the requirements of section 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than June 9, 2010.

The following is a brief overview of the impose and use application No. 10–07–C–00–LAX:

*Proposed charge effective date:* June 1, 2012.

*Proposed charge expiration date:* March 1, 2019.

*Level of the proposed PFC:* $4.50.

*Total estimated PFC revenue:* $855,000,000.

*Description of proposed project:*

*Impose and use:* Bradley West Project—This project will improve and expand the existing Tom Bradley International Terminal (TBIT) to accommodate new large aircraft and construct new concourses to the north and south of TBIT to replace the existing concourses.

*Class or classes of air carriers which the public agency has requested not be required to collect PFCs:* Nonscheduled/on demand air carriers, filing FAA Form 1800–31.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Division located at: Federal Aviation Administration, Airports Division, 15000 Aviation Blvd., Room 3012, Lawndale, CA 90261. In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Los Angeles World Airport.

[11] 17 CFR 200.30–3(a)(12).

Issued in Lawndale, California, on March 2, 2010.

**Debbie Roth,**

*Acting Manager, Airports Division, Western-Pacific Region.*

[FR Doc. 2010–5285 Filed 3–12–10; 8:45 am]

**BILLING CODE 4910–13–M**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

### Release of Waybill Data

The Surface Transportation Board has received a request from BST Associates (WB616–3–1/22/10) for access to certain data from the Board's 2008 Carload Waybill Sample. A copy of this request may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

*Contact:* Scott Decker, (202) 245–0330.

**Kulunie L. Cannon,**

*Clearance Clerk.*

[FR Doc. 2010–5511 Filed 3–12–10; 8:45 am]

**BILLING CODE 4915–01–P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

**[STB Finance Docket No. 34554 (Sub-No. 13)]**

### Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company

**AGENCY:** Surface Transportation Board, DOT.

**ACTION:** Partial revocation of exemption.

**SUMMARY:** Under 49 U.S.C. 10502, the Board revokes the class exemption as it pertains to the trackage rights described in STB Finance Docket No. 34554 (Sub-No. 12) [1] to permit the trackage rights to expire on or about December 18, 2010, in accordance with the agreement of the parties,[2] subject to the employee protective conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

**DATES:** This exemption will be effective on April 14, 2010. Petitions to stay must be filed by March 25, 2010. Petitions for reconsideration must be filed by April 5, 2010.

**ADDRESSES:** Send an original and 10 copies of all pleadings, referring to STB Finance Docket No. 34554 (Sub-No. 13) to: Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on UP's representative: Mack H. Shumate, Jr., Senior General Attorney, 101 North Wacker Drive, Room #1920, Chicago, IL 60606.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 245–0395. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

**SUPPLEMENTARY INFORMATION:** Additional information is contained in the Board's decision. Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: March 8, 2010.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

**Jeffrey Herzig,**

*Clearance Clerk.*

[FR Doc. 2010–5587 Filed 3–12–10; 8:45 am]

**BILLING CODE 4915–01–P**

[1] In that docket, on December 18, 2009, UP filed a verified notice of exemption under the Board's class exemption procedures at 49 CFR 1180.2(d)(7). The notice covered the agreement by BNSF Railway Company (BNSF) to extend to December 18, 2010, the expiration date of the local trackage rights granted to UP over BNSF's line of railroad extending from BNSF milepost 579.3 near Mill Creek, OK, to BNSF milepost 631.1 near Joe Junction, TX, a distance of approximately 52 miles. UP submits that while the trackage rights are only temporary rights, because they are "local" rather than "overhead" rights, they do not qualify for the Board's class exemption for temporary trackage rights under 49 CFR 1180.2(d)(8). *See Union Pacific Railroad Company—Temporary Trackage Rights Exemption—BNSF Railway Company,* STB Finance Docket No. 34554 (Sub-No. 12) (STB served Dec. 31, 2009).

[2] The trackage rights were originally granted in *Union Pacific Railroad Company—Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company,* STB Finance Docket No. 34554 (STB served Oct. 7, 2004). Subsequently, the parties filed several notices of exemption based on their agreements to extend expiration dates of the same trackage rights. *See* STB Finance Docket No. 34554 (Sub-No. 2) (decision served February 11, 2005); STB Finance Docket No. 34554 (Sub-No. 4) (decision served March 3, 2006); STB Finance Docket No. 34554 (Sub-No. 6) (decision served January 12, 2007); STB Finance Docket No. 34554 (Sub-No. 8) (decision served January 4, 2008); and STB Finance Docket No. 34554 (Sub-No. 10) (decision served January 8, 2009). Because the original and subsequent trackage rights notices were filed under the class exemption at 49 CFR 1180.2(d)(7), under which trackage rights normally remain effective indefinitely, in each instance the Board granted partial revocation of the class exemption to permit the authorized trackage rights to expire. *See* STB Finance Docket No. 34554 (Sub-No. 1) (decision served November 24, 2004); STB Finance Docket No. 34554 (Sub-No. 3) (decision served March 25, 2005); STB Finance Docket No. 34554 (Sub-No. 5) (decision served March 23, 2006); STB Finance Docket No. 34554 (Sub-No. 7) (decision served March 13, 2007); STB Finance Docket No. 34554 (Sub-No. 9) (decision served March 20, 2008); and STB Finance Docket No. 34554 (Sub-No. 11) (decision served March 11, 2009). At the time of the extension authorized in STB Finance Docket No. 34554 (Sub-No. 10), the parties anticipated that the authority to allow the rights to expire would be exercised by December 31, 2009. However, the parties filed on December 18, 2009, in STB Finance Docket No. 34554 (Sub-No. 12) their most recent notice of exemption so that the trackage rights could be extended to December 18, 2010, and in STB Finance Docket No. 34554 (Sub-No. 13) their latest petition to partially revoke the class exemption to permit expiration, which we are addressing here.

## DEPARTMENT OF THE TREASURY

### Alcohol and Tobacco Tax and Trade Bureau

### Proposed Information Collections; Comment Request

**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau, Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

**DATES:** We must receive your written comments on or before May 14, 2010.

**ADDRESSES:** You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- P.O. Box 14412, Washington, DC 20044–4412;
- 202–453–2686 (facsimile); or
- *formcomments@ttb.gov* (e-mail).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, send no more than five 8.5 x 11 inch pages in order to ensure electronic access to our equipment.

**FOR FURTHER INFORMATION CONTACT:** To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, P.O. Box 14412, Washington, DC 20044–4412; or telephone 202–453–2265.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please not do include any confidential or inappropriate material in your comments.

*We invite comments on:* (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

**Information Collections Open for Comment**

Currently, we are seeking comments on the following forms and recordkeeping requirements:

*Title:* Brewer's Notice, and Letterhead applications and notices filed by Brewers.

*OMB Control Number:* 1513–0005.

*TTB Form Number:* 5130.10.

*TTB Record Number:* 5130/2.

*Abstract:* The Internal Revenue Code requires brewers to file a notice of intent to operate a brewery. TTB Form 5130.10 is similar to a permit and, when approved by TTB, is a brewer's authorization to operate. Letterhead applications and notices are necessary to identify brewery activities so that TTB may ensure that proposed operations do not jeopardize Federal revenues.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of responses, and estimated total annual burden hours are unchanged.

*Type of Review:* Extension of a currently approved collection.

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

*Estimated Number of Responses:* 9,792.

*Estimated Total Annual Burden Hours:* 8,976.

*Title:* Principal Place of Business on Beer Labels.

*OMB Control Number:* 1513–0085.

*TTB Record Number:* 5130/5.

*Abstract:* TTB regulations permit domestic brewers who operate more than one brewery to show as their address on labels and kegs of beer, their "principal place of business" address. This label option may be used in lieu of showing the actual place of production or of listing all of the brewer's locations on the label.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of responses, and estimated total annual burden hours are unchanged.

*Type of Review:* Extension of a currently approved collection.

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

*Estimated Number of Responses:* 1,632.

*Estimated Total Annual Burden Hours:* One (1).

*Title:* Marks on Equipment and Structures, and Marks and Labels on Containers of Beer.

*OMB Control Number:* 1513–0086.

*TTB Record Numbers:* 5230/3 and 5130/4.

*Abstract:* Marks, signs, and calibrations are necessary on equipment and structures for identifying major equipment for accurate determination of tank contents, and for the segregation of taxpaid and nontaxpaid beer. Marks and labels on containers of beer are necessary to inform consumers of container contents and to identify the brewer and place of production.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of responses, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

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

*Estimated Number of Responses:* 1,632.

*Estimated Total Annual Burden Hours:* One (1).

*Title:* Pay.gov User Agreement.

*OMB Control Number:* 1513–0117.

*TTB Form Number:* 5000.31.

*Abstract:* The Pay.gov User Agreement will be used to identify, validate, approve, and register qualified users so they may submit electronic forms via the Pay.gov system.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of responses, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

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

*Estimated Number of Responses:* 5,800.

*Estimated Total Annual Burden Hours:* 483.

*Title:* Permit Application Questions, Amended Permit Application Questions, Claims Questions, and other Questionnaires.

*OMB Control Number:* 1513–0124.

*TTB Form and Record Number:* None.

*Abstract:* TTB, in an effort to improve its Customer Service, uses these questionnaires to keep track of its customer service quality and progress, as well as to identify potential needs, problems, and opportunities for improvement. These questionnaires will be used primarily in telephone interviews and TTB's Expo, but may be used on other occasions as well. The respondents for the telephone interviews are applicants, permittees, and claimants pursuant to the Federal Alcohol Administration Act, the Internal Revenue Code, and TTB regulations. The Expo survey is taken by anyone in attendance. There is no cost to respondents other than their time, and responding to these customer service questionnaires is voluntary.

*Current Actions:* We are submitting this generic information collection request for extension purposes only. The information collection, estimated number of responses, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

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

*Total Number of Responses Requested:* 107,500.

*Total Burden Hours Requested:* 53,000.

*Title:* Distilled Spirits Bond.

*OMB Control Number:* 1513–0125.

*TTB Form Number:* 5110.56.

*Abstract:* This form is used by Distilled Spirits Plants (DSPs) and Alcohol Fuel Plants to file bond

coverage with TTB. Using this form, these plants may file coverage and/or withdraw coverage for one plant or multiple plants. DSPs may file this bond and include operations coverage for adjacent wine cellars. The bond may be secured through a surety company or it may be secured with collateral (cash, Treasury Bonds, or Treasury Notes). The bond protects the revenue assigned to distilled spirits on which excise tax has not been paid. Should the industry member fail to pay its tax liability, including any penalties and interest, TTB may obligate the funds used to secure the bond to satisfy the debt.

*Current Actions:* We are submitting this information collection for extension purposes only. The information collection, estimated number of responses, and estimated total annual burden hours remain unchanged.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit; Farms.

*Estimated Number of Responses:* 232.

*Estimated Total Annual Burden Hours:* 232.

Dated: March 8, 2010.

**Theresa McCarthy,**

*Acting Director, Regulations and Rulings Division.*

[FR Doc. 2010–5509 Filed 3–12–10; 8:45 am]

**BILLING CODE 4810–31–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Comment Request for Form 1139

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1139, Corporation Application for Tentative Refund.

**DATES:** Written comments should be received on or before May 14, 2010 to be assured of consideration.

**ADDRESSES:** Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form and instructions should be directed to Joel P. Goldberger at (202) 927–9368, or at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or through the Internet at *Joel.P.Goldberger@irs.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title:* Corporation Application for Tentative Refund.

*OMB Number:* 1545–0582.

*Form Number:* 1139.

*Abstract:* Form 1139 is filed by corporations that expect to have a net operating loss, net capital loss, or unused general business credits, carried back to a prior tax year. IRS uses Form 1139 to determine if the amount of the loss or unused credits is proper.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 3,750.

*Estimated Time per Respondent:* 44 hr., 25 min.

*Estimated Total Annual Burden Hours:* 165,938.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record.

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: February 26, 2010.

**R. Joseph Durbala,**

*IRS Supervisory Tax Analyst.*

[FR Doc. 2010–5504 Filed 3–12–10; 8:45 am]

**BILLING CODE 4830–01–P**


Federal Register

**Monday,**
**March 15, 2010**

## Part II

# Federal Reserve System

**12 CFR Part 226**
**Truth in Lending; Proposed Rule**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 226

**[Regulation Z; Docket No. R–1384]**

### Truth in Lending

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Proposed rule; request for public comment.

**SUMMARY:** The Board proposes to amend Regulation Z, which implements the Truth in Lending Act, and the staff commentary to the regulation in order to implement provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 that go into effect on August 22, 2010. In particular, the proposed rule would require that penalty fees imposed by card issuers be reasonable and proportional to the violation of the account terms. The proposed rule would also require credit card issuers to reevaluate at least every six months annual percentage rates increased on or after January 1, 2009.

**DATES:** Comments must be received on or before April 14, 2010. Comments on the Paperwork Reduction Act analysis set forth in Section VII of this **Federal Register** notice must be received on or before May 14, 2010.

**ADDRESSES:** You may submit comments, identified by Docket No. R–1384, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *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 the docket number in the subject line of the message.
- *Facsimile:* (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.

**FOR FURTHER INFORMATION CONTACT:** Stephen Shin, Attorney, or Amy Henderson or Benjamin K. Olson, Senior Attorneys, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667 or 452–2412; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869.

**SUPPLEMENTARY INFORMATION:**

## I. Background

*The Credit Card Act*

This proposed rule represents the third stage of the Board's implementation of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act), which was signed into law on May 22, 2009. Public Law 111–24, 123 Stat. 1734 (2009). The Credit Card Act primarily amends the Truth in Lending Act (TILA) and establishes a number of new substantive and disclosure requirements to establish fair and transparent practices pertaining to open-end consumer credit plans.

The requirements of the Credit Card Act that pertain to credit cards or other open-end credit for which the Board has rulemaking authority become effective in three stages. First, provisions generally requiring that consumers receive 45 days' advance notice of interest rate increases and significant changes in terms (new TILA Section 127(i)) and provisions regarding the amount of time that consumers have to make payments (revised TILA Section 163) became effective on August 20, 2009 (90 days after enactment of the Credit Card Act). A majority of the requirements under the Credit Card Act for which the Board has rulemaking authority, including, among other things, provisions regarding interest rate increases (revised TILA Section 171), over-the-limit transactions (new TILA Section 127(k)), and student cards (new TILA Sections 127(c)(8), 127(p), and 140(f)) become effective on February 22, 2010 (9 months after enactment). Finally, two provisions of the Credit Card Act addressing the reasonableness and proportionality of penalty fees and charges (new TILA Section 149) and re-evaluation by creditors of rate increases (new TILA Section 148) become effective on August 22, 2010 (15 months after enactment). The Credit Card Act also requires the Board to conduct several studies and to make several reports to Congress, and sets forth differing time periods in which these studies and reports must be completed.

*Implementation of Credit Card Act*

The Board is implementing the provisions of the Credit Card Act in stages, consistent with the statutory timeline established by Congress. On July 22, 2009, the Board published an interim final rule to implement the provisions of the Credit Card Act that became effective on August 20, 2009. *See* 74 FR 36077 (July 2009 Regulation Z Interim Final Rule). On January 12, 2010, the Board issued a final rule adopting in final form the requirements of the July 2009 Regulation Z Interim Final Rule and implementing the provisions of the Credit Card Act that become effective on February 22, 2010. *See* 75 FR 7658 (February 2010 Regulation Z Rule). This proposed rule implements the provisions of the Credit Card Act that become effective on August 22, 2010.

## II. Summary of Major Proposed Revisions

*A. Reasonable and Proportional Penalty Fees*

*Statutory requirements.* The Credit Card Act provides that "[t]he amount of any penalty fee or charge that a card issuer may impose with respect to a credit card account under an open end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over-the-limit fee, or any other penalty fee or charge, shall be reasonable and proportional to such omission or violation." The Credit Card Act further directs the Board to issue rules that "establish standards for assessing whether the amount of any penalty fee or charge * * * is reasonable and proportional to the omission or violation to which the fee or charge relates."

In issuing these rules, the Credit Card Act requires the Board to consider: (1) The cost incurred by the creditor from an omission or violation; (2) the deterrence of omissions or violations by the cardholder; (3) the conduct of the cardholder; and (4) such other factors as the Board may deem necessary or appropriate. The Credit Card Act authorizes the Board to establish "different standards for different types of fees and charges, as appropriate." Finally, the Act authorizes the Board to "provide an amount for any penalty fee or charge * * * that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates."

*Cost incurred as a result of violations.* The proposed rule permits an issuer to charge a penalty fee for a particular type

of violation (such as a late payment) if it has determined that the amount of the fee represents a reasonable proportion of the costs incurred by the issuer as a result of that type of violation. Thus, the proposed rule permits issuers to use penalty fees to pass on the costs incurred as a result of violations while ensuring that those costs are spread evenly among consumers so that no individual consumer bears an unreasonable or disproportionate share.

The proposed rule provides guidance regarding the types of costs incurred by card issuers as a result of violations. For example, with respect to late payments, the proposed rule states that the costs incurred by a card issuer include collection costs, such as the cost of notifying consumers of delinquencies and resolving those delinquencies (including the establishment of workout and temporary hardship arrangements). In order to ensure that penalty fees are based on relatively current cost information, the proposed rule would require card issuers to re-evaluate their costs at least annually.

Notably, the proposed rule states that, although higher rates of loss may be associated with particular violations, those losses and related costs (such as the cost of holding reserves against losses) are excluded from the cost analysis.

*Deterrence of violations.* The Credit Card Act requires the Board to consider the deterrence of violations by the cardholder. Accordingly, as an alternative to basing penalty fees on costs, the proposed rule permits a card issuer to charge a penalty fee for a particular type of violation if it has determined that the amount of the fee is reasonably necessary to deter that type of violation.

Because it would not be feasible to determine the specific amount necessary to deter a particular consumer, the proposed rule requires issuers that base their penalty fees on deterrence to use an empirically derived, demonstrably and statistically sound model that reasonably estimates the effect of the amount of the fee on the frequency of violations. In order to support a determination that the dollar amount of a fee is reasonably necessary to deter a particular type of violation, a model must reasonably estimate that, independent of other variables, the imposition of a lower fee amount would result in a substantial increase in the frequency of that type of violation.

*Consumer conduct.* The Credit Card Act requires the Board to consider the conduct of the cardholder. The proposed rule does not require that each penalty fee be based on an assessment of the individual consumer conduct associated with the violation. Instead, the proposed rule takes consumer conduct into account in other ways.

The proposed rule contains provisions specifically based on consumer conduct. First, the proposed rule prohibits issuers from imposing penalty fees that exceed the dollar amount associated with the violation. Thus, for example, a consumer who exceeds the credit limit by $5 could not be charged an over-the-limit fee of more than $5. Second, the proposed rule prohibits issuers from imposing multiple penalty fees based on a single event or transaction.

*Safe harbor.* Consistent with the authority granted by the Credit Card Act, the proposed rule contains a safe harbor that provides a single penalty fee amount that will generally be sufficient to cover an issuer's costs and to deter violations. Because the Board does not have sufficient information to determine the appropriate safe harbor amount at this time, the proposed rule does not provide a specific amount. Instead, the proposed rule requests that credit card issuers and other interested parties submit data regarding costs incurred as a result of violations and the deterrent effect of different fee amounts on violations.

Because violations involving large dollar amounts may impose greater costs on the card issuer and require greater deterrence, the proposed safe harbor would also permit an issuer to impose a penalty fee that exceeds the specific safe harbor amount in certain circumstances. Specifically, the proposed safe harbor would permit an issuer to impose a penalty that does not exceed 5% of the dollar amount associated with the violation (up to a specific dollar limit). Thus, for example, if a $500 minimum payment was delinquent, the safe harbor would permit the card issuer to impose a $25 late payment fee.

*B. Reevaluation of Rate Increases*

*Statutory requirements.* The Credit Card Act requires card issuers that increase an annual percentage rate applicable to a credit card account, based on the credit risk of the consumer, market conditions, or other factors, to periodically consider changes in such factors and determine whether to reduce the annual percentage rate. Creditors are required to perform this review no less frequently than once every six months, and must maintain reasonable methodologies for this evaluation. The statute requires card issuers to reduce the annual percentage rate that was previously increased if a reduction is "indicated" by the review. However, the statute expressly provides that no specific amount of reduction in the rate is required. This provision is effective August 22, 2010 but requires that creditors review accounts on which an annual percentage rate has been increased since January 1, 2009.

*General rule.* Consistent with the Credit Card Act, the proposed rule applies to card issuers that increase an annual percentage rate applicable to a credit card account, based on the credit risk of the consumer, market conditions, or other factors. For any rate increase imposed on or after January 1, 2009, the proposed rule requires card issuers to review changes in such factors no less frequently than once each six months and, if appropriate based on their review, reduce the annual percentage rate applicable to the account. The requirement to reevaluate rate increases applies both to increases in annual percentage rates based on factors specific to a particular consumer, such as changes in the consumer's creditworthiness, and to increases in annual percentage rates imposed due to factors such as changes in market conditions or the issuer's cost of funds. If based on its review a card issuer is required to reduce the rate applicable to an account, the proposed rule requires that the rate be reduced within 30 days after completion of the evaluation.

*Factors relevant to reevaluation of rate increases.* The proposed rule sets forth guidance on the factors that a credit card issuer must consider when performing the reevaluation of a rate increase. Credit card underwriting standards can change over time and for various reasons. In some cases, the proposed rule would require card issuers to review a consumer's account every six months for several years, and the issuer's underwriting standards for its new and existing cardholders may change significantly during that time. Accordingly, the proposed rule would permit a card issuer to review either the same factors on which the rate increase was originally based, or to review the factors that the card issuer currently considers when determining the annual percentage rates applicable to its credit card accounts.

*Termination of obligation to reevaluate rate increases.* The proposed rule requires that a card issuer continue to review a consumer's account each six months unless the rate is reduced to the rate in effect prior to the increase. In some circumstances, the proposed rule may require card issuers to reevaluate rate increases each six months for an indefinite period. The proposal solicits comment on whether the obligation to

review the rate applicable to a consumer's account should terminate after some specific time period elapses following the initial increase, for example after five years, as well as on whether there is significant benefit to consumers from requiring card issuers to continue reevaluating rate increases even after an extended period of time.

**III. Statutory Authority**

Section 2 of the Credit Card Act states that the Board "may issue such rules and publish such model forms as it considers necessary to carry out this Act and the amendments made by this Act." In addition, the provisions of the Credit Card Act implemented by this proposal rule direct the Board to issue implementing regulations. *See* Credit Card Act § 101(c) (new TILA § 148) and § 102(b) (new TILA § 149). Furthermore, these provisions of the Credit Card Act amend TILA, which mandates that the Board prescribe regulations to carry out its purposes and specifically authorizes the Board, among other things, to do the following:

- Issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, facilitate compliance with the act, or prevent circumvention or evasion. 15 U.S.C. 1604(a).
- Exempt from all or part of TILA any class of transactions if the Board determines that TILA coverage does not provide a meaningful benefit to consumers in the form of useful information or protection. The Board must consider factors identified in the act and publish its rationale at the time it proposes an exemption for comment. 15 U.S.C. 1604(f).
- Add or modify information required to be disclosed with credit and charge card applications or solicitations if the Board determines the action is necessary to carry out the purposes of, or prevent evasions of, the application and solicitation disclosure rules. 15 U.S.C. 1637(c)(5).
- Require disclosures in advertisements of open-end plans. 15 U.S.C. 1663.

For the reasons discussed in this notice, the Board is using its specific authority under TILA and the Credit Card Act, in concurrence with other TILA provisions, to effectuate the purposes of TILA, to prevent the circumvention or evasion of TILA, and to facilitate compliance with TILA.

**IV. Section-by-Section Analysis**

*Section 226.5a Credit and Charge Card Applications and Solicitations*

*Section 226.6 Account-Opening Disclosures*

Sections 226.5a(a)(2)(iv) and 226.6(b)(1)(i) address the use of bold text in, respectively, the application and solicitation table and the account-opening table. Currently, these provisions require that any fee or percentage amounts for late payment, returned payment, and over-the-limit fees be disclosed in bold text. However, these provisions also state that bold text shall not be used for any maximum limits on fee amounts unless the fee varies by state.

As discussed in detail below with respect to the proposed amendments to Appendix G–18, disclosure of a maximum limit (or "up to" amount) will generally be necessary to accurately describe penalty fees that are consistent with the new substantive restrictions in proposed § 226.52(b). While the Board previously restricted the use of bold text for maximum fee limits in order to focus consumers' attention on the fee or percentage amounts, the Board believes that—because the maximum limit will generally be the only amount disclosed for penalty fees—it is important to highlight that amount.

Accordingly, the Board is proposing to amend §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i) to require the use of bold text when disclosing maximum limits on fees. For consistency and to facilitate compliance, these amendments would apply to maximum limits for all fees required to be disclosed in the §§ 226.5a and 226.6 tables (including maximum limits for cash advance and balance transfer fees). The Board would also make conforming amendments to comment 5a(a)(2)–5.ii.

*Section 226.7 Periodic Statement*

Section 226.7(b)(11)(i)(B) requires card issuers to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. If a range of late payment fees may be assessed, the card issuer may state the range of fees, or the highest fee and at the issuer's option with the highest fee an indication that the fee imposed could be lower. Comment 7(b)(11)–4 clarifies that disclosing a late payment fee as "up to $29" complies with this requirement. Model language is provided in Samples G–18(B), G–18(D), G–18(F), and G–18(G).

As discussed in greater detail below with respect to the proposed amendments to Appendix G, an "up to" disclosure will generally be necessary to accurately describe a late payment fee that is consistent with the substantive restrictions in proposed § 226.52(b). Accordingly, the Board is proposing to amend § 226.7(b)(11)(i)(B) to clarify that it is no longer optional to disclose an indication that the late payment fee may be lower than the disclosed amount.

However, the Board notes that, consistent with § 226.52(b), a card issuer could disclose a range of late payment fees if, for example, the issuer chose not to impose a fee when a required minimum periodic payment below a certain amount is not received by the payment due date. As discussed in detail below, proposed § 226.52(b)(2)(i) would prohibit a card issuer from imposing a late payment fee that exceeds the amount of the delinquent minimum payment. A card issuer could choose to comply with this prohibition by only charging a late payment fee when the delinquent payment is above a certain amount. In these circumstances, the card issuer could disclose the late payment fee as a range. For example, if a card issuer chose not to impose a late payment fee when a payment that is less than $5 is late, the issuer could disclose its fee as a range from $5 to the maximum fee amount under the safe harbor in proposed § 226.52(b)(3).

*Section 226.9 Subsequent Disclosure Requirements*

9(c) Change in Terms

9(c)(2) Rules Affecting Open-End (Not Home-Secured) Plans

9(g) Increases in Rates Due to Delinquency or Default or as a Penalty

The Credit Card Act added new TILA Section 148, which requires creditors that increase an annual percentage rate applicable to a credit card account under an open-end consumer credit plan, based on factors including the credit risk of the consumer, market conditions, or other factors, to consider changes in such factors in subsequently determining whether to reduce the annual percentage rate. New TILA Section 148 requires creditors to maintain reasonable methodologies for assessing these factors. The statute also sets forth a timing requirement for this review. Specifically, creditors are required to review, no less frequently than once every six months, accounts for which the annual percentage rate has been increased to assess whether these factors have changed. New TILA Section 148 is effective August 22, 2010 but requires that creditors review accounts

on which the annual percentage rate has been increased since January 1, 2009.[1]

New TILA Section 148 requires creditors to reduce the annual percentage rate that was previously increased if a reduction is "indicated" by the review. However, new TILA Section 148(c) expressly provides that no specific amount of reduction in the rate is required. The Board is proposing to implement the substantive requirements of new TILA Section 148 in a new § 226.59, discussed elsewhere in this supplementary information.

In addition to these substantive requirements, TILA Section 148 also requires creditors to disclose the reasons for an annual percentage rate increase applicable to a credit card under an open-end consumer credit plan in the notice required to be provided 45 days in advance of that increase. The Board proposes to implement the notice requirements in § 226.9(c) and (g), which are discussed in this section. As discussed in the February 2010 Regulation Z Rule, card issuers are required to provide 45 days' advance notice of rate increases due to a change in contractual terms pursuant to § 226.9(c)(2) and of rate increases due to delinquency, default, or as a penalty not due to a change in contractual terms of the consumer's account pursuant to § 226.9(g). The additional notice requirements included in new TILA Section 148 are the same regardless of whether the rate increase is due to a change in the contractual terms or the exercise of a penalty pricing provision already in the contract; therefore for ease of reference the proposed notice requirements under § 226.9(c)(2) and (g) are discussed in a single section of this supplementary information.

Consistent with the approach that the Board has taken in implementing other provisions of the Credit Card Act that apply to credit card accounts under an open-end consumer credit plan, the proposed changes to § 226.9(c)(2) and (g) would apply to "credit card accounts under an open-end (not home-secured) consumer credit plan" as defined in § 226.2(a)(15). Therefore, home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by a debit card would not be subject to the new requirements to disclose the reasons for a rate increase implemented in § 226.9(c)(2) and (g).

Section 226.9(c)(2)(iv) sets forth the content requirements for significant changes in account terms, including rate increases that are due to a change in the contractual terms of the consumer's account. The Board is proposing to add a new § 226.9(c)(2)(iv)(A)(*8*) that requires a card issuer to disclose no more than four principal reasons for the rate increase for a credit card account under an open-end (not home-secured) credit plan, listed in their order of importance, in order to implement the notice requirements of new TILA Section 148. Comment 9(c)(2)(iv)–11 would provide additional guidance on the required disclosure. Specifically comment 9(c)(2)(iv)–11 states that there is no minimum number of reasons that are required to be disclosed under § 226.9(c)(2)(iv)(A)(*8*), but that the reasons disclosed are required to relate to and accurately describe the principal factors actually considered by the credit card issuer. The Board does not believe that it is appropriate to mandate disclosure of a minimum number of reasons, because rate increases may occur in different circumstances and the number of principal factors considered by the issuer could vary. For example, the rate increase could be the result of the consumer's behavior on the account, such as making a late payment, and in that case there would be only one principal reason for the rate increase. In contrast, a card issuer could base a rate increase on several different reasons, for example, a decrease in the consumer's credit score and changes in market conditions. In those circumstances, the card issuer would be required to disclose both principal reasons. However, as noted above, in order to avoid information overload, the regulation would limit the number of principal reasons to a maximum of four.

The comment further notes that a card issuer may describe the reasons for the increase in general terms, by disclosing for example that a rate increase is due to "a decline in your creditworthiness" or "a decline in your credit score," if the rate increase is triggered by a decrease of 100 points in a consumer's credit score. Similarly, the comment notes that a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as "a change in market conditions." The Board believes that this is the appropriate level of detail for this disclosure, because it would inform the consumer whether the rate increase is due to changes in the consumer's creditworthiness or behavior on the account, which the consumer may be able to take actions to mitigate, or whether the increase is due to more general factors such as changes in market conditions. The Board believes that consumers may find more detailed information confusing, and that, accordingly, the benefit to consumers of such detailed information would not outweigh the operational burden associated with providing additional detail.

The disclosure requirements of new § 226.9(c)(2)(iv)(A)(*8*) are intended to be flexible, to reflect the Board's understanding that different card issuers may consider different reasons, or may weigh similar reasons differently, in determining whether to raise the rate applicable to a consumer's account. Proposed comment 9(c)(2)(iv)–11 notes that in some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. For example, assume that the rate applicable to a consumer's account is being increased because a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer's credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer's credit score and the consumer's late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer's credit score, it is not required to be separately disclosed.

Similarly, the Board proposes to add a new § 226.9(g)(3)(i)(A)(*6*) for rate increases due to delinquency, default, or as a penalty not due to a change in contractual terms of the consumer's account pursuant to § 226.9(g). Proposed § 226.9(g)(3)(i)(A)(*6*) would require a card issuer to disclose no more than four reasons for the rate increase, listed in their order of importance, for a credit card account under an open-end (not home-secured) credit plan. New comment 9(g)–7 would cross-reference comment 9(c)(2)(iv)–11 for guidance on disclosure of the reasons for a rate increase.

The Board proposes to amend Samples G–18(F), G–18(G), G–20, and G–22 to incorporate examples of disclosures of the reasons for a rate increase as required by proposed § 226.9(c)(2)(iv)(A)(*8*) and (g)(3)(i)(A)(*6*).

*Section 226.52 Limitations on Fees*

52(b) Limitations on Penalty Fees

Most credit card issuers will assess a penalty fee if a consumer engages in activity that violates the terms of the cardholder agreement or other requirements imposed by the issuer

[1] As discussed in the supplementary information to § 226.59, the proposed rule would require that rate increases imposed between January 1, 2009 and August 21, 2010 first be reviewed prior to February 22, 2011 (six months after the effective date of new § 226.59).

with respect to the account. For example, most agreements provide that a fee will be assessed if the required minimum periodic payment is not received on or before the payment due date or if a payment is returned for insufficient funds or for other reasons. Similarly, many agreements provide that a fee will be assessed if amounts are charged to the account that exceed the account's credit limit.[2] These fees have increased significantly over the past fifteen years. A 2006 report by the Government Accountability Office (GAO) found that late-payment and over-the-limit fees increased from an average of approximately $13 in 1995 to an average of approximately $30 in 2005.[3] The GAO also found that, over the same period, the percentage of issuer revenue derived from penalty fees increased to approximately 10%.[4]

According to data obtained by the Board from Mintel Comperemedia, the average late payment fee has increased to approximately $37 as of May 2009, while the average over-the-limit fee has increased to approximately $36.[5] In addition, a July 2009 review of credit card application disclosures by the Pew Charitable Trusts found that the median late-payment and over-the-limit fees charged by the twelve largest bank card issuers were $39.[6]

However, it appears that many smaller credit card issuers charge significantly lower late-payment and over-the-limit fees. For example, the Board understands that some community bank issuers charge late-payment and over-the-limit fees that average between $17 to $25. In addition, the Board understands that many credit unions charge late-payment and over-the-limit fees of $20 on average. Similarly, the Pew Credit Card Report found that the median late-payment and over-the-limit fees charged by the twelve largest credit union card issuers were $20.[7]

The Credit Card Act creates a new TILA Section 149. Section 149(a) provides that "[t]he amount of any penalty fee or charge that a card issuer may impose with respect to a credit card account under an open end consumer credit plan in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over-the-limit fee, or any other penalty fee or charge, shall be reasonable and proportional to such omission or violation." Section 149(b) further provides that the Board, in consultation with the other Federal banking agencies[8] and the National Credit Union Administration (NCUA), shall issue rules that "establish standards for assessing whether the amount of any penalty fee or charge * * * is reasonable and proportional to the omission or violation to which the fee or charge relates."

In issuing these rules, new TILA Section 149(c) requires the Board to consider: (1) The cost incurred by the creditor from such omission or violation; (2) the deterrence of such omission or violation by the cardholder; (3) the conduct of the cardholder; and (4) such other factors as the Board may deem necessary or appropriate. Section 149(d) authorizes the Board to establish "different standards for different types of fees and charges, as appropriate." Finally, Section 149(e) authorizes the Board—in consultation with the other Federal banking agencies and the NCUA—to "provide an amount for any penalty fee or charge * * * that is presumed to be reasonable and proportional to the omission or violation to which the fee or charge relates."

As discussed below, the Board proposes to implement new TILA Section 149 in proposed § 226.52(b). In developing this proposal, the Board consulted with the other Federal banking agencies and the NCUA.

Reasonable and Proportional Standard and Consideration of Statutory Factors

As noted above, the Board is responsible for establishing standards for assessing whether a credit card penalty fee is reasonable and proportional to the violation for which it is imposed. New TILA Section 149 does not define "reasonable and proportional," nor is the Board aware of any generally accepted definition for those terms when used in conjunction with one another. As a separate legal term, "reasonable" has been defined as "fair, proper, or moderate."[9] Congress often uses a reasonableness standard to provide agencies or courts with broad discretion in implementing or interpreting a statutory requirement.[10] The term "proportional" is seldom used by Congress and does not have a generally-accepted legal definition. However, it is commonly defined as meaning "corresponding in size, degree, or intensity" or as "having the same or a constant ratio."[11] Thus, it appears that Congress intended the words "reasonable and proportional" in new TILA Section 149(a) to require that there be a reasonable and generally consistent relationship between the dollar amounts of credit card penalty fees and the violations for which those fees are imposed, providing the Board with substantial discretion in implementing that requirement.

However, in Section 149(c), Congress also set forth certain factors that the Board is required to consider when establishing standards for determining whether penalty fees are reasonable and proportional. Although Section 149(c) only requires consideration of these

[2] The Board notes that some card issuers have recently announced that they will cease imposing fees for exceeding the credit limit. In addition, § 226.56 prohibits card issuers from imposing such fees unless the consumer has consented to the issuer's payment of transactions that exceed the credit limit.

[3] U.S. Gov't Accountability Office, *Credit Cards: Increased Complexity in Rates and Fees Heightens Need for More Effective Disclosures to Consumers* (Sept. 2006) (GAO Credit Card Report) at 5, 18–22, 33, 72 (available at *http://www.gao.gov/new.items/d06929.pdf*).

[4] *See* GAO Credit Card Report at 72–73.

[5] The Mintel data, which is derived from a representative sample of credit card solicitations, indicates that the average late payment fee was approximately $37 in January 2007 and remained at that level through May 2009. During the same period, the average over-the-limit fee increased from approximately $35 to approximately $36. In addition, the average returned-payment fee during this period increased from approximately $30 to approximately $32.

[6] *See* The Pew Charitable Trusts, *Still Waiting: "Unfair or Deceptive" Credit Card Practices Continue as Americans Wait for New Reforms to Take Effect* (Oct. 2009) (Pew Credit Card Report) at 3, 12–13, 31–33 (available at *http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/Pew_Credit_Cards_Oct09_Final.pdf*). As noted in the Pew Credit Card Report, the largest bank card issuers generally tier late payment fees based on the account balance (with a median fee of $39 applying when the account balance is $250 or more). Similarly, some bank card issuers tier over-the-limit fees (with the median fee of $39 applying when the account balance is $1,000 or more). In both cases, the balance necessary to trigger the highest penalty fee is significantly less than the average outstanding balance on active credit card accounts. *See id.* at 12–13, 31.

[7] *See* Pew Credit Card Report at 3, 31–33.

[8] The Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS).

[9] *E.g., Black's Law Dictionary* at 1272 (7th ed. 1999); *see also id.* ("It is extremely difficult to state what lawyers mean when they speak of 'reasonableness.'" (quoting John Salmond, *Jurisprudence* 183 n.(u) (Glanville L. Williams ed., 10th ed. 1947)).

[10] *See, e.g.,* 42 U.S.C. 12112(b)(5) (defining the term "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee"); 28 U.S.C. 2412(b) ("Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States or any agency."); 43 U.S.C. 1734(a) ("Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.").

[11] *E.g., Merriam-Webster's Collegiate Dictionary* at 936 (10th ed. 1995).

factors, the Board believes that they reflect Congressional intent with respect to the implementation of Section 149(a) and therefore provide useful measures for determining whether penalty fees are "reasonable and proportional." Accordingly, when implementing the reasonable and proportional requirement, the Board has been guided by these factors. In addition, pursuant to its authority under Section 149(c)(4) to consider "such other factors as the Board may deem necessary or appropriate," the Board has considered the need for general regulations that can be consistently applied by card issuers and enforced by the Federal banking agencies, the NCUA, and the Federal Trade Commission. The Board has also considered the need for regulations that result in fees that can be effectively disclosed to consumers in solicitations, account-opening disclosures, and elsewhere.

As discussed below, when the statutory factors in Section 149(c) were in conflict, the Board found it necessary to give more weight to a particular factor or factors. In addition, while the Board has generally attempted to establish consistent relationships between the dollar amounts of penalty fees and the violations for which they are imposed, there are certain circumstances in which the Board believes that a particular factor or factors may warrant modifications to those relationships that could produce some degree of inconsistency. The Board is making these determinations pursuant to the authority granted by new TILA Section 149 and existing TILA Section 105(a). In particular, as noted above, new TILA Section 149(d) provides that "the Board may establish different standards for different types of fees and charges, as appropriate."

Cost Incurred as a Result of Violations

New TILA Section 149(c)(1) requires the Board to consider the cost incurred by the creditor from the violation. The Board believes that, for purposes of new TILA Section 149(a), the dollar amount of a penalty fee is reasonable and proportional to a violation if it represents a reasonable proportion of the total costs incurred by the issuer as a result of that type of violation across all consumers. This interpretation appears to be consistent with Congress' intent insofar as it permits card issuers to use penalty fees to pass on the costs incurred as a result of violations while ensuring that those costs are spread evenly among consumers and that no individual consumer bears an unreasonable or disproportionate share. As discussed below, the Board also intends to adopt a safe harbor amount for penalty fees that the Board believes would be generally sufficient to cover issuers' costs.

The Board notes that the proposed rule would not require that a penalty fee be reasonable and proportional to the costs incurred as a result of a specific violation on a specific account. Such a requirement would force card issuers to wait until after a violation has occurred to determine the associated costs. In addition to being inefficient and overly burdensome for card issuers, this type of requirement would be difficult for regulators to enforce and would result in fees that could not be disclosed to consumers in advance. The Board does not believe that Congress intended this result. Instead, as discussed in greater detail below, the proposed rule would require card issuers to determine that their penalty fees represent a reasonable proportion of the total costs incurred by the issuer as a result of the *type of violation* (for example, late payments).

Deterrence of Violations

New TILA Section 149(c)(2) requires the Board to consider the deterrence of violations by the cardholder. The Board believes that a penalty fee is reasonable and proportional to a violation under new TILA Section 149(a) if the dollar amount of the fee is reasonably necessary to deter that type of violation. The Board believes that this interpretation is consistent with Congress' intent because it will prevent consumers from being charged fees that unreasonably exceed—or are out of proportion to—their deterrent effect. As discussed below, the Board would also adopt a safe harbor amount for penalty fees that the Board believes would be generally sufficient to deter violations.

The proposed rule does not require that penalty fees be calibrated to deter individual consumers from engaging in specific violations. The Board believes that this type of requirement would be unworkable because the amount necessary to deter a particular consumer from, for example, paying late may depend on the individual characteristics of that consumer (such as the consumer's disposable income or other obligations) and other highly specific factors. Imposing such a requirement would create compliance, enforcement, and disclosure difficulties similar to those discussed above with respect to costs. Accordingly, as discussed in more detail below, the proposed rule would require that penalty fees be reasonably necessary to deter the type of violation, rather than a specific violation or an individual consumer.[12]

Consumer Conduct

New TILA Section 149(c)(3) requires the Board to consider the conduct of the cardholder. As discussed above, the Board does not believe that Congress intended to require that each penalty fee be based on an assessment of the individual characteristics of the violation. Thus, the proposed rule would not require card issuers to examine the conduct of the individual consumer before imposing a penalty fee. The Board believes that—to the extent certain consumer conduct that violates the account terms or other requirements has the effect of increasing the costs incurred by the card issuer—fees imposed pursuant to the proposed rule would reflect that conduct because the issuer would be permitted to recover the increased cost. Similarly, the proposed rule takes consumer conduct into account by permitting issuers to charge penalty fees that are reasonably necessary to deter certain types of conduct that result in violations. Thus, because consideration of individual consumer conduct is not feasible and because general consumer conduct would be reflected in the cost and deterrence analyses, the Board's general rule would not permit penalty fees to be based exclusively on consumer conduct.

However, the Board considered consumer conduct when developing other provisions of the proposed rule. These provisions reflect the Board's belief that Congress intended the amount of a penalty fee to bear a reasonable relationship to the magnitude of the violation. For example, a consumer who exceeds the credit limit by $5 should not be penalized to the same degree as a consumer who exceeds the limit by $500. Accordingly, the proposed rule would prohibit issuers from imposing penalty fees that exceed the dollar amount associated with the violation of the account terms or other requirements. Thus, a consumer who exceeds the

[12] The Board acknowledges that a penalty fee is unlikely to have a deterrent effect in circumstances where consumers cannot avoid the violation of the account terms. However, deterrence is a required factor under new TILA Section 149(c), and there is evidence indicating that, as a general matter, penalty fees may deter future violations of the account terms. *See* Agarwal *et al., Learning in the Credit Card Market* (Feb. 8, 2008) (finding that, based on a study of four million credit card statements, a consumer who incurs a late payment fee is 40% less likely to incur a late payment fee during the next month, although this effect depreciates approximately 10% each month) (available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091623&download=yes*).

credit limit by $5 could not be charged an over-the-limit fee of more than $5.

The proposed rule would also establish a safe harbor permitting higher penalty fees when a large dollar amount is associated with the violation. Specifically, issuers would be permitted to impose penalty fees that do not exceed 5% of the dollar amount associated with the violation (up to a maximum amount). Thus, a consumer who exceeds the credit limit by $500 could be charged an over-the-limit fee of $25.

Furthermore, the proposed rule would prohibit issuers from imposing multiple penalty fees based on a single event or transaction. The Board believes that imposing multiple fees in these circumstances could be unreasonable and disproportionate to the conduct of the consumer because the same conduct may result in a single or multiple violations, depending on circumstances that may not be in the control of the consumer. For example, the proposed rule would prohibit issuers from charging a late payment fee and a returned payment fee based on a single payment.

Finally, the Board solicits comment on whether there are additional methods for regulating the amount of credit card penalty fees based on the conduct of the consumer. In particular, the Board solicits comment on whether the safe harbor in § 226.52(b)(3) should permit issuers to base penalty fees on consumer conduct by:

- Tiering the dollar amount of penalty fees based on the number of times a consumer engages in particular conduct during a specified period. For example, card issuers could be permitted to charge a fee for the second late payment during a 12-month period that is higher than the fee charged for the first late payment.
- Imposing penalty fees in increments based on the consumer's conduct. For example, card issuers could be permitted to charge a late payment fee of $5 each day after the payment due date until the required minimum periodic payment is received. Thus, a consumer who is only a day late would be charged $5 in late payment fees, while a consumer who is five days late would be charged $25.

52(b)(1) General Rule

Proposed § 226.52(b)(1) implements the general rule in new TILA Section 149(a) by providing that a card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the card issuer has determined that either: (1) The dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation; or (2) the dollar amount of the fee is reasonably necessary to deter that type of violation.

Because a card issuer is in the best position to determine the costs it incurs as a result of violations and the deterrent effect of its penalty fees, the Board believes that, as a general matter, it is appropriate to make card issuers responsible for determining that their fees comply with new TILA Section 149(a) and § 226.52(b)(1). As discussed below, proposed § 226.52(b)(3) contains a safe harbor that is intended to reduce the burden of making these determinations. The Board notes that a card issuer that chooses to base its penalty fees on its own determinations (rather than on the safe harbor) must be able to demonstrate to the regulator responsible for enforcing compliance with TILA and Regulation Z that its determinations are consistent with § 226.52(b)(1).

As discussed above, it would be inefficient and overly burdensome to require card issuers to make individualized determinations with respect to the costs incurred as a result of each violation or the amount necessary to deter each violation. Instead, card issuers would be required to make these determinations with respect to the type of violation (for example, late payments), rather than a specific violation or an individual consumer. Although "the conduct of the cardholder" is a relevant consideration under new TILA Section 149(c)(3), proposed § 226.52(b)(1) would not require a card issuer to examine the conduct of the individual consumer with respect to a particular violation before imposing a penalty fee, nor would it permit an issuer to base the amount of a penalty fee solely on a consumer's conduct. Instead, the Board believes that this factor supports the prohibitions in proposed § 226.52(b)(2) on penalty fees that exceed the dollar amount associated with the violation and the imposition of multiple penalty fees based on a single event or transaction.

Proposed comment 52(b)–1 would clarify that, for purposes of § 226.52(b), a fee is any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates. This comment provides the following examples of fees that are subject to the limitations in—or prohibited by—§ 226.52(b): (1) Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date; (2) returned-payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned; (3) any fee or charge for an over-the-limit transaction as defined in § 226.56(a), to the extent the imposition of such a fee or charge is permitted by § 226.56; [13] (4) any fee or charge for a transaction that the card issuer declines to authorize; and (5) any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or amount of transactions or a particular type of transaction) or the closure or termination of an account.[14]

Proposed comment 52(b)–1 would also provide the following examples of fees to which § 226.52(b) does not apply: (1) Balance transfer fees; (2) cash advance fees; (3) foreign transaction fees; (4) annual fees and other fees for the issuance or availability of credit described in § 226.5a(b)(2), except to the extent that such fees are based on account inactivity; (4) fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the account terms or other requirements; (5) fees for making an expedited payment (to the extent permitted by § 226.10(e)); (6) fees for optional services (such as travel insurance); and (7) fees for reissuing a lost or stolen card.

In addition, proposed comment 52(b)–1 would clarify that § 226.52(b) does not apply to charges attributable to an increase in an annual percentage rate based on an act or omission that violates the account terms. Currently, many credit card issuers apply an increased

[13] It appears that Congress intended new TILA Section 149 to apply to all over-the-limit fees, even if the consumer has affirmatively consented to the payment of over-the-limit transactions pursuant to new TILA Section 127(k) and § 226.56. *See* new TILA § 149(a) (listing over-the-limit fees as an example of a penalty fee or charge). Furthermore, the Board has determined that the Credit Card Act's restrictions on fees for over-the-limit transactions apply regardless of whether the card issuer characterizes the fee as a fee for a service or a fee for a violation of the account terms. *See* comment 56(j)–1.

[14] As discussed below, § 226.52(b)(2)(i)(B) would prohibit the imposition of fees for declined transactions, fees based on account inactivity, and fees based on the closure or termination of an account.

annual percentage rate (or penalty rate) based on certain violations of the account terms. Application of this increased rate can result in increased interest charges. However, the Board does not believe that Congress intended the words "any penalty fee or charge" in new TILA Section 149(a) to apply to penalty rate increases.

Elsewhere in the Credit Card Act, Congress expressly referred to increases in annual percentage rates when it intended to address them.[15] In fact, the Credit Card Act contains several provisions that specifically limit the ability of card issuers to apply penalty rates. Revised TILA Section 171 prohibits application of penalty rates to existing credit card balances unless the account is more than 60 days delinquent. *See* revised TILA § 171(b)(4); *see also* § 226.55(b)(4). Furthermore, if an account becomes more than 60 days delinquent and a penalty rate is applied to an existing balance, the card issuer must terminate the penalty rate if it receives the required minimum payments on time for the next six months. *See* revised TILA § 171(b)(4)(B); § 226.55(b)(4)(ii). With respect to new transactions, new TILA § 172(a) generally prohibits card issuers from applying penalty rates during the first year after account opening. *See also* § 226.55(b)(3)(iii). Subsequently, the card issuer must provide 45 days advance notice before applying a penalty rate to new transactions. *See* new TILA § 127(i); § 226.9(g). Finally, once a penalty rate is in effect, the card issuer generally must review the account at least once every six months thereafter and reduce the rate if appropriate. *See* new TILA § 148; proposed § 226.59. These protections—in combination with the lack of any express reference to penalty rate increases in new TILA Section 149—indicate that Congress did not intend to apply the "reasonable and proportional" standard to increases in annual percentage rates.[16]

Proposed comment 52(b)–2 would clarify that a card issuer may round any fee that complies with § 226.52(b) to the nearest whole dollar. For example, if the proposed rule permits a card issuer to impose a late payment fee of $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the permissible late payment fee were $21.49, the card issuer would not be permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21.

Proposed comment 52(b)(1)–1 would clarify that the fact that a card issuer's fees for violating the account terms are comparable to fees assessed by other card issuers is not sufficient to satisfy the requirements of § 226.52(b)(1). Instead, a card issuer must make its own determinations whether the amounts of its fees represent a reasonable proportion of the total costs incurred by the issuer or are reasonably necessary to deter violations.

*A. Fees Based on Costs*

Proposed comment 52(b)(1)(i)–1 would clarify that a card issuer is not required to base its fees on the costs incurred as a result of a specific violation of the account terms or other requirements. Instead, for purposes of § 226.52(b)(1)(i), a card issuer must have determined that a fee for violating the account terms or other requirements represents a reasonable proportion of the costs incurred by the card issuer as a result of that type of violation. The factors relevant to this determination include: (1) The number of violations of a particular type experienced by the card issuer during a prior period; and (2) the costs incurred by the card issuer during that period as a result of those violations. In addition, the card issuer may, at its option, base its fees on a reasonable estimate of changes in the number of violations of that type and the resulting costs during an upcoming period.

For example, a card issuer could satisfy § 226.52(b)(1)(i) by determining that its late payment fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of late payments based on the number of delinquencies it experienced in the past twelve months, the costs incurred as a result of those delinquencies, and a reasonable estimate about changes in delinquency rates and the costs incurred as a result of delinquencies during a subsequent period of time (such as the next twelve months). As discussed below, proposed comments 52(b)(1)(i)–4 through –6 would provide more detailed examples of the types of costs that a card issuer may incur as a result of late payments, returned payments, and transactions that exceed the credit limit as well as examples of fees that would represent a reasonable proportion of those costs.

Proposed comment 52(b)(1)(i)–2 would clarify that, although higher rates of loss may be associated with particular violations of the account terms, those losses and associated costs (such as the cost of holding reserves against losses) are excluded from the § 226.52(b)(1)(i) cost analysis. Although an account cannot become a loss without first becoming delinquent, delinquencies and associated losses may be caused by a variety of factors (such unemployment, illness, and divorce). Furthermore, it appears that most violations of the account terms do not actually result in losses.[17]

In addition, the Board understands that, as a general matter, card issuers currently do not price for the risk of loss through penalty fees; instead, issuers generally price for risk through upfront annual percentage rates and penalty rate increases.[18] However, the Credit Card Act generally prohibits penalty rate increases during the first year after account opening and with respect to existing balances.[19] The Board imposed similar limitations in January 2009, reasoning that pricing for risk using upfront rates rather than penalty rate increases would promote transparency and protect consumers from unanticipated increases in the cost of credit.[20] For these same reasons, the Board is concerned that—if card issuers

[15] For example, revised TILA Section 171(a) and (b) and new TILA Section 172 explicitly distinguish between annual percentage rates, fees, and finance charges.

[16] The Board also notes that prior versions of the Credit Card Act contained language that would have limited the amount of penalty rate increases, but that language was removed prior to enactment. *See* S. 414 § 103 (introduced Feb. 11, 2009) (proposing to create a new TILA § 127(o) requiring that "[t]he amount of any fee or charge that a card issuer may impose in connection with any omission with respect to, or violation of, the cardholder agreement, including any late payment fee, over the limit fee, *increase in the applicable annual percentage rate,* or any similar fee or charge, shall be reasonably related to the cost to the card issuer of such omission or violation") (emphasis added) (available at *http://thomas.loc.gov*).

[17] For example, data submitted to the Board during the comment period for the January 2009 FTC Act Rule indicated that more than 93% of accounts that were over the credit limit or delinquent twice in a twelve month period did not charge off during the subsequent twelve months. *See* Federal Reserve Board Docket No. R–1314: Exhibit 5, Table 1a to Comment from Oliver I. Ireland, Morrison Foerster LLP (Aug 7, 2008) (Argus Analysis) (presenting results of analysis by Argus Information & Advisory Services, LLC of historical data for consumer credit card accounts believed to represent approximately 70% of all outstanding consumer credit card balances). Furthermore, because collections generally continue after the account has been charged off, an account that has been charged off is not necessarily a total loss.

[18] The Board recognizes that this is not necessarily the case for charge card accounts, which generally impose an annual fee but not interest charges because the balance must be paid in full each billing cycle. As discussed below, the Board solicits comment on whether a different approach should be taken with these types of accounts.

[19] *See* revised TILA § 171; new TILA § 172; *see also* § 226.55.

[20] This rule was issued jointly with the OTS and NCUA under the Federal Trade Commission Act to protect consumers from unfair acts or practices with respect to consumer credit card accounts. *See* 74 FR 5521–5528.

were permitted to begin recovering losses and associated costs through penalty fees rather than upfront rates—transparency in credit card pricing would be reduced.[21] Nevertheless, the Board solicits comment on whether card issuers should be permitted to include losses and associated costs in the § 226.52(b)(1)(i) determination.

Proposed comment 52(b)(1)(i)–3 would clarify that, as a general matter, amounts charged to the card issuer by a third party as a result of a violation of the account terms are costs incurred by the card issuer for purposes of § 226.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined for purposes of § 226.52(b)(1)(i) that the amount represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer for delinquent accounts, the card issuer must determine that the amount charged to the card issuer by the affiliate for such services represents a reasonable proportion of the costs incurred by the affiliate as a result of late payments.

Proposed comment 52(b)(1)(i)–4 would clarify the application of proposed § 226.52(b)(1)(i) to late payment fees. In addition to providing illustrative examples, the comment would state that, for purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements). The Board solicits comment on whether card issuers incur other costs as a result of late payments.

Proposed comment 52(b)(1)(i)–5 would clarify the application of proposed § 226.52(b)(1)(i) to returned-payment fees. The comment would state that, for purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include the costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments as well as the costs associated with notifying the consumer of the returned payment and arranging for a new payment. The comment would also provide illustrative examples. As above, the Board solicits comment on whether card issuers incur other costs as a result of returned payments.

Proposed comment 52(b)(1)(i)–6 would clarify the application of proposed § 226.52(b)(1)(i) to over-the-limit fees. In addition to providing illustrative examples, the comment would state that, for purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include the costs associated with determining whether to authorize over-the-limit transactions and the costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit. The Board solicits comment on whether card issuers incur other costs as a result of over-the-limit transactions.

*B. Fees Based on Deterrence*

Proposed comment 52(b)(1)(ii)–1 would clarify that § 226.52(b)(1)(ii) does not require a card issuer to determine that a fee for violating the account terms or other requirements is necessary to deter violations by a specific consumer or with respect to a specific account. Instead, for purposes of § 226.52(b)(1)(ii), a card issuer must determine that a fee is reasonably necessary to deter the type of violation for which the fee is imposed.

Because it would not be feasible to determine the specific amount necessary to deter a particular consumer from violating the account terms or other requirements, § 226.52(b)(1)(ii) would require issuers that base their penalty fees on deterrence to use an empirically derived, demonstrably and statistically sound model that reasonably estimates the effect of the amount of the fee on the frequency of violations. Proposed comment 52(b)(1)(ii)–2 clarifies that a model that reasonably estimates a statistical correlation between the imposition of a fee and the frequency of a type of violation is not sufficient to satisfy the requirements of § 226.52(b)(1)(ii). The Board acknowledges that, as a general matter, the imposition of a fee for particular behavior (such as paying late) can reduce the frequency of that behavior. However, the frequency of violations may also be influenced by other factors (such as unemployment rates). In addition, consistent with the intent of new TILA Section 149, proposed § 226.52(b)(1)(ii) requires the issuer to determine that the *dollar amount* of the fee is reasonably necessary to deter violations.

Thus, the proposed comment clarifies that, in order to support a determination that the dollar amount of a fee is reasonably necessary to deter a particular type of violation, a model must reasonably estimate that, independent of other variables, the imposition of a lower fee amount would result in a substantial increase in the frequency of that type of violation. In addition, the parameterization of the model must be sufficiently flexible to allow for the identification of a lower fee level above which additional fee increases have no marginal effect on the frequency of violations. In other words, a card issuer that currently charges a $35 late payment fee could not satisfy the requirements in § 226.52(b)(1)(ii) by developing a model that estimates that delinquencies will increase if *no* late payment fee is charged. Instead, the issuer's model must be able to reasonably estimate that delinquencies

[21] The Board notes that this proposed approach is consistent with the conclusions reached by the United Kingdom's Office of Fair Trading in its statement of the principles that credit card issuers must follow in setting default charges. *See* Office of Fair Trading (United Kingdom), *Calculating Fair Default Charges in Credit Card Contracts: A Statement of the OFT's Position* (April 2006) (OFT Credit Card Statement) at 1, 19–22 ("[W]e fail to see how [losses] can legitimately be said to have been caused in any legally relevant sense by a particular default of the consumer given that * * * most defaulters do not default again in any given year, let alone are their accounts written off at a later stage."); *see also id.* at 25 ("[I]t is preferable for credit card providers' costs to be covered * * * by the overall interest rate charged for using the card. That rate is most likely to be in the forefront of the minds of consumers when entering contracts, and the figure is one which readily enables the consumer to compare the advantages (or otherwise) of signing up for one credit card rather than another. The transparency of core terms such as the interest rate payable on the card enhances the ability of consumers to compare and contrast the various credit cards on offer in the market and is therefore likely to bring about competitive downward pressure on the rates, and hence costs involved. It is therefore preferable, from the point of view of making markets work well that if credit card companies want to recover costs associated with default from their customers, they should do so by virtue of the overall interest rate payable for credit on the card.") (available at *http://www.oft.gov.uk/shared_oft/reports/financial_products/oft842.pdf*). The Board is aware that a recent opinion by the Supreme Court of the United Kingdom has called into question aspects of the OFT's legal authority to regulate prices paid by consumers for banking services. *See Office of Fair Trading* v. *Abbey Nat'l Plc and Others* (Nov. 25, 2009) (available at *http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0070_Judgment.pdf*). However, this opinion does not appear to affect the OFT's authority to regulate default charges, which was the basis for the Credit Card Statement. *See* OFT Credit Card Statement at 10–17. Regardless, this question does not affect the Board's legal authority (and mandate) to regulate credit card penalty fees under new TILA Section 149. Accordingly, while the Board does not find the OFT Credit Card Statement to be dispositive on any particular point, the Board believes that the OFT's findings with respect to credit card penalty fees warrant consideration, along with other factors.

will increase substantially if a late payment fee of less than $35 is charged.

The Board understands that, in order to develop the empirically-derived estimates required by § 226.52(b)(1)(ii), card issuers must have data regarding the effect of different fee amounts on the frequency of violations. Specifically, in order to comply with § 226.52(b)(1)(ii), it will be necessary for a card issuer to test the effect of fee amounts that are lower and higher than the amount ultimately found to be reasonably necessary to deter a type of violation. For example, in the process of determining that a $20 fee is reasonably necessary to deter a particular type of violation, a card issuer may need to test the deterrent effect of an $15 fee and a $25 fee.

Some card issuers may be able to gather the necessary data by testing the deterrent effect of different fee amounts prior to the August 22, 2010 effective date for new TILA Section 149. Issuers that cannot do so would be required to base their penalty fees on costs consistent with § 226.52(b)(1)(i) or to use the safe harbor in § 226.52(b)(3). However, the Board does not believe that these issuers should be permanently foreclosed from gathering the data necessary to base their penalty fees on deterrence. Furthermore, as discussed below with respect to § 226.52(b)(1)(iii), card issuers that base their fees on deterrence will be required to reevaluate those fees annually and will therefore need to gather updated data.

Accordingly, the Board solicits comment on whether it is appropriate to permit card issuers to test the effect of penalty fee amounts that exceed the amounts otherwise permitted by § 226.52(b)(1). In addition, the Board solicits comment on whether limitations are necessary to ensure that such testing is legitimate. For example, testing of higher fee amounts could be limited to a representative sample of accounts that is no larger than reasonably necessary to make statistically-sound estimates regarding the effect of the amount of the fee on the frequency of violations. Similarly, testing could be limited to a period of time that is no longer than reasonably necessary to make such estimates.

*C. Reevaluation of Fees*

Proposed § 226.52(b)(1)(iii) provides that a card issuer must reevaluate its determination under § 226.52(b)(1)(i) or (b)(1)(ii) at least once every twelve months. If as a result of the reevaluation the card issuer determines that a lower fee is consistent with § 226.52(b)(1)(i) or (b)(1)(ii), the card issuer must begin imposing the lower fee within 30 days after completing the reevaluation. If the card issuer instead determines that a higher fee is consistent with § 226.52(b)(1)(i) or (b)(1)(ii), the card issuer may begin imposing the higher fee after complying with the notice requirements in § 226.9. This provision is intended to ensure that card issuers impose penalty fees based on relatively current cost or deterrence information. However, the Board does not wish to encourage frequent changes in penalty fees, which could reduce predictability for consumers. Accordingly, the Board solicits comment on whether twelve months is an appropriate interval for the reevaluation.

52(b)(2) Prohibited Fees

Section 226.52(b)(2) would prohibit credit card penalty fees that the Board believes to be inconsistent with new TILA Section 149. In particular, these prohibitions are intended to ensure that—consistent with new TILA Section 149(c)(3)—penalty fees are generally reasonable and proportional to the conduct of the cardholder.

*A. Fees That Exceed Dollar Amount Associated With Violation*

Section 226.52(b)(2)(i)(A) would prohibit fees based on violations of the account terms that exceed the dollar amount associated with the violation at the time the fee is imposed. The Board believes that this prohibition is consistent with Congress' intent to prohibit penalty fees that are not reasonable and proportional to the violation. Specifically, penalty fees that exceed the dollar amount associated with the violation do not appear to be proportional to the consumer conduct that resulted in the violation. For example, the Board believes that Congress did not intend to permit issuers to impose a $35 over-the-limit fee when a consumer has exceeded the credit limit by $5.

The Board recognizes the possibility that a card issuer could incur costs as a result of a violation that exceed the dollar amount associated with that violation. However, the Board does not believe this will be the case in most circumstances. Furthermore, to the extent an issuer cannot recover all of its costs from violations involving small dollar amounts, proposed § 226.52(b)(1) permits the issuer to recover those costs by spreading them evenly among all other consumers who engage in that type of violation. In addition, the proposed limitation may encourage card issuers either to undertake efforts to reduce the costs incurred as a result of violations that involve small dollar amounts or to build those costs into upfront rates and fees, which will result in greater transparency for consumers regarding the cost of using their credit card accounts.

An argument could be made that prohibiting penalty fees from exceeding the dollar amount associated with the violation will result in fees that are not sufficient to deter violations. However, the need for deterrence may be less pronounced with respect to violations involving small dollar amounts. Furthermore, the Board believes that consumers may be unlikely to change their behavior in reliance on this limitation. Penalty fees will still have a deterrent effect in these circumstances because a card issuer would be permitted to impose a fee that equals the dollar amount associated with the violation (so long as that fee is otherwise consistent with § 226.52(b)). *See* examples in proposed comment 52(b)(2)(i)–1 through –3.

Finally, the Board recognizes that proposed § 226.52(b)(2)(i)(A) would require card issuers to charge individualized penalty fees insofar as the amount of the fee is tied to the dollar amount associated with the particular violation. However, unlike individualized consideration of cost, deterrence, or consumer conduct, § 226.52(b)(2)(i)(A) would require a mathematical determination that issuers should generally be able to program their systems to perform automatically. Thus, it does not appear that compliance with § 226.52(b)(2)(i)(A) would be overly burdensome. Nevertheless, the Board solicits comment on the compliance burden associated with this provision.

As discussed below, the proposed commentary and § 226.52(b)(2)(i)(B) provide guidance regarding the dollar amounts associated with specific violations of the account terms or other requirements. Consistent with the intent of proposed § 226.52(b)(2)(i), the Board generally clarifies the dollar amount associated with a violation in terms of the consumer conduct that resulted in the violation. The Board requests comment on whether additional guidance is needed regarding the dollar amounts associated with other types of violations.

1. Dollar Amount Associated With Late Payments

Proposed comment 52(b)(2)(i)–1 would clarify that the dollar amount associated with a late payment is the amount of the required minimum periodic payment that was not received on or before the payment due date. Thus, § 226.52(b)(2)(i)(A) prohibits a

card issuer from imposing a late payment fee that exceeds the amount of the required minimum periodic payment on which that fee is based. For example, a card issuer would be prohibited from charging a late payment fee of $39 based on a consumer's failure to make a $20 required minimum periodic payment by the payment due date.

2. Dollar Amount Associated With Returned Payments

Proposed comment 52(b)(2)(i)–2 would clarify that, for purposes of § 226.52(b)(2)(i)(A), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due during the billing cycle in which the payment is returned to the card issuer. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a returned-payment fee that exceeds the amount of that required minimum periodic payment.

For example, assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $20 is due on March 25. The card issuer receives a check for $100 on March 23, which is returned to the card issuer for insufficient funds on March 26. Section 226.52(b)(2)(i)(A) would prohibit the card issuer from imposing a returned-payment fee that exceeds $20. However, assume instead that the card issuer receives the $100 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is $30. Section 226.52(b)(2)(i)(A) would prohibit the card issuer from imposing a returned-payment fee that exceeds $30.

The Board considered whether the dollar amount associated with the required minimum periodic payment should be the amount of the returned payment itself. However, some returned payments may substantially exceed the amount of the required minimum periodic payment, which would result in § 226.52(b)(2)(i)(A) permitting a returned-payment fee that substantially exceeds the late payment fee. For example, if the required minimum periodic payment is $20 and the consumer makes a $100 payment that is returned, § 226.52(b)(2)(i)(A) would have limited the late payment fee to $20 but permitted a $100 returned-payment fee. In addition to being anomalous, this result would be inconsistent with the intent of new TILA Section 149. Accordingly, the Board believes the better approach is to define the dollar amount associated with a returned payment as the required minimum periodic payment due when the payment is returned.

As a general matter, a card issuer should be readily able to determine the required minimum periodic payment due during the billing cycle in which the payment is returned because that payment must be disclosed on the periodic statement provided shortly after the start of each cycle. However, it is possible that, in certain circumstances, this approach could result in a short delay in the imposition of a returned-payment fee. For example, assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month, that periodic statements are mailed on the third day of the month, and that the required minimum periodic payment is due on the twenty-fifth day of the month. If a payment is returned on March 1, the card issuer may not yet have determined the required minimum periodic payment due on March 25. However, the card issuer must determine the amount of the payment prior to sending the periodic statement on March 3. Furthermore, regardless of whether the fee is imposed on March 1 or March 3, it will be reflected on the periodic statement sent on April 3. Thus, in these circumstances, it does not appear that the short delay in the imposition of the fee would be significantly detrimental to the issuer or the consumer.

Proposed comment 52(b)(2)(i)–2 would also clarify that, if a payment has been returned and is submitted again for payment by the card issuer, there is no separate or additional dollar amount associated with a subsequent return of that payment. Thus, as discussed below, § 226.52(b)(2)(i)(B) prohibits a card issuer imposing an additional returned-payment fee in these circumstances. It would be inconsistent with the Board's understanding of the consumer conduct factor in new TILA Section 149(c)(3) to permit a card issuer to generate additional returned-payment fees by resubmitting a returned payment because resubmission does not involve any additional conduct by the consumer.[22]

3. Dollar Amount Associated With Extensions of Credit In Excess of Credit Limit

Proposed comment 52(b)(2)(i)–3 would clarify that the dollar amount associated with extensions of credit in excess of the credit limit is the total amount of credit extended by the card issuer in excess of that limit as of the date on which the over-the-limit fee is imposed. The comment would further clarify that, although § 226.56(j)(1)(i) prohibits a card issuer from imposing more than one over-the-limit fee per billing cycle, the card issuer may choose the date during the billing cycle on which to impose an over-the-limit fee.[23]

For example, assume that the billing cycles for a credit card account with a credit limit of $5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 1, the account has a $4,950 balance. On March 6, a $60 transaction is charged to the account, increasing the balance to $5,010. If the card issuer chooses to impose an over-the-limit fee on March 6, § 226.52(b)(2)(i)(A) would prohibit the card issuer from imposing an over-the-limit fee that exceeds $10.

However, assume instead that the card issuer chooses not to impose an over-the-limit fee on March 6. On March 25, a $5 transaction is charged to the account, increasing the balance to $5,015. If the card issuer chooses to impose an over-the-limit fee on March 25, § 226.52(b)(2)(i)(A) would prohibit the card issuer from imposing an over-the-limit fee that exceeds $15.

4. Dollar Amounts Associated With Other Types of Violations

Section 226.52(b)(2)(i)(B) would prohibit the imposition of penalty fees in circumstances where there is no dollar amount associated with the violation. In particular, § 226.52(b)(2)(i)(B) would specifically prohibit a card issuer from imposing a fee based on a transaction that the issuer declines to authorize. Although the imposition of fees based on declined transactions does not appear to be

[22] Although this concern could also be addressed under the prohibition on multiple fees based on a single event or transaction in § 226.52(b)(2)(ii), that provision permits issuers to comply by imposing no more than one penalty fee per billing cycle. Thus, if imposition of an additional returned-payment fee were not prohibited under § 226.52(b)(2)(i), the card issuer could impose that fee by resubmitting a payment that is returned late in a billing cycle immediately after the start of the next cycle.

[23] The Board considered whether the dollar amount associated with extensions of credit in excess of the credit limit should be the total amount of credit extended by the card issuer in excess of that limit as of the last day of the billing cycle. However, in the February 2010 Regulation Z Rule, the Board determined with respect to § 226.56(j)(1) that this approach could delay the generation and mailing of the periodic statement, thereby impeding issuers' ability to comply with the 21-day requirement for mailing statements in advance of the payment due date.

widespread at present, the Board believes that it is important to address this issue in this rulemaking. A card issuer may decline to authorize a transaction because, for example, the transaction would have exceeded the credit limit for the account. Unlike over-the-limit transactions, however, declined transactions do not result in an extension of credit. Thus, there does not appear to be any dollar amount associated with a declined transaction.

In addition, it does not appear that the imposition of a fee for a declined transaction can be justified based on the costs incurred by the card issuer. Unlike returned payments, it is not necessary for a card issuer to incur costs reconciling its systems or arranging for a new payment when a transaction is declined. Furthermore, the Board understands that card issuers generally use a single automated system for determining whether transactions should be authorized or declined. Thus, to the extent that card issuers incur costs designing and administering such systems, they are permitted to recover those costs through over-the-limit fees. *See* proposed comment 52(b)(1)(i)–6. However, the Board solicits comment on whether a prohibition on penalty fees in these circumstances is appropriate.

In addition, proposed § 226.52(b)(2)(i)(B) specifically prohibits a card issuer from imposing a penalty fee based on account inactivity or the closure or termination of an account. The Board believes that this prohibition is warranted because there does not appear to be any dollar amount associated with this consumer conduct. The Board understands that card issuers may receive less revenue from accounts that are not used for a significant number of transactions or are inactive or closed. The Board also understands that card issuers incur costs associated with the administration of such accounts (such as providing periodic statements or other required disclosures). However, because card issuers incur these costs with respect to all accounts, the Board does not believe that they constitute a dollar amount associated with a violation. As above, however, the Board solicits comment on whether it is appropriate to prohibit penalty fees in these circumstances.

*B. Multiple Fees Based On a Single Event or Transaction*

Section 226.52(b)(2)(ii) would prohibit card issuers from imposing more than one penalty fee based on a single event or transaction, although issuers would be permitted to comply with this requirement by imposing no more than one penalty fee during a billing cycle. As discussed above, the Board believes that imposing multiple fees based on a single event or transaction is unreasonable and disproportionate to the conduct of the consumer because the same conduct may result in a single or multiple violations, depending on how the card issuer categorizes the conduct or on circumstances that may not be in the control of the consumer. For example, if a consumer submits a payment that is returned for insufficient funds or for other reasons, the consumer should not be charged both a returned payment fee and a late payment fee. Similarly, in these circumstances, it does not appear that multiple fees are reasonably necessary to deter the single event or transaction that caused the violations.

The Board understands that a card issuer may incur greater costs as a result of an event or transaction that causes multiple violations than an event or transaction that causes a single violation. Using the example above, assume that the card issuer incurs costs as a result of the late payment and costs as a result of the returned payment. If the card issuer imposes a late payment fee, § 226.52(b)(2)(ii) would prohibit the issuer from recovering the costs incurred as a result of the returned payment by also charging a returned-payment fee. However, in these circumstances, § 226.52(b)(1)(i) permits the issuer to recover those costs by spreading them evenly among all other consumers whose payments are returned.

Proposed comment 52(b)(2)(ii)–1 provides additional examples of circumstances where multiple penalty fees would be prohibited, as well as examples of circumstances where multiple fees would be permitted. For instance, assume that the credit limit for an account is $1,000. On March 31, the balance on the account is $975 and the card issuer has not received the $20 required minimum periodic payment due on March 25. On that same date (March 31), a $50 transaction is charged to the account, which increases the balance to $1,025. Section 226.52(b)(2)(i)(A) would permit the card issuer to impose a late payment fee of $20 and an over-the-limit fee of $25 (assuming that these amounts comply with the requirements of § 226.52(b)(1) or the safe harbor in § 226.52(b)(3)). Section 226.52(b)(2)(ii) would not prohibit the imposition of both fees because those fees are based on different events or transactions (payment not being received on or before the payment due date and the $25 extension of credit in excess of the credit limit).

Notwithstanding this guidance, the Board understands that determining whether multiple violations are caused by a single event or transaction will be operationally difficult for card issuers. Accordingly, in order to facilitate compliance, § 226.52(b)(2)(ii) permits a card issuer to avoid the burden associated with making such determinations by charging no more than one penalty fee per billing cycle. The Board believes that this approach will generally provide at least the same degree of protection for consumers as prohibiting multiple fees based on a single event or transaction because fees imposed in different billing cycles will generally be caused by different events or transactions.

52(b)(3) Safe Harbor

As discussed above, new TILA Section 149(e) authorizes the Board to provide amounts for penalty fees that are presumed to be reasonable and proportional to the violation. The Board acknowledges that specific safe harbor amounts cannot be entirely consistent with the factors listed in new TILA Section 149(c) insofar as the costs incurred as a result of violations, the amount necessary to deter violations, and the consumer conduct associated with violations will vary depending on the issuer, the consumer, the type of violation, and other circumstances. However, as discussed above, it would not be feasible to implement new TILA Section 149 based on individualized determinations. Instead, the Board believes that establishing a generally applicable safe harbor will facilitate compliance by issuers and increase consistency and predictability for consumers.

Accordingly, § 226.52(b)(3) would provide a safe harbor that may be used to comply with the requirement in § 226.52(b)(1) that a card issuer determine that its penalty fees either represent a reasonable proportion of the total costs incurred by the card issuer as a result of violations or are reasonably necessary to deter violations. However, the Board does not have sufficient information to determine the appropriate amount at this time. Accordingly, rather than proposing a specific dollar amount, the Board is requesting comment regarding an amount that is generally consistent with the requirements in § 226.52(b)(1).

*A. Information Considered by the Board*

As discussed below, in developing the proposed safe harbor approach, the Board considered a variety of relevant information. First, the Board considered the dollar amounts of penalty fees

currently charged by card issuers. Although credit card penalty fees appear to be approximately $32 to $37 on average, many smaller card issuers (such as community banks and credit unions) charge penalty fees of approximately $20. The Board understands that—rather than basing penalty fees solely on costs and deterrence—card issuers currently consider a number of additional factors, including the need to maintain or increase overall revenue. Nevertheless, the discrepancy between the fees charged by large and small issuers suggests that—although violations of the account terms or other requirements likely impact different types of card issuers to different degrees—fees that are substantially lower than the current average may be sufficient to cover the costs incurred as a result of those violations and to deter such violations.

Second, the Board considered the dollar amounts of penalty fees charged with respect to deposit accounts and consumer credit accounts other than credit cards. As a general matter, these fees appear to be significantly lower than average credit card penalty fees, which also indicates that lower credit card penalty fees may adequately reflect the cost of violations and deter future violations. For example, according to a recent report by the GAO, the average overdraft and insufficient funds fee charged by depository institutions was just over $26 per item in 2007.[24] Notably, the GAO also reported that large institutions on average charged between $4 and $5 more for overdraft and insufficient funds fees compared to smaller institutions.[25] Similarly, the Board understands that, for many home-equity lines of credit, the late payment fee, returned-payment fee, and over-the-limit fee is $25 (although in some cases those fees may be set by state law). However, for most closed-end mortgage loans and some home-equity lines of credit and automobile installment loans, the late payment fee is 5% of the overdue payment.

Third, the Board considered state and local laws regulating penalty fees. As above, except in the case of late payment fees that are a percentage of the overdue amount, it appears that state and local laws that specifically address penalty fees generally limit those fees to amounts that are significantly lower than the current average for credit card penalty fees. For example, California law does not permit credit and charge card late payment fees unless the account is at least five days' past due and then limits the fee to an amount between $7 and $15, depending on the number of days the account is past due and whether the account was previously past due.[26] In addition, California law does not permit over-the-limit fees unless the credit limit is exceeded by the lesser of $500 or 20% of the limit and then restricts the fee to $10.[27] Massachusetts law limits delinquency charges for all open-end credit plans to the lesser of $10 or 10% of the outstanding balance and permits such fees only when the account is more than 15 days past due.[28] Maine law generally limits delinquency charges for consumer credit transactions and open-end credit plans to the lesser of $10 or 5% of the unpaid amount.[29] Finally, the Board understands some state and local laws governing late payment fees for utilities permit only fixed fee amounts (ranging between $5 and $25), while others limit the fee to a percentage of the amount past due (ranging from 1% to 10%) or some combination of the two (for example, the greater of $20 or 5% of the amount past due).

Fourth, the Board considered the safe harbor threshold for credit card default charges established by the United Kingdom's Office of Fair Trading (OFT) in 2006. As a general matter, the OFT concluded that—under the laws and regulations of the United Kingdom—provisions in credit card agreements authorizing default charges "are open to challenge on grounds of unfairness if they have the object of raising more in revenue than is reasonably expected to be necessary to recover certain limited administrative costs incurred by the credit card issuer."[30] In order to "help encourage a swift change in market practice," the OFT stated that it would regard charges set below a monetary threshold of £12 as "either not unfair, or insufficiently detrimental to the economic interests of consumers in all the circumstances to warrant regulatory intervention at this time."[31] The OFT explained that, in establishing its threshold, it took into account "information * * * on the banks' recoverable costs includ[ing] not only direct costs but also indirect costs that have to be allocated on the basis of judgment."[32] The OFT did not, however, disclose this cost information, nor does it appear that the OFT considered the need to deter violations of the account terms or the relationship between the amount of the fee and the conduct of the cardholder (which the Board is required to do). Based on average annual exchange rates, £12 has been equivalent to approximately $18 to $24 (based on annual averages) since the OFT announced its monetary threshold in April 2006.

The Board requests that commenters submit additional relevant information that will assist the Board in establishing a safe harbor amount or amounts for credit card penalty fees. In particular, to the extent possible, commenters are asked to provide, for each type of violation of the terms or other requirements of a credit card account, data regarding the costs incurred as a result of that type of violation (itemized by the type of cost). In addition, commenters are asked to provide, if known, the dollar amounts reasonably necessary to deter violations and the methods used to determine those amounts.

*B. Proposed Safe Harbor*

If a card issuer imposes a penalty fee pursuant to the safe harbor in proposed § 226.52(b)(3), that fee would be limited to the greater of: (1) A specific dollar amount; or (2) 5% of the dollar amount associated with the violation of the account terms or other requirements (up to a specific dollar amount). This approach is generally consistent with state laws that permit penalty fees to be the greater of a dollar amount or a percentage of the amount past due.

Proposed § 226.52(b)(3) is intended to provide a single penalty fee amount that is generally consistent with the requirements of § 226.52(b)(1) and would be imposed for most violations. Card issuers would be permitted to use the 5% safe harbor to impose a higher fee when the dollar amount associated

[24] *See Bank Fees: Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts,* GAO Report 08–281, at 14 (January 2008) (GAO Bank Fees Report); *see also* "Consumer Overdraft Fees Increase During Recession: First-Time Phenomenon," Press release, Moebs $ervices (July 15, 2009) (Moebs 2009 Pricing Survey Press Release) (available at: *http://www.moebs.com/AboutUs/Pressreleases/tabid/58/ctl/Details/mid/380/ItemID/65/Default.aspx*) (reporting an average overdraft fee of $26).

[25] *See* GAO Bank Fees Report at 16. Another recent survey suggests that the cost difference in overdraft fees between small and large institutions may be larger than reported by the GAO. *See* Moebs 2009 Pricing Survey Press Release (reporting that banks with more than $50 billion in assets charged on average $35 per overdrawn check compared to $26 for all institutions).

[26] *See* Cal. Fin. Code § 4001(a)(1)–(2).

[27] *See id.* § 4001(a)(3).

[28] *See* Mass. Ann. Laws ch. 140 § 114B.

[29] *See* Me. Rev. Stat. Ann. tit. 9–A, § 2–502(1); *see also* Minn. Stat. §§ 48.185(d), 53C.08(1)(c), and 604.113(2)(a) (generally limiting late payment fees on open-end credit plans to the greater of $5 or 5% of the amount past due if the account is more than 10 days past due and limiting returned-payment and over-the-limit fees to $30).

[30] OFT Credit Card Statement at 1.

[31] OFT Credit Card Statement at 27–28.

[32] OFT Credit Card Statement at 29.

with the violation is large, although that fee could not exceed a specified upper limit. For example, if the specific safe harbor amount were $20, the safe harbor would not permit a card issuer to impose a fee that exceeds $20 unless the dollar amount associated with the violation was more than $400. In addition, if the upper limit were $40, a card issuer could not impose a fee that exceeds $40 under the safe harbor even if the dollar amount associated with the violation was more than $800.[33]

Section 226.52(b)(3)(i) would provide that a card issuer generally complies with the requirements of § 226.52(b)(1) if the amount of the fee does not exceed a specific amount. As noted above, the Board is requesting comment on the appropriate amount. This amount would be adjusted annually by the Board to reflect changes in the Consumer Price Index. Proposed comment 52(b)(3)–2 states that the Board will calculate each year a price level adjusted safe harbor fee using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current safe harbor fee amount has risen by a whole dollar, the safe harbor fee amount will be increased by $1.00. In contrast, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current safe harbor fee amount has decreased by a whole dollar, the safe harbor fee amount will be decreased by $1.00. The comment also states that the Board will publish adjustments to the safe harbor fee.[34]

Section 226.52(b)(3)(ii) would generally permit a card issuer to impose a penalty fee that does not exceed 5% of the dollar amount associated with the violation.[35] Because violations involving substantial dollar amounts may impose greater costs on card issuers, require greater deterrence, and involve more serious conduct by the consumer, § 226.52(b)(3)(ii) would generally permit a card issuer to impose a penalty fee in excess of the specific safe harbor amount in § 226.52(b)(3)(i), so long as that fee does not exceed 5% of the dollar amount associated with the violation.

However, the Board is concerned that—even when a substantial dollar amount is associated with a violation—a penalty fee over a certain dollar amount could generally be inconsistent with the factors in new TILA Section 149(c) because the fee could substantially exceed the costs incurred by the card issuer as a result of that type of violation and the amount reasonably necessary to deter such violations. Furthermore, the Board does not believe that Congress intended new TILA Section 149 to authorize the imposition of penalty fees that are significantly higher than those currently charged by credit card issuers. Accordingly, a fee imposed pursuant to § 226.52(b)(3)(ii) could not exceed a specific dollar amount. The Board requests comment on the appropriate upper limit.[36]

The Board solicits comment on the general safe harbor approach in proposed § 226.52(b)(3). The Board also solicits comment on the appropriate dollar amounts for proposed § 226.52(b)(3)(i) and the upper limit in proposed § 226.52(b)(3)(ii). Finally, the Board solicits comment on whether 5% is the appropriate percentage for proposed § 226.52(b)(3)(ii). As noted above, the Board encourages commenters to provide data supporting their submissions.

Application of Proposed § 226.52(b) to Charge Card Accounts

For purposes of Regulation Z, a charge card is a credit card on an account for which no periodic rate is used to compute a finance charge. *See* § 226.2(a)(15)(iii). Charge cards are typically products where outstanding balances cannot be carried over from one billing cycle to the next and are payable when the periodic statement is received. *See* § 226.5a(b)(7). The Board understands that—unlike conventional credit card accounts—issuers do not use upfront annual percentage rates to manage risk on charge card accounts. Charge card accounts typically require payment of an annual fee, although it is unclear whether these fees are based on the risk.

The Board solicits comment on the methods used by issuers to manage risk with respect to charge card accounts. The Board also solicits comment on whether any adjustments to proposed § 226.52(b) are necessary to permit charge card issuers to manage risk.

*Section 226.56 Requirements for Over-the-Limit Transactions*

Section 226.56(e)(1)(i) provides that, in the notice informing consumers that their affirmative consent (or opt-in) is required for the card issuer to pay over-the-limit transactions, the issuer must disclose the dollar amount of any fees or charges assessed by the issuer on a consumer's account for an over-the-limit transaction. Model language is provided in Model Forms G–25(A) and G–25(B).

Comment 56(e)–1 states that, if the amount of an over-the-limit fee may vary, such as based on the amount of the over-the-limit transaction, the card issuer may indicate that the consumer may be assessed a fee "up to" the maximum fee. For the reasons discussed below with respect to Model Forms G–25(A) and G–25(B), the Board proposes to amend comment 56(e)–1 to refer to those model forms for guidance on how to disclose the amount of the over-the-limit fee consistent with the substantive restrictions in proposed § 226.52(b).

In addition, because proposed § 226.52(b) would impose additional substantive limitations on over-the-limit fees, the Board proposes to add a cross-reference to § 226.52(b) in new comment 56(j)–6.

*Section 226.59 Reevaluation of Rate Increases*

As discussed in the supplementary information to § 226.9(c)(2) and (g), the Credit Card Act added new TILA Section 148, which requires creditors that increase an annual percentage rate applicable to a credit card account under an open-end consumer credit plan, based on factors including the credit risk of the consumer, market conditions, or other factors, to consider changes in such factors in subsequently determining whether to reduce the annual percentage rate. Creditors are required to maintain reasonable methodologies for assessing these factors. The statute also sets forth a timing requirement for this review. Specifically, at least once every six months, creditors are required to review accounts as to which the annual percentage rate has been increased to assess whether these factors have changed. New TILA Section 148 is effective August 22, 2010 but requires that creditors review accounts on which

[33] Proposed comments 52(b)(2)–1 and 52(b)(3)–1 would clarify that the safe harbor in § 226.52(b)(3) would not permit a card issuer to impose a fee that is prohibited by § 226.52(b)(2). For example, if § 226.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds $15, the card issuer could not use the safe harbor in § 226.52(b)(3) to impose a higher fee.

[34] The approach set forth in this proposed comment is similar to § 226.5a(b)(3), which sets a $1.00 threshold for disclosure of the minimum interest charge but provides that the threshold will be adjusted periodically to reflect changes in the Consumer Price Index.

[35] Consistent with proposed § 226.52(b)(2)(i), proposed comment 52(b)(3)–3 clarifies the meaning of "dollar amount associated with the violation" with respect to late payments, returned payments, and extensions of credit in excess of the credit limit. As above, the Board requests comment on whether guidance is needed regarding the dollar amount associated with other type of violations.

[36] As discussed in proposed comment 52(b)(3)–2, this upper limit would also be adjusted annually based on changes in the Consumer Price Index.

an annual percentage rate has been increased since January 1, 2009.

New TILA Section 148 requires creditors to reduce the annual percentage rate that was previously increased if a reduction is "indicated" by the review. However, new TILA Section 148(c) expressly provides that no specific amount of reduction in the rate is required. The Board is proposing to implement the substantive requirements of new TILA Section 148 in new § 226.59.

In addition to these substantive requirements, TILA Section 148 also requires creditors to disclose the reasons for an annual percentage rate increase applicable to a credit card under an open-end consumer credit plan in the notice required to be provided 45 days in advance of that increase. The Board proposes to implement the notice requirements of new TILA Section 148 in § 226.9(c)(2) and (g), which are discussed in the supplementary information to § 226.9.

Proposed § 226.59 would apply to "credit card accounts under an open-end (not home-secured) consumer credit plan" as defined in § 226.2(a)(15), consistent with the approach the Board has taken to other provisions of the Credit Card Act that apply to credit card accounts. Therefore, home-equity lines of credit accessed by credit cards and overdraft lines of credit accessed by a debit card would not be subject to the new substantive requirements regarding reevaluation of rate increases.

59(a) General Rule

Proposed § 226.59(a) sets forth the general rule regarding the reevaluation of rate increases. Proposed § 226.59(a)(1) generally mirrors the statutory language of TILA Section 148 and states that if a card issuer increases an annual percentage rate that applies to a credit card account under an open-end (not home-secured) consumer credit plan, based on the credit risk of the consumer, market conditions, or other factors, or increased such a rate on or after January 1, 2009, the card issuer must review changes in such factors and, if appropriate based on its review of such factors, reduce the annual percentage rate applicable to the account. Proposed § 226.59(a)(1) would limit this obligation to rate increases for which 45 days' advance notice is required under § 226.9(c)(2) or (g). The Board believes that this limitation is appropriate and necessary for consistency with the approach Congress adopted in new TILA Section 171(b), which sets forth the exceptions to the 45-day notice requirement for rate increases and significant changes in terms. The Board believes that Congress did not intend for card issuers to have to reevaluate rate increases in those circumstances where no advance notice is required, for example, rate increases due to fluctuations in the index for a properly-disclosed variable rate plan or rate increases due to the expiration of a properly-disclosed introductory or promotional rate. The Board also notes that creditors do not consider factors in connection with the expiration of a promotional rate or an increase in a variable rate due to fluctuations in the index on which that rate is based. Thus, the Board believes that coverage of such rate increases by § 226.59 would be inconsistent with the purposes of new TILA Section 148. Accordingly, the Board is proposing this limitation to the scope of § 226.59(a) using its authority under TILA Section 105(a) to provide for adjustments and exceptions for any class of transactions as necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a).

Proposed comment 59(a)–1 would clarify that § 226.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on circumstances specific to that consumer, such as changes in the consumer's creditworthiness, and to increases in annual percentage rates applied to the account due to factors such as changes in market conditions or the issuer's cost of funds. The Board believes that this is consistent with the intent of TILA Section 148, which is broad in scope and specifically notes "market conditions" as a factor for which rate increases need to be reevaluated. The Board believes that Congress intended for new TILA Section 148 to apply broadly to most types of rate increases, and is not limited to those rate increases based on an individual consumer's conduct on the account or creditworthiness. The Board notes that as discussed below in the supplementary information to § 226.59(d), a card issuer is not required under § 226.59(a) to evaluate the same factors it considered in connection with the rate increase, but may evaluate those factors that it currently uses in determining the annual percentage rates applicable to its accounts. For example, if a card issuer raised a rate based on market conditions, the card issuer may review all relevant factors, including the credit risk of the consumer, current market conditions, the card issuer's cost of funds, and other factors, in determining whether a rate reduction is required for the account.

Proposed comment 59(a)–2 clarifies that a card issuer must review changes in factors under § 226.59(a) only if the increased rate is actually imposed on the consumer's account. For example, if a card issuer increases the penalty rate applicable to a consumer's credit card but the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(c)(2) of the change in terms, but the requirements of § 226.59 do not apply. If the consumer's actions later trigger application of the penalty rate, the card issuer must provide 45 days' advance notice pursuant to § 226.9(g) and must, upon imposition of the penalty rate, begin to periodically review and consider factors to determine whether a rate reduction is appropriate under § 226.59. The Board believes that this approach is appropriate because until an increased rate is imposed on the consumer's account, the consumer incurs no costs associated with that increased rate. For example, requiring a review of a consumer's account if the penalty rate was increased but the consumer's account has no balance subject to the penalty rate would have no benefit to the consumer but would place a continuing burden on the card issuer. In addition, the Credit Card Act and Regulation Z contain additional protections for consumers against prospective rate increases, including the general prohibition on increasing the rate applicable to an outstanding balance set forth in § 226.55 and the 45-day advance notice requirements in § 226.9(c)(2) and (g). Finally, once an increased rate is imposed on the consumer's account, the card issuer would then be subject to the requirements of § 226.59.

Proposed § 226.59(a)(2) states that if a card issuer is required to reduce the rate applicable to an account pursuant to § 226.59(a)(1), the card issuer must reduce the rate not later than 30 days after completion of the evaluation described in § 226.59(a)(1). The Board believes that the intent of new TILA Section 148 is to ensure that the rates on consumers' accounts be reduced promptly when the card issuer's review of factors indicates that a rate reduction is appropriate. The Board solicits comment on the operational issues associated with reducing the rate applicable to a consumer's account and whether a different timing standard for how promptly rate changes must be implemented should apply.

Proposed comment 59(a)–3 clarifies how § 226.59(a) applies to certain rate increases imposed prior to the effective date of the rule. Section 226.59(a) and new TILA Section 148 require that card issuers reevaluate rate increases that

occurred between January 1, 2009 and August 21, 2010. Proposed comment 59(a)–3 states that for increases in annual percentage rates on or after January 1, 2009 and prior to August 22, 2010, § 226.59(a) requires a card issuer to review changes in factors and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 226.9(c)(2) or (g). The requirements of § 226.9(c)(2) and (g), which were first effective on August 20, 2009 and modified by the February 2010 Regulation Z Rule were not applicable during the entire period from January 1, 2009 to August 21, 2010. Therefore, the relevant test for purposes of proposed § 226.59(a)(1) and comment 59(a)–3 would be whether the rate increase is or was of a type for which 45 days' advance notice pursuant to § 226.9(c)(2) or (g) would currently be required.

Comment 59(a)–3 would further illustrate this requirement by stating, for example, that the requirements of § 226.59 would not apply to a rate increase due to an increase in the index by which a properly-disclosed variable rate is determined in accordance with § 226.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 226.9(c)(2)(v)(B) have been provided.

The Board understands that the requirement to review changes in factors in connection with rate increases that occurred prior to the effective date of this rule may impose a substantial burden on card issuers that raised interest rates applicable to consumers' accounts prior to the enactment of the Credit Card Act or prior to the effective date of this rule. However, the Board believes that this requirement is necessary to effectuate the intent of new TILA Section 148, which expressly requires a review of rate increases imposed on or after January 1, 2009. As discussed further in this supplementary information, the Board's proposal would permit a card issuer to review either the factors that it used in increasing the rate applicable to the consumer's account or the factors that the card issuer currently uses in determining the annual percentage rates applicable to its credit card accounts. The Board solicits comment on appropriate transition guidance for card issuers in conducting reviews of rate increases imposed prior to August 22, 2010.

59(b) Policies and Procedures

Proposed § 226.59(b) provides, consistent with new TILA Section 148, that a card issuer must have reasonable policies and procedures in place to review the factors described in § 226.59. Section 226.59(b) would further require that these policies and procedures be written. The Board is not proposing to prescribe specific policies and procedures that issuers must use in order to conduct this analysis. The Board believes that a requirement that such policies and procedures be reasonable will ensure that issuers undertake due consideration of these factors in order to determine whether a rate reduction is required on a consumer's account. The Board believes that a more prescriptive rule could unduly burden creditors and raise safety and soundness concerns for financial institutions. In addition, the particular factors that are the most predictive of the credit risk of a particular consumer or portfolio of consumers, and the appropriate manner in which to weigh those factors, may change over time. Moreover, the factors can vary greatly among institutions. For example, underwriting standards for private label or retail credit cards will differ from the standards used for general purpose credit card accounts. The Board solicits comment on whether more guidance is necessary regarding whether a card issuer's policies and procedures are "reasonable."

Proposed comment 59(b)–1 notes, consistent with TILA Section 148, that even in circumstances where a rate reduction is required, § 226.59 does not require that a card issuer decrease the rate to the annual percentage rate that was in effect prior to the rate increase giving rise to the obligation to periodically review the consumer's account. The comment notes that the amount of the rate decrease that is required must be determined based upon the issuer's reasonable policies and procedures. Proposed comment 59(b)–1 sets forth an illustrative example, which assumes that a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of 23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer then makes all of the payments required on the account on time for the six months following the rate increase. The comment notes that the card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase, but that the card issuer's policies and procedures for performing the review required by § 226.59(a) must be reasonable and should take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

The Board notes that the requirements of proposed § 226.59 are different from, and operate in addition to, the requirements of § 226.55(b)(4). Section 226.55(b)(4) addresses a consumer's right to cure the application of an increased rate by making the first six minimum payments on time after the effective date of the increase, when the rate increase is the result of a delinquency of more than 60 days. The Board notes that it may appear to be an anomalous result that a consumer whose rate is increased based on a payment received five days late cannot automatically cure the application of the increased rate by making six timely minimum payments, while a consumer whose account is more than 60 days delinquent has that right under § 226.55(b)(4).

The Board believes that this is the appropriate reading of TILA Sections 148 and 171(b)(4), for two reasons. First, a rate increase based on a consumer's making a payment that is five days late can only apply to new transactions. Therefore, a consumer has the ability to mitigate the impact of the rate increase by reducing the number of new transactions in which he or she engages. In contrast, a creditor may increase the rate on both existing balances and new transactions when a consumer makes a payment that is more than 60 days late. Second, new TILA Section 171(b)(4) expressly provides for the cure right implemented in § 226.55(b)(4) only for payments that are more than 60 days late. Congress could have, but did not, adopt an analogous cure provision for delinquencies of less than 60 days. The Board believes that for other violations of the account terms, Congress intended for the review of factors in TILA Section 148 to be the means by which rate decreases, when appropriate, are required in circumstances other than delinquencies of more than 60 days.

59(c) Timing

Proposed § 226.59(c) clarifies the timing requirements for the reevaluation of rate increases pursuant to § 226.59(a). Consistent with new TILA Section 148(b)(2), a card issuer that is subject to § 226.59(a) must review changes in factors in accordance with § 226.59(a) and (d) not less frequently than once every six months after the initial rate increase. Proposed comment 59(c)–1 would clarify that an issuer has flexibility in determining exactly when to engage in this review for its accounts. Specifically, comment 59(c)–1 would provide that an issuer may review all of its accounts at the same time every six months, may review each account once each six months on a rolling basis based

on the date on which the rate was increased for that account, or may otherwise review each account not less frequently than once every six months. The Board believes that as long as the consideration of factors required for each account subject to § 226.59 is performed at least once every six months, it is appropriate to provide flexibility to card issuers to decide upon a schedule for reviewing their accounts.

Proposed comment 59(c)–2 sets forth an example of the timing requirements in § 226.59(c). The example assumes that a card issuer increases the rates applicable to one half of its credit card accounts on June 1, 2010, and increases the rates applicable to the other half of its credit card accounts on September 1, 2010. The card issuer may review the rate increases for all of its credit card accounts on or before December 1, 2010, and at least every six months thereafter. In the alternative, the card issuer may first review the rate increases for the accounts that were repriced on June 1, 2010 on or before December 1, 2010, and may first review the rate increases for the accounts that were repriced on September 1, 2010 on or before March 1, 2011.

Proposed comment 59(c)–3 clarifies the timing requirement for increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010. Proposed comment 59(c)–3 states that § 226.59(c) requires that the first review for such rate increases be conducted prior to February 22, 2011. The Board believes that this clarification is consistent with the general timing standard under new TILA Section 148, which requires that rate increases generally be reevaluated at least once every six months. The Board believes, therefore, that six months from the effective date of TILA Section 148, or February 22, 2011, is the appropriate date by which the initial review of rate increases that occurred prior to the effective date of the final rule must take place.

59(d) Factors

Proposed 226.59(d) provides clarification on the factors that a credit card issuer must consider when performing the consideration of a consumer's account under § 226.59(a). The Board is aware that credit card underwriting standards can change over time and for a number of reasons. Under some circumstances, a card issuer may be required to continue to review a consumer's account each six months for several years, and the issuer's underwriting standards for its new and existing cardholders may change significantly during that time. As a result, proposed § 226.59(d) would provide that a card issuer is not required to base its review under § 226.59(a) on the same factors on which a rate increase was based. A card issuer would be permitted to review either the same factors on which the rate increase was originally based, or to review the factors that it currently uses when determining the annual percentage rates applicable to its consumers' credit card accounts. The Board believes that it is appropriate to permit card issuers to review the factors they currently consider in advancing credit to new consumers, because a review of these factors may result in the consumer receiving any reduced rate that he or she would receive if applying for a new credit card with the same card issuer. The Board believes that competition for new consumers is an incentive that may lead an issuer to lower its rates, and if the rates on existing consumers' accounts are assessed using the same factors used for new consumers, existing customers of a card issuer may also benefit from competition in the market.

Proposed comment 59(d)–1 clarifies the requirements of § 226.59(d) in the circumstances where a creditor has recently changed the factors that it evaluates in determining annual percentage rates applicable to its credit card accounts. The proposed comment notes that a creditor that complies with § 226.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to its credit card accounts may change those factors from time to time. The comment clarifies that when a creditor changes the factors it considers in determining the annual percentage rates applicable to its credit card accounts from time to time, it may comply with § 226.59(a) for a brief transition period by reviewing the set of factors it considered immediately prior to the change in factors, or may consider the new factors.

For example, a creditor changes the factors it uses to determine the rates applicable to new credit card accounts on January 1, 2011. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 226.59(a) on January 25, 2011. The creditor complies with § 226.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2010 when determining the rates applicable to its new credit card accounts, or may consider the factors that it considers as of January 25, 2011. The Board notes that this provision is intended to permit a card issuer to consider its prior set of factors only for a brief period after it changes the factors it uses to determine the rates applicable to new accounts, for operational reasons. Accordingly, the Board solicits comment on whether the rule should establish an express safe harbor for what constitutes a brief transition period following a change in factors, for example, 30 days or 60 days.

The Board is not proposing a list of particular factors that card issuers must consider. Similarly, the Board is not proposing to prohibit the consideration of other factors. The Board believes that a prescriptive rule that sets forth certain factors or excludes other factors could inadvertently harm consumers, in part by constraining card issuers' ability to design or utilize new underwriting models and products that could potentially benefit consumers. The Board believes that the requirement that a card issuer consider either the factors it currently uses in determining the annual percentage rate to apply to its credit card accounts or the factors that it originally used to increase the annual percentage rate will ensure that the factors considered in connection with the reduction of rates will parallel the factors an issuer considers when determining whether to increase a rate.

Proposed comment 59(d)–2 clarifies that the review of factors need not result in existing accounts being subject to the same rates and rate structure as a creditor imposes on new accounts, even if a creditor evaluates the same factors for both types of accounts. For example, the comment notes that a creditor may offer variable rates on new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. The account that the creditor is required to review pursuant to § 226.59(a) may have variable rates that were determined by adding a different margin, depending on different factors, to the prime rate. In performing the review required by § 226.59(a), the creditor may review the factors it uses to determine the rates applicable to its new accounts. If a rate reduction is required, however, the creditor need not base the variable rate for the existing account on the LIBOR index but may continue to use the prime rate. The amount of the rate on the existing account after the reduction, however, as determined by adding the prime rate and margin, must be comparable to the rate, as determined by adding the margin and LIBOR, charged on a new account (except for any promotional rate) for which the factors are comparable.

Proposed comment 59(d)–3 provides additional clarification on how an issuer should identify the factors to consider

when evaluating whether a rate reduction is required. Comment 59(d)–3 states that if a card issuer evaluates different factors in determining the applicable annual percentage rates for different types of credit card plans, it must review those factors that it considers in determining annual percentage rates for the consumer's specific type of credit card plan. The Board believes that this clarification is appropriate to ensure that a credit card issuer considers only those factors that are relevant to the consumer's specific type of credit card account rather than factors for a different product that may be underwritten based on different information. Proposed comment 59(d)–3 sets forth several examples to illustrate what constitute "types" of credit card plans. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. However, a card issuer must review the same factors for credit card accounts with similar features that are offered for similar purposes and may not consider different factors for each of its individual credit card accounts.

59(e) Rate Increases Subject to § 226.55(b)(4)

Proposed § 226.59(e) sets forth a special timing rule for card issuers that increase a rate pursuant to § 226.55(b)(4) based on the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment. In such circumstances, § 226.55(b)(4)(ii) requires a card issuer to reduce the annual percentage rate to the rate that applied prior to the increase if the consumer makes the first six consecutive required minimum periodic payments on time after the effective date of the increase. The Board believes that new TILA Section 171(b)(4)(B), as implemented in § 226.55(b)(4)(ii), provides the appropriate mechanism for lenders to use in determining whether to reduce the rate on an account that has become more than 60 days delinquent, during the period immediately following the effective date of the increase. The Board understands that consumers whose accounts are more than 60 days delinquent pose a significantly greater risk of nonpayment than consumers who make timely payments or payments that are, for example, one day late. The statute therefore sets forth one clear method that establishes consumers' rights for a rate increase caused by the consumer's failure to make a minimum payment within 60 days of the due date for that payment. The Board believes that in light of the statutory cure mechanism, as implemented in § 226.55(b)(4)(ii), the requirement to review an account under § 226.59(a) should not apply during the first six billing periods following a rate increase based on a delinquency of more than 60 days. The Board notes that the cure mechanism implemented in § 226.55(b)(4)(ii) is a stronger right than the requirement that card issuers review consumers' accounts pursuant to § 226.59. Section 226.55(b)(4)(ii) requires that the rate be reduced to the rate that was in effect prior to the rate increase, if the consumer makes the next six required minimum periodic payments on time. In contrast, new TILA Section 148 and proposed § 226.59 do not require in all circumstances that the rate be reduced to the rate that was in effect prior to the rate increase.

Accordingly, § 226.59(e) would provide that a card issuer is not required to review factors in accordance with § 226.59(a) prior to the sixth payment due date following the effective date of the rate increase when the rate increase results from a consumer's account becoming more than 60 days delinquent. At that time, if the rate has not been decreased based on the consumer making six consecutive timely minimum payments, the issuer would be required to begin performing a review of factors for subsequent six-month periods. The Board believes that it is appropriate that a creditor review a consumer's account after the cure right expires under § 226.59(a) if the consumer's rate has not been reduced, because a consumer's credit risk or other factors might change after the cure period expires, warranting a rate reduction at that time.

59(f) Termination of Obligation to Review Factors

TILA Section 148 does not expressly state when the obligation to review changes in factors and determine whether to reduce the annual percentage rate applicable to a consumer's credit card account terminates. The Board believes that the intent of TILA Section 148 is not to impose a permanent requirement on card issuers to review changes in factors for a consumer's account even after the annual percentage rate applicable to the account has been reduced to the original rate. The statutory requirement applies once the card issuer has increased an annual percentage rate applicable to a consumer's account but does not apply to accounts on which an annual percentage rate has not been increased. The Board believes that if Congress had intended for all card issuers to review the annual percentage rates applicable to all of their accounts indefinitely, this would be expressly provided for in TILA Section 148. Therefore, proposed § 226.59(f) would state that the obligation to review factors under § 226.59(a) ceases to apply if the issuer reduces the annual percentage rate to a rate equal to or less than the rate applicable immediately prior to the increase, or, if the rate applicable immediately prior to the increase was a variable rate, to a rate equal to or less than a variable rate determined by the same index and margin that applied prior the increase.

The Board is aware that proposed § 226.59 could require card issuers to review the annual percentage rates applicable to certain credit card accounts for an extended period of time. Under the proposed rule, an issuer would be required to continue to review a consumer's account each six months unless and until the rate is reduced to the rate in effect prior to the increase. In some circumstances, this could mean that the review required by § 226.59(a) would need to occur each six months for an indefinite period. The Board is concerned that an obligation to continue to review the rate applicable to a consumer's account many years after the rate increase occurred would impose significant burden on issuers, and might not have a significant benefit to consumers. For example, a card issuer might increase the rate applicable to a consumer's account based on market conditions in year one. If those market conditions do not change and the review of factors each six months pursuant to § 226.59(a) does not otherwise require that the consumer's rate be decreased, an issuer could be required to continue reviewing the consumer's account ten or even twenty years after the initial increase. The Board solicits comment on whether the obligation to review the rate applicable to a consumer's account should terminate after some specific time period elapses following the initial increase, for example after five years. The Board also solicits comment on whether there is significant benefit to consumers from requiring card issuers to continue reviewing factors under

§ 226.59 even after an extended period of time.

59(g) Acquired Accounts

Proposed § 226.59(g) addresses existing credit card accounts acquired by a card issuer. Section 226.59(g)(1) sets forth the general rule that, except as provided in § 226.59(g)(2), the obligation to review changes in factors in § 226.59(a) applies even to such acquired accounts. Consistent with the rule in § 226.59(d), a card issuer may review either the factors that the original issuer considered when imposing the rate increase, or may review the factors that the acquiring card issuer currently considers in determining the annual percentage rates applicable to its credit card accounts. The Board notes that in some cases, a card issuer may not know whether accounts that it acquired were subject to a rate increase by the prior issuer. In these cases, a card issuer complying with § 226.59(g)(1) may choose to review factors in accordance with § 226.59(a) for all of its acquired accounts rather than seeking to identify just those accounts to which a rate increase was applied.

Proposed § 226.59(g)(2) sets forth an alternate means for compliance with § 226.59 for accounts acquired by a card issuer. The Board is proposing § 226.59(g)(2) using its authority under TILA Section 105(a) to provide for adjustments and exceptions for any class of transactions as necessary to effectuate the purposes of TILA. 15 U.S.C. 1604(a). Proposed § 226.59(g)(2) applies if a card issuer reviews all of the credit card accounts it acquires, as soon as reasonably practicable after the acquisition of such accounts, in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts. Following the card issuer's initial review of its acquired accounts, proposed § 226.59(g)(2)(i) provides that the card issuer generally is required to review changes in factors for those acquired accounts in accordance with § 226.59(a) only for rate increases that are imposed as a result of that review. Similarly, § 226.59(g)(2)(ii) provides that the card issuer generally is not required to review changes in factors in accordance with § 226.59(a) for any rate increases made prior to the card issuer's acquisition of such accounts.

The Board believes that this alternative means of compliance is important because, as noted above, card issuers may not have full information regarding rate increases imposed by the prior issuer, when it acquires a new portfolio of accounts. If a card issuer does not know the rate that initially applied to the accounts it acquires, it would be required to continue to review its accounts indefinitely, without the opportunity to cease reviewing those accounts under § 226.59(f) once the rate is reduced to the rate that initially applied. The Board is proposing an alternative means of compliance rather than an exception for acquired accounts, because it believes that coverage of these accounts is consistent with the purposes of new TILA Section 148. However, the Board believes that if a card issuer reviews all of the accounts that it acquires in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts, this will ensure that acquired accounts are subject to the same rates that would apply if the consumer opened a new credit card account with the acquiring issuer (except for any promotional rates). The Board believes that this will promote fair pricing of consumers' accounts when they are acquired by a new card issuer. If the card issuer raises the rate applicable to a consumer's account as a result of that review, it will have full information about the rate that applied prior to that increase and therefore the requirements of § 226.59(a) would apply with regard to that rate increase. The Board solicits comment on whether § 226.59(g) appropriately addresses acquired accounts and on any alternatives that would balance the burden on card issuers against consumer benefit. The Board also solicits comment on whether additional guidance is necessary regarding the requirement that the review of acquired accounts occur "as soon as reasonably practicable" after the acquisition of those accounts.

Comment 59(g)(2)–1 sets forth an example of the alternative means of compliance in § 226.59(g)(2). The example assumes that a card issuer acquires a portfolio of accounts that currently are subject to annual percentage rates of 12%, 15%, and 18%. As soon as reasonably practicable after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts. As a result of that review, the card issuer decreases the rate on the accounts that are currently subject to a 12% annual percentage rate to 10%, leaves the rate applicable to the accounts currently subject to a 15% annual percentage rate at 15%, and increases the rate applicable to the accounts currently subject to a rate of 18% to 20%. Proposed § 226.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts for which the rate has been increased to 20%. The card issuer is not required to review the accounts subject to 10% and 15% rates pursuant to § 226.59, unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

In addition to the general rule in § 226.59(g)(2)(i) and (g)(2)(ii), the Board is proposing § 226.59(g)(2)(iii), which provides that if as a result of the card issuer's review, an account is subject to, or continues to be subject to, an increased rate as a penalty or due to the consumer's delinquency or default, the requirements to review the account under § 226.59(a) would apply. The Board is aware that penalty rates are often much higher than the standard rates that apply to consumers' credit card accounts and that the imposition of a penalty rate for an extended period of time can be very costly to a consumer. The Board believes that the requirements to review accounts under § 226.59(a) should apply if a card issuer imposes, or continues to impose, a penalty rate on an acquired account. The Board believes that this treatment is consistent with the purposes of new TILA Section 148, which specifically mentions the credit risk of the consumer as a factor giving rise to the obligation to review the rate on an account.

Comment 59(g)(2)–2 sets forth an example of the requirements of proposed § 226.59(g)(2)(iii) for acquired accounts. A card issuer acquires a portfolio of accounts that currently are subject to standard annual percentage rates of 12% and 15%. In addition, several acquired accounts are subject to a penalty rate of 24%. As soon as reasonably practicable after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts. As a result of that review, the card issuer leaves the standard rates applicable to the accounts at 12% and 15%, respectively. The card issuer decreases the rate applicable to the accounts currently at 24% to its penalty rate of 23%. Section 226.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts that are subject to a penalty rate of 23%. The card issuer is not required to review the accounts subject to 12% and 15% rates pursuant to § 226.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

The Board notes that any rate increases the acquiring card issuer makes as a result of its review pursuant to § 226.59(g)(2) are subject to the substantive and notice requirements regarding rate increases in §§ 226.9 and 226.55. Proposed § 226.59(g)(2) contains an express cross-reference to those sections.

59(h) Exceptions

The Board is proposing two exceptions to the requirements of § 226.59, using its authority under TILA Section 105(a), which are set forth in § 226.59(h). The first exception applies to rate increases imposed when the requirement to reduce rates pursuant to the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. 501 *et seq.,* ceases to apply. Specifically, 50 U.S.C. app. 527(a)(1) provides that "[a]n obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent. * * *" With respect to credit card accounts, this restriction applies during the period of military service. *See* 50 U.S.C. app. 527(a)(1)(B).[37]

The Board believes that it is not appropriate to require a card issuer to perform an ongoing review of the rates on an account, when the rate increase is a reinstatement of a prior rate that was temporarily reduced to comply with the SCRA. Proposed § 226.59(h)(1) provides that the requirements of § 226.59 do not apply to increases in an annual percentage rate that was previously decreased pursuant to 50 U.S.C. app. 527, provided that such a rate increase is made in accordance with § 226.55(b)(6). Section 226.55(b)(6) provides that the rate may be increased when the SCRA ceases to apply, but that the increased rate may not exceed the rate that applied prior to the decrease.

The second proposed exception applies to charged off accounts. Proposed § 226.59(h)(2) provides that the requirements of § 226.59 do not apply to accounts that the card issuer has charged off in accordance with loan-loss provisions. The Board understands that for safety and soundness reasons, card issuers charge off accounts that have serious delinquencies, typically of 180 days or six months. For such accounts, full payment is due immediately. The Board understands, therefore, that there should be no further activity on these accounts, and therefore believes that the requirement to review the rate every six months should not apply.

**Appendix G—Open-End Model Forms and Clauses**

For consistency with the substantive limitations in proposed § 226.52(b), the Board is proposing to amend the model language in Appendix G for the disclosure of late payment fees, over-the-limit fees, and returned-payment fees.

*Samples G–10(B) & G–10(C)—Applications and Solicitations Samples (Credit Cards) (§ 226.5a(b))*

*Samples G–17(B) & G–17(C)—Account-Opening Samples (§ 226.6(b)(2))*

Sections 226.5a and 226.6 require creditors to disclose late payment fees, over-the-limit fees, and returned-payment fees in, respectively, the application and solicitation disclosures and the account-opening disclosures. *See* §§ 226.5a(b)(9), (b)(10), (b)(12); §§ 226.6(b)(2)(viii), (b)(2)(ix), (b)(2)(xi). Model language is provided in Samples G–10(B) and G–10(C) and G–17(B) and G–17(C). The model language generally reflects current fee practices by disclosing specific amounts for over-the-limit and returned-payment fees, while disclosing a lower late payment fee if the account balance is less than or equal to a specified amount ($1,000 in the model forms) and a higher fee if the account balance is more than that amount.

As discussed above, proposed § 226.52(b) would establish new substantive restrictions on the amount of credit card penalty fees, including late payment fees, over-the-limit fees, and returned-payment fees. If adopted, these restrictions would change the way penalty fees are disclosed. Accordingly, for consistency with § 226.52(b), the Board is proposing to amend the model language in Samples G–10(B) and G–10(C) and G–17(B) and G–17(C) to disclose late payment fees, over-the-limit fees, and returned-payment fees as "up to $XX." In this model language, $XX represents the maximum fee under the safe harbor in proposed § 226.52(b)(3)(ii).

The Board recognizes that, because the maximum safe harbor fee only applies when a large dollar amount is associated with the violation, this disclosure will generally overstate the amount of the penalty fee. For example, if the maximum fee were $40, the card issuer would disclose the amount of its penalty fees as "up to $40." However, § 226.52(b)(3)(ii) would not actually permit the issuer to impose a $40 penalty fee unless 5% of the dollar amount associated with the violation was greater than or equal to $40—in other words, the dollar amount associated with the violation would have to be $800 or more. Nevertheless, a consumer who incorrectly assumes that a $40 penalty fee will be imposed for all violations of the account terms or other requirements will not be harmed if—when a violation actually occurs—a lower penalty fee is imposed. Furthermore, disclosing the highest possible penalty fee under the safe harbor in § 226.52(b)(3) may deter consumers from violating the account terms or other requirements, which would be consistent with the intent of new TILA Section 149 (as stated in Section 149(c)(2)).

The Board is also concerned that providing additional detail could increase consumer confusion and would not substantially improve the accuracy of the model disclosure. In particular, the Board considered whether the method used in Samples G–10(B) and G–10(C) and G–17(B) and G–17(C) for disclosing cash advance and balance transfer fees should be applied to penalty fees. For example, Sample G–10(C) discloses the balance transfer fee as "[e]ither $5 or 3% of the amount of each transfer, whichever is greater (maximum fee: $100)." Similarly, using as examples a safe harbor amount of $20 and a maximum safe harbor fee of $40, late payment fees could be disclosed as "either $20 or 5% of the minimum payment, which is greater (maximum fee: $40)." However, although this disclosure would provide more detail than a disclosure of "up to $40," it would not inform consumers that, consistent with § 226.52(b)(2)(i), a $20 late payment fee could not be imposed if the delinquent minimum payment is $15. Thus, a more detailed disclosure could create an appearance of accuracy that is not justified.[38] Nevertheless, the Board solicits comment on the proposed model language as well as alternative methods for disclosing penalty fees.

[37] 50 U.S.C. app. 527(a)(1)(B) applies to obligations or liabilities that do not consist of a mortgage, trust deed, or other security in the nature of a mortgage.

[38] The Board also considered combining the "up to" disclosure with the method currently used for disclosing cash advance and balance transfer fees. For example, late payment fees would be disclosed as "either up to $20 or 5% of the minimum payment, whichever is greater (maximum fee: $40)." However, the Board is concerned that this disclosure would be too complex to provide consumers with useful information about the amount of penalty fees.

*Samples G–18(B), G–18(D), G–18(F), and G–18(G)—Periodic Statement Forms (§ 226.7(b))*

As noted above, § 226.7(b)(11)(i)(B) requires cards issuers to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. The model language in Sample G–18(B) states: "Late Payment Warning: If we do not receive your minimum payment by the date listed above, you may have to pay a $35 late fee and your APRs may be increased up to the Penalty APR of 28.99%." This language is restated in Samples G–18(D), G–18(F), and G–18(G). Consistent with the proposed amendments to Samples G–10(B), G–10(C), G–17(B), and G–17(C), the Board is proposing to amend the late payment warning in Samples G–18(B), G–18(D), G–18(F), and G–18(G) to read as follows: "If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $XX and your APRs may be increased up to the Penalty APR of 28.99%."

*Sample G–21—Change-in-Terms Sample (Increase in Fees) (§ 226.9(c)(2))*

The Board proposes to amend the model language in Sample G–21 disclosing a change in a late payment fee for consistency with the proposed amendments to Samples G–10(B), G–10(C), G–17(B), and G–17(C).

*Model Form G–25(A)—Consent Form for Over-the-Limit Transactions (§ 226.56)*

*Model Form G–25(B)—Revocation Notice for Periodic Statement Regarding Over-the-Limit Transactions (§ 226.56)*

As noted above, § 226.56(e)(1)(i) provides that, in the notice informing consumers that they must affirmatively consent (or opt in) to the card issuer's payment of over-the-limit transactions, the card issuer must disclose the dollar amount of any fees or charges assessed by the issuer on a consumer's account for an over-the-limit transaction. Model language is provided in Model Forms G–25(A) and G–25(B). For consistency with proposed § 226.52(b) and the proposed amendments to Samples G–10(B), G–10(C), G–17(B), and G–17 (C) discussed above, the Board proposes to revise Model Forms G–25(A) and G–25(B) to disclose the amount of the over-the-limit fee as "up to $XX."

## V. Comment Period

The consumer protections in new TILA Sections 148 and 149 go into effect on August 22, 2010. See new TILA Section 148(d); new TILA Section 149(b). Accordingly, the Board must issue the final rule implementing those provisions sufficiently in advance of August 22 to permit card issuers to make the necessary changes to bring their systems and practices into compliance. Thus, in order to ensure that the Board has adequate time to analyze the comments received on the proposed rule, the Board is requiring that those comments be submitted no later than 30 days after publication of the proposal in the **Federal Register.** Because the proposal is limited to the implementation of two statutory provisions, the Board believes that interested parties will have sufficient time to review the proposed rule and prepare their comments.

## VI. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires an agency to perform an initial and final regulatory flexibility analysis on the impact a rule is expected to have on small entities.

Based on its analysis and for the reasons stated below, the Board believes that this proposed rule would have a significant economic impact on a substantial number of small entities. Accordingly, the Board has prepared the following initial regulatory flexibility analysis pursuant to section 604 of the RFA. A final regulatory flexibility analysis will be conducted after consideration of comments received during the public comment period.

1. *Statement of the need for, and objectives of, the proposed rule.* The proposed rule would implement new substantive requirements and updates to disclosure provisions in the Credit Card Act, which establishes fair and transparent practices relating to the extension of open-end consumer credit plans. The supplementary information above describes in detail the reasons, objectives, and legal basis for each component of the proposed rule.

2. *Small entities affected by the proposed rule.* All creditors that offer credit card accounts under open-end (not home-secured) consumer credit plans are subject to the proposed rule. The Board is relying on the analysis in the January 2009 FTC Act Rule, in which the Board, the OTS, and the NCUA estimated that approximately 3,500 small entities offer credit card accounts. *See* 74 FR 5549–5550 (January 29, 2009). The Board acknowledges, however, that the total number of small entities likely to be affected by the proposed rule is unknown, in part because the estimate in the January 2009 FTC Act Rule does not include card issuers that are not banks, savings associations, or credit unions. The Board invites comment on the effect of the proposed rule on small entities.

3. *Recordkeeping, reporting, and compliance requirements.* The proposed rule does not impose any new recordkeeping or reporting requirements. The proposed rule would, however, impose new compliance requirements. The compliance requirements of this proposed rule are described above in IV. Section-by-Section Analysis. The Board notes that the precise costs to small entities to conform their open-end credit disclosures to the proposed rule and the costs of updating their systems to comply with the rule are difficult to predict. These costs would depend on a number of factors that are unknown to the Board, including, among other things, the specifications of the current systems used by such entities to prepare and provide disclosures and administer credit card accounts, the complexity of the terms of the credit card products that they offer, and the range of such product offerings. The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small entities.

*Proposed Amendments*

This subsection summarizes several of the proposed amendments to Regulation Z and their likely impact on small entities that offer open-end credit. More information regarding these and other proposed changes can be found in IV. Section-by-Section Analysis.

Proposed §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i) would generally require creditors that are small entities to use bold text when disclosing maximum limits on fees in the application and solicitation table and the account-opening table, respectively. Creditors that are small entities are already required to provide this information so the Board does not anticipate any significant additional burden on small entities by requiring the use of bold text.

Proposed § 226.7(b)(11)(i)(B) would generally require card issuers that are small entities to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. In addition, proposed § 226.7(b)(11)(i)(B) would permit the use of the term "up to" to disclose the highest fee if a range of late payment fees may be assessed. However, § 226.7(b)(11)(i)(B) already requires card issuers to disclose late payment fee information so the Board does not anticipate any significant additional burden on small entities. The Board also seeks to reduce the burden

on small entities by proposing model forms which can be used to ease compliance with the proposed rule.

Proposed §§ 226.9(c)(2)(iv)(A)(*8*) and 226.9(g)(3)(i)(A)(*6*) would generally require card issuers that are small entities to disclose no more than four reasons for an annual percentage rate increase in the notice required to be provided 45 days in advance of that increase. Although §§ 226.9(c) and (g) already require card issuers to provide 45 days' notice prior to an annual percentage rate increase, proposed §§ 226.9(c)(2)(iv)(A)(*8*) and 226.9(g)(3)(i)(A)(*6*) may require some small entities to establish processes and alter their systems in order to comply with the provision. The cost of such change would depend on the size of the institution and the composition of its portfolio.

Proposed § 226.52(b) would generally limit the dollar amount of penalty fees imposed by card issuers that are small entities. Specifically, credit card penalty fees must be based on certain permitted determinations or on a proposed safe harbor. In addition, proposed § 226.52(b) prohibits penalty fees that exceed the dollar amount associated with the violation and certain types of penalty fees. As discussed in IV. Section-by-Section Analysis, in 2006 the GAO found that the percentage of issuer revenue derived from penalty fees had increased to approximately 10%.[39] Compliance with this provision may reduce revenue that some entities derive from fees. Compliance with proposed § 226.52(b) would also require card issuers that are small entities to conform certain penalty fee disclosures already required under §§ 226.5a, 226.6, 226.7, and 226.56.

Proposed § 226.59 would generally require small entities that are card issuers to reevaluate an increased annual percentage rates no less than every six months. In addition, proposed § 226.59 would require small entities that are card issuers to reduce the annual percentage rate, if appropriate, based on such reevaluation. Proposed § 226.59 would require some small entities to establish processes and alter their systems in order to comply with the provision. The cost of such change would depend on the size of the institution and the composition of its portfolio. In addition, this provision may reduce revenue that some small entities derive from finance charges.

Accordingly, the Board believes that, in the aggregate, the provisions of its proposed rule would have a significant economic impact on a substantial number of small entities.

4. *Other Federal rules.* The Board has not identified any Federal rules that duplicate, overlap, or conflict with the proposed revisions to Regulation Z.

5. *Significant alternatives to the proposed revisions.* The provisions of the proposed rule would implement the statutory requirements of the Credit Card Act that go into effect on August 22, 2010. The Board has sought to avoid imposing additional burden, while effectuating the statute in a manner that is beneficial to consumers. The Board welcomes comment on any significant alternatives, consistent with the Credit Card Act, which would minimize impact of the proposed rule on small entities.

## VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR part 1320 Appendix A.1), the Board reviewed the proposed rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The collection of information that is required by this proposed rule is found in 12 CFR part 226. The Federal Reserve may not conduct or sponsor, and an organization is not required to respond to, this information collection unless the information collection displays a currently valid OMB control number. The OMB control number is 7100–0199.[40]

This information collection is required to provide benefits for consumers and is mandatory (15 U.S.C. 1601 *et seq.*). The respondents/recordkeepers are creditors and other entities subject to Regulation Z, including for-profit financial institutions, small businesses, and institutions of higher education. TILA and Regulation Z are intended to ensure effective disclosure of the costs and terms of credit to consumers. For open-end credit, creditors are required to, among other things, disclose information about the initial costs and terms and to provide periodic statements of account activity, notices of changes in terms, and statements of rights concerning billing error procedures. Regulation Z requires specific types of disclosures for credit and charge card accounts and home-equity plans. For closed-end loans, such as mortgage and installment loans, cost disclosures are required to be provided prior to consummation. Special disclosures are required in connection with certain products, such as reverse mortgages, certain variable-rate loans, and certain mortgages with rates and fees above specified thresholds. TILA and Regulation Z also contain rules concerning credit advertising. Creditors are required to retain evidence of compliance for twenty-four months (§ 226.25), but Regulation Z does not specify the types of records that must be retained.

Under the PRA, the Federal Reserve accounts for the paperwork burden associated with Regulation Z for the state member banks and other creditors supervised by the Federal Reserve that engage in lending covered by Regulation Z and, therefore, are respondents under the PRA. Appendix I of Regulation Z defines the Federal Reserve-regulated institutions as: State member banks, branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act. Other Federal agencies account for the paperwork burden on other entities subject to Regulation Z. To ease the burden and cost of complying with Regulation Z (particularly for small entities), the Federal Reserve provides model forms, which are appended to the regulation.

Under proposed §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i), the use of bold text would be required when disclosing maximum limits on fees in the application and solicitation table and the account-opening table, respectively. The Board anticipates that creditors would incorporate, with little change, the proposed formatting change with the disclosure already required under §§ 226.5a(a)(2)(iv) and 226.6(b)(1)(i).

Under proposed § 226.7(b)(11)(i)(B), a card issuer would be required to disclose the amount of any late payment fee and any increased rate that may be imposed on the account as a result of a late payment. In addition, proposed § 226.7(b)(11)(i)(B) would permit the use of the term "up to" to disclose the highest fee if a range of late payment fees may be assessed. The Board anticipates that card issuers, with little additional burden, would incorporate the proposed disclosure requirement with the disclosures already required under § 226.7(b)(11)(i)(B). In an effort to reduce burden the Board is amending Appendix G–18 to provide guidance on an "up to" disclosure.

Under proposed §§ 226.9(c)(2)(iv)(A)(*8*) and

[39] *See* GAO Credit Card Report at 72–73.

[40] In 2009, the information collection was re-titled—Reporting, Recordkeeping and Disclosure Requirements associated with Regulation Z (Truth in Lending) and Regulation AA (Unfair or Deceptive Acts or Practices).

226.9(g)(3)(i)(A)(*6*), a card issuer would be required to disclose no more than four reasons for an annual percentage rate increase in the notice required to be provided 45 days in advance of that increase. The Board anticipates that card issuers, with little additional burden, would incorporate the proposed disclosure requirement with the disclosure already required under § 226.9(c) and § 226.9(g).

Proposed § 226.52(b) would generally limit the dollar amount of penalty fees imposed by card issuers. Specifically, credit card penalty fees must be based on certain permitted determinations or on a proposed safe harbor. In addition, proposed § 226.52(b) prohibits penalty fees that exceed the dollar amount associated with the violation and certain types of penalty fees. Compliance with proposed § 226.52(b) would require card issuers to conform certain penalty fee disclosures already required under §§ 226.5a, 226.6, 226.7, and 226.56. As mentioned in IV. Section-by-Section Analysis, in an effort to reduce burden the Board is proposing to amend guidance in Appendix G to provide model language for the disclosure of late-payment fees, over-the-limit fees, and returned-payment fees.

The Board anticipates that creditors would incorporate the proposed disclosure requirement with the disclosures already required under §§ 226.5a(a)(2)(iv), 226.6(b)(1)(i), 226.7(b)(11)(i)(B), 226.9(c)(2)(iv)(A)(*8*), 226.9(g)(3)(i)(A)(*6*), and 226.52(b). The Board estimates that the proposed rule would impose a one-time increase in the total annual burden under Regulation Z. The 1,138 respondents would take, on average, 40 hours to update their systems to comply with the disclosure requirements addressed in this proposed rule. The total annual burden is estimated to increase by 45,520 hours, from 1,654,814 to 1,700,334 hours.[41]

The total one-time burden increase represents averages for all respondents regulated by the Federal Reserve. The Federal Reserve expects that the amount of time required to implement each of the proposed changes for a given financial institution or entity may vary based on the size and complexity of the respondent.

The other Federal financial agencies: the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Corporation (FDIC), and the National Credit Union Administration (NCUA) are responsible for estimating and reporting to OMB the total paperwork burden for the domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks for which they have primary administrative enforcement jurisdiction under TILA Section 108(a), 15. U.S.C. 1607(a). These agencies are permitted, but are not required, to use the Board's burden estimation methodology. Using the Board's method, the total current estimated annual burden for the approximately 17,200 domestically chartered commercial banks, thrifts, and Federal credit unions and U.S. branches and agencies of foreign banks supervised by the Federal Reserve, OCC, OTS, FDIC, and NCUA under TILA would be approximately 13,706,325 hours. The proposed rule would impose a one-time increase in the estimated annual burden for such institutions by 688,000 hours to 14,394,325 hours. The above estimates represent an average across all respondents; the Board expects variations between institutions based on their size, complexity, and practices.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the Board's functions; including whether the information has practical utility; (2) the accuracy of the Board's estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. Comments on the collection of information should be sent to Michelle Shore, Federal Reserve Board Clearance Officer, Division of Research and Statistics, Mail Stop 95–A, Board of Governors of the Federal Reserve System, Washington, DC 20551, with copies of such comments sent to the Office of Management and Budget, Paperwork Reduction Project (7100–0199), Washington, DC 20503.

**List of Subjects in 12 CFR Part 226**

Advertising, Consumer protection, Federal Reserve System, Reporting and recordkeeping requirements, Truth in Lending.

**Text of Interim Final Revisions**

For the reasons set forth in the preamble, the Board proposes to amend Regulation Z, 12 CFR part 226, as set forth below:

## PART 226—TRUTH IN LENDING (REGULATION Z)

1. In § 226.5a, revise paragraph (a)(2)(iv) to read as follows:

**§ 226.5a Credit and charge card applications and solicitations.**

(a) * * *

(2) * * *

(iv) When a tabular format is required, any annual percentage rate required to be disclosed pursuant to paragraph (b)(1) of this section, any introductory rate required to be disclosed pursuant to paragraph (b)(1)(ii) of this section, any rate that will apply after a premium initial rate expires required to be disclosed under paragraph (b)(1)(iii) of this section, and any fee or percentage amounts or maximum limits on fee amounts disclosed pursuant to paragraphs (b)(2), (b)(4), (b)(8) through (b)(13) of this section must be disclosed in bold text. However, bold text shall not be used for: The amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

* * * * *

2. In § 226.6, revise paragraph (b)(1)(i) to read as follows:

**§ 226.6 Account-opening disclosures.**

* * * * *

(b) * * *

(1) * * *

(i) *Highlighting.* In the table, any annual percentage rate required to be disclosed pursuant to paragraph (b)(2)(i) of this section; any introductory rate permitted to be disclosed pursuant to paragraph (b)(2)(i)(B) or required to be disclosed under paragraph (b)(2)(i)(F) of this section, any rate that will apply after a premium initial rate expires permitted to be disclosed pursuant to paragraph (b)(2)(i)(C) or required to be disclosed pursuant to paragraph (b)(2)(i)(F), and any fee or percentage amounts or maximum limits on fee amounts disclosed pursuant to paragraphs (b)(2)(ii), (b)(2)(iv), (b)(2)(vii) through (b)(2)(xii) of this section must be disclosed in bold text. However, bold text shall not be used for: The amount of any periodic fee disclosed pursuant to paragraph (b)(2) of this section that is not an annualized amount; and other annual percentage rates or fee amounts disclosed in the table.

* * * * *

3. Section 226.7(b)(11)(i)(B) is revised to read as follows:

[41] The burden estimate for this rulemaking does not include the burden addressing changes to implement provisions of Closed-End Mortgages (Docket No. R–1366), the Home-Equity Lines of Credit (Docket No. R–1367), or Notification of Sale or transfer of Mortgage Loans (Docket No. R–1378), as announced in separate proposed rulemakings. *See* 74 FR 43232, 74 FR 43428, and 74 FR 60143.

**§ 226.7 Periodic statement.**

(11) Due date; late payment costs.

(i) * * *

(B) The amount of any late payment fee and any increased periodic rate(s) (expressed as an annual percentage rate(s)) that may be imposed on the account as a result of a late payment. If a range of late payment fees may be assessed, the card issuer may state the range of fees, or the highest fee and an indication that the fee imposed could be lower. If the rate may be increased for more than one feature or balance, the card issuer may state the range of rates or the highest rate that could apply and at the issuer's option an indication that the rate imposed could be lower.

* * * * *

4. Section 226.9(c)(2) and (g) are revised to read as follows:

**§ 226.9 Subsequent disclosure requirements.**

* * * * *

(c) * * *

(2) *Rules affecting open-end (not home-secured) plans.* (i) *Changes where written advance notice is required.* (A) *General.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraphs (c)(2)(i)(B), (c)(2)(iii) and (c)(2)(v) of this section, when a significant change in account terms as described in paragraph (c)(2)(ii) of this section is made to a term required to be disclosed under § 226.6(b)(3), (b)(4) or (b)(5) or the required minimum periodic payment is increased, a creditor must provide a written notice of the change at least 45 days prior to the effective date of the change to each consumer who may be affected. The 45-day timing requirement does not apply if the consumer has agreed to a particular change; the notice shall be given, however, before the effective date of the change. Increases in the rate applicable to a consumer's account due to delinquency, default or as a penalty described in paragraph (g) of this section that are not due to a change in the contractual terms of the consumer's account must be disclosed pursuant to paragraph (g) of this section instead of paragraph (c)(2) of this section.

(B) *Changes agreed to by the consumer.* A notice of change in terms is required, but it may be mailed or delivered as late as the effective date of the change if the consumer agrees to the particular change. This paragraph (c)(2)(i)(B) applies only when a consumer substitutes collateral or when the creditor can advance additional credit only if a change relatively unique to that consumer is made, such as the consumer's providing additional security or paying an increased minimum payment amount. The following are not considered agreements between the consumer and the creditor for purposes of this paragraph (c)(2)(i)(B): the consumer's general acceptance of the creditor's contract reservation of the right to change terms; the consumer's use of the account (which might imply acceptance of its terms under state law); the consumer's acceptance of a unilateral term change that is not particular to that consumer, but rather is of general applicability to consumers with that type of account; and the consumer's request to reopen a closed account or to upgrade an existing account to another account offered by the creditor with different credit or other features.

(ii) *Significant changes in account terms.* For purposes of this section, a "significant change in account terms" means a change to a term required to be disclosed under § 226.6(b)(1) and (b)(2), an increase in the required minimum periodic payment, or the acquisition of a security interest.

(iii) *Charges not covered by § 226.6(b)(1) and (b)(2).* Except as provided in paragraph (c)(2)(vi) of this section, if a creditor increases any component of a charge, or introduces a new charge, required to be disclosed under § 226.6(b)(3) that is not a significant change in account terms as described in paragraph (c)(2)(ii) of this section, a creditor may either, at its option:

(A) Comply with the requirements of paragraph (c)(2)(i) of this section; or

(B) Provide notice of the amount of the charge before the consumer agrees to or becomes obligated to pay the charge, at a time and in a manner that a consumer would be likely to notice the disclosure of the charge. The notice may be provided orally or in writing.

(iv) *Disclosure requirements.* (A) *Significant changes in account terms.* If a creditor makes a significant change in account terms as described in paragraph (c)(2)(ii) of this section, the notice provided pursuant to paragraph (c)(2)(i) of this section must provide the following information:

(*1*) A summary of the changes made to terms required by § 226.6(b)(1) and (b)(2), a description of any increase in the required minimum periodic payment, and a description of any security interest being acquired by the creditor;

(*2*) A statement that changes are being made to the account;

(*3*) For accounts other than credit card accounts under an open-end (not home-secured) consumer credit plan subject to § 226.9(c)(2)(iv)(B), a statement indicating the consumer has the right to opt out of these changes, if applicable, and a reference to additional information describing the opt-out right provided in the notice, if applicable;

(*4*) The date the changes will become effective;

(*5*) If applicable, a statement that the consumer may find additional information about the summarized changes, and other changes to the account, in the notice;

(*6*) If the creditor is changing a rate on the account, other than a penalty rate, a statement that if a penalty rate currently applies to the consumer's account, the new rate described in the notice will not apply to the consumer's account until the consumer's account balances are no longer subject to the penalty rate;

(*7*) If the change in terms being disclosed is an increase in an annual percentage rate, the balances to which the increased rate will be applied. If applicable, a statement identifying the balances to which the current rate will continue to apply as of the effective date of the change in terms; and

(*8*) If the change in terms being disclosed is an increase in an annual percentage rate for a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) *Right to reject for credit card accounts under an open-end (not home-secured) consumer credit plan.* In addition to the disclosures in paragraph (c)(2)(iv)(A) of this section, if a card issuer makes a significant change in account terms on a credit card account under an open-end (not home-secured) consumer credit plan, the creditor must generally provide the following information on the notice provided pursuant to paragraph (c)(2)(i) of this section. This information is not required to be provided in the case of an increase in the required minimum periodic payment, a change in an annual percentage rate applicable to a consumer's account, a change in the balance computation method applicable to consumer's account necessary to comply with § 226.54, or when the change results from the creditor not receiving the consumer's required minimum periodic payment within 60 days after the due date for that payment:

(*1*) A statement that the consumer has the right to reject the change or changes prior to the effective date of the changes, unless the consumer fails to make a required minimum periodic payment within 60 days after the due date for that payment;

(*2*) Instructions for rejecting the change or changes, and a toll-free telephone number that the consumer may use to notify the creditor of the rejection; and

(*3*) If applicable, a statement that if the consumer rejects the change or changes, the consumer's ability to use the account for further advances will be terminated or suspended.

(C) *Changes resulting from failure to make minimum periodic payment within 60 days from due date for credit card accounts under an open-end (not home-secured) consumer credit plan.* For a credit card account under an open-end (not home-secured) consumer credit plan, if the significant change required to be disclosed pursuant to paragraph (c)(2)(i) of this section is an increase in an annual percentage rate or a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (c)(2)(i) of this section must also contain the following information:

(*1*) A statement of the reason for the increase; and

(*2*) That the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(D) *Format requirements.* (*1*) *Tabular format.* The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must be in a tabular format (except for a summary of any increase in the required minimum periodic payment), with headings and format substantially similar to any of the account-opening tables found in G–17 in appendix G to this part. The table must disclose the changed term and information relevant to the change, if that relevant information is required by § 226.6(b)(1) and (b)(2). The new terms shall be described in the same level of detail as required when disclosing the terms under § 226.6(b)(2).

(*2*) *Notice included with periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must be disclosed on the front of any page of the statement. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(*7*) and, if applicable, paragraphs (c)(2)(iv)(A)(*8*), (c)(2)(iv)(B), and (c)(2)(iv)(C) of this section, and be substantially similar to the format shown in Sample G–20 or G–21 in appendix G to this part.

(*3*) *Notice provided separately from periodic statement.* If a notice required by paragraph (c)(2)(i) of this section is not included on or with a periodic statement, the information described in paragraph (c)(2)(iv)(A)(*1*) of this section must, at the creditor's option, be disclosed on the front of the first page of the notice or segregated on a separate page from other information given with the notice. The summary of changes required to be in a table pursuant to paragraph (c)(2)(iv)(A)(*1*) of this section may be on more than one page, and may use both the front and reverse sides, so long as the table begins on the front of the first page of the notice and there is a reference on the first page indicating that the table continues on the following page. The summary of changes described in paragraph (c)(2)(iv)(A)(*1*) of this section must immediately follow the information described in paragraph (c)(2)(iv)(A)(*2*) through (c)(2)(iv)(A)(*7*) and, if applicable, paragraphs (c)(2)(iv)(A)(*8*), (c)(2)(iv)(B), and (c)(2)(iv)(C), of this section, substantially similar to the format shown in Sample G–20 or G–21 in appendix G to this part.

(v) *Notice not required.* For open-end plans (other than home equity plans subject to the requirements of § 226.5b) a creditor is not required to provide notice under this section:

(A) When the change involves charges for documentary evidence; a reduction of any component of a finance or other charge; suspension of future credit privileges (except as provided in paragraph (c)(2)(vi) of this section) or termination of an account or plan; when the change results from an agreement involving a court proceeding; when the change is an extension of the grace period; or if the change is applicable only to checks that access a credit card account and the changed terms are disclosed on or with the checks in accordance with paragraph (b)(3) of this section;

(B) When the change is an increase in an annual percentage rate upon the expiration of a specified period of time, provided that:

(*1*) Prior to commencement of that period, the creditor disclosed in writing to the consumer, in a clear and conspicuous manner, the length of the period and the annual percentage rate that would apply after expiration of the period;

(*2*) The disclosure of the length of the period and the annual percentage rate that would apply after expiration of the period are set forth in close proximity and in equal prominence to the first listing of the disclosure of the rate that applies during the specified period of time; and

(*3*) The annual percentage rate that applies after that period does not exceed the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this paragraph or, if the rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*) of this section was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that was used to calculate the variable rate disclosed pursuant to paragraph (c)(2)(v)(B)(*1*);

(C) When the change is an increase in a variable annual percentage rate in accordance with a credit card agreement that provides for changes in the rate according to operation of an index that is not under the control of the creditor and is available to the general public; or

(D) When the change is an increase in an annual percentage rate, a fee or charge required to be disclosed under § 226.6(b)(2)(ii), (b)(2)(iii), or (b)(2)(xii), or the required minimum periodic payment due to the completion of a workout or temporary hardship arrangement by the consumer or the consumer's failure to comply with the terms of such an arrangement, provided that:

(*1*) The annual percentage rate or fee or charge applicable to a category of transactions or the required minimum periodic payment following any such increase does not exceed the rate or fee or charge or required minimum periodic payment that applied to that category of transactions prior to commencement of the arrangement or, if the rate that applied to a category of transactions prior to the commencement of the workout or temporary hardship arrangement was a variable rate, the rate following any such increase is a variable rate determined by the same formula (index and margin) that applied to the category of transactions prior to commencement of the workout or temporary hardship arrangement; and

(*2*) The creditor has provided the consumer, prior to the commencement of such arrangement, with a clear and conspicuous disclosure of the terms of the arrangement (including any increases due to such completion or failure). This disclosure must generally be provided in writing. However, a creditor may provide the disclosure of the terms of the arrangement orally by telephone, provided that the creditor mails or delivers a written disclosure of

the terms of the arrangement to the consumer as soon as reasonably practicable after the oral disclosure is provided.

(vi) *Reduction of the credit limit.* For open-end plans that are not subject to the requirements of § 226.5b, if a creditor decreases the credit limit on an account, advance notice of the decrease must be provided before an over-the-limit fee or a penalty rate can be imposed solely as a result of the consumer exceeding the newly decreased credit limit. Notice shall be provided in writing or orally at least 45 days prior to imposing the over-the-limit fee or penalty rate and shall state that the credit limit on the account has been or will be decreased.

* * * * *

(g) *Increase in rates due to delinquency or default or as a penalty.* (1) *Increases subject to this section.* For plans other than home-equity plans subject to the requirements of § 226.5b, except as provided in paragraph (g)(4) of this section, a creditor must provide a written notice to each consumer who may be affected when:

(i) A rate is increased due to the consumer's delinquency or default; or

(ii) A rate is increased as a penalty for one or more events specified in the account agreement, such as making a late payment or obtaining an extension of credit that exceeds the credit limit.

(2) *Timing of written notice.* Whenever any notice is required to be given pursuant to paragraph (g)(1) of this section, the creditor shall provide written notice of the increase in rates at least 45 days prior to the effective date of the increase. The notice must be provided after the occurrence of the events described in paragraphs (g)(1)(i) and (g)(1)(ii) of this section that trigger the imposition of the rate increase.

(3)(i) *Disclosure requirements for rate increases.* (A) *General.* If a creditor is increasing the rate due to delinquency or default or as a penalty, the creditor must provide the following information on the notice sent pursuant to paragraph (g)(1) of this section:

(*1*) A statement that the delinquency or default rate or penalty rate, as applicable, has been triggered;

(*2*) The date on which the delinquency or default rate or penalty rate will apply;

(*3*) The circumstances under which the delinquency or default rate or penalty rate, as applicable, will cease to apply to the consumer's account, or that the delinquency or default rate or penalty rate will remain in effect for a potentially indefinite time period;

(*4*) A statement indicating to which balances the delinquency or default rate or penalty rate will be applied;

(*5*) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless a consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(*6*) For a credit card account under an open-end (not home-secured) consumer credit plan, a statement of no more than four principal reasons for the rate increase, listed in their order of importance.

(B) *Rate increases resulting from failure to make minimum periodic payment within 60 days from due date.* For a credit card account under an open-end (not home-secured) consumer credit plan, if the rate increase required to be disclosed pursuant to paragraph (g)(1) of this section is an increase pursuant to § 226.55(b)(4) based on the consumer's failure to make a minimum periodic payment within 60 days from the due date for that payment, the notice provided pursuant to paragraph (g)(1) of this section must also contain the following information:

(*1*) A statement of the reason for the increase; and

(*2*) That the increase will cease to apply to transactions that occurred prior to or within 14 days of provision of the notice, if the creditor receives six consecutive required minimum periodic payments on or before the payment due date, beginning with the first payment due following the effective date of the increase.

(ii) *Format requirements.* (A) If a notice required by paragraph (g)(1) of this section is included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement, above the notice described in paragraph (c)(2)(iv) of this section if that notice is provided on the same statement.

(B) If a notice required by paragraph (g)(1) of this section is not included on or with a periodic statement, the information described in paragraph (g)(3)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the increase in the rate to a penalty rate may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(4) of this section.

(4) *Exception for decrease in credit limit.* A creditor is not required to provide a notice pursuant to paragraph (g)(1) of this section prior to increasing the rate for obtaining an extension of credit that exceeds the credit limit, provided that:

(i) The creditor provides at least 45 days in advance of imposing the penalty rate a notice, in writing, that includes:

(A) A statement that the credit limit on the account has been or will be decreased.

(B) A statement indicating the date on which the penalty rate will apply, if the outstanding balance exceeds the credit limit as of that date;

(C) A statement that the penalty rate will not be imposed on the date specified in paragraph (g)(4)(i)(B) of this section, if the outstanding balance does not exceed the credit limit as of that date;

(D) The circumstances under which the penalty rate, if applied, will cease to apply to the account, or that the penalty rate, if applied, will remain in effect for a potentially indefinite time period;

(E) A statement indicating to which balances the penalty rate may be applied; and

(F) If applicable, a description of any balances to which the current rate will continue to apply as of the effective date of the rate increase, unless the consumer fails to make a minimum periodic payment within 60 days from the due date for that payment; and

(ii) The creditor does not increase the rate applicable to the consumer's account to the penalty rate if the outstanding balance does not exceed the credit limit on the date set forth in the notice and described in paragraph (g)(4)(i)(B) of this section.

(iii) (A) If a notice provided pursuant to paragraph (g)(4)(i) of this section is included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be in the form of a table and provided on the front of any page of the periodic statement; or

(B) If a notice required by paragraph (g)(4)(i) of this section is not included on or with a periodic statement, the information described in paragraph (g)(4)(i) of this section must be disclosed on the front of the first page of the notice. Only information related to the reduction in credit limit may be included with the notice, except that this notice may be combined with a notice described in paragraph (c)(2)(iv) or (g)(1) of this section.

* * * * *

5. Section 226.52(b) is added to read as follows:

**§ 226.52 Limitations on fees.**

* * * * *

(b) *Limitations on penalty fees.* (1) *General rule.* A card issuer must not

impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan unless the dollar amount of the fee is based on one of the determinations set forth in this paragraph.

(i) *Fees based on costs.* A card issuer may impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee represents a reasonable proportion of the total costs incurred by the card issuer as a result of that type of violation.

(ii) *Fees based on deterrence.* A card issuer may impose a fee for violating the terms or other requirements of an account if the card issuer has determined that the dollar amount of the fee is reasonably necessary to deter that type of violation using an empirically derived, demonstrably and statistically sound model that reasonably estimates the effect of the amount of the fee on the frequency of violations.

(iii) *Reevaluation of determinations.* A card issuer must reevaluate a determination made under paragraph (b)(1)(i) or (b)(1)(ii) of this section at least once every twelve months. If as a result of the reevaluation the card issuer determines that a lower fee is consistent with paragraph (b)(1)(i) or (b)(1)(ii) of this section, the card issuer must begin imposing the lower fee within 30 days after completing the reevaluation. If as a result of the reevaluation the card issuer determines that a higher fee is consistent with paragraph (b)(1)(i) or (b)(1)(ii) of this section, the card issuer may begin imposing the higher fee after complying with the notice requirements in § 226.9.

(2) *Prohibited fees.* (i) *Fees that exceed dollar amount associated with violation.* (A) *Generally.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan that exceeds the dollar amount associated with the violation at the time the fee is imposed.

(B) *No dollar amount associated with violation.* A card issuer must not impose a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan when there is no dollar amount associated with the violation. For purposes of paragraph (b)(2)(i) of this section, there is no dollar amount associated with the following violations:

(*1*) Transactions that the card issuer declines to authorize;

(*2*) Account inactivity; and

(*3*) The closure or termination of an account.

(ii) *Multiple fees based on a single event or transaction.* A card issuer must not impose more than one fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan based on a single event or transaction. A card issuer may at its option comply with this prohibition by imposing no more than one fee for violating the account terms or other requirements during a billing cycle.

(3) *Safe harbor.* Except as provided in paragraph (b)(2) of this section, a card issuer complies with paragraph (b)(1) of this section if the dollar amount of a fee for violating the terms or other requirements of a credit card account under an open-end (not home-secured) consumer credit plan does not exceed the greater of:

(i) $[XX.XX], adjusted annually by the Board to reflect changes in the Consumer Price Index; or

(ii) Five percent of the dollar amount associated with the violation, provided that the dollar amount of the fee does not exceed $[XX.XX], adjusted annually by the Board to reflect changes in the Consumer Price Index.

6. Section 226.59 is added to read as follows:

**§ 226.59 Reevaluation of rate increases.**

(a) *General rule.* (1) *Reevaluation of rate increases.* If a card issuer increases an annual percentage rate that applies to a credit card account under an open-end (not home-secured) consumer credit plan, based on the credit risk of the consumer, market conditions, or other factors, or increased such a rate on or after January 1, 2009, and 45 days' advance notice of the rate increase is required pursuant to § 226.9(c)(2) or (g), the card issuer must:

(i) Evaluate whether such factors have changed; and

(ii) Based on its review of such factors, reduce the annual percentage rate applicable to the consumer's account, as appropriate.

(2) *Rate reductions—timing.* If a card issuer is required to reduce the rate applicable to an account pursuant to paragraph (a)(1) of this section, the card issuer must reduce the rate not later than 30 days after completion of the evaluation described in paragraph (a)(1).

(b) *Policies and procedures.* A card issuer must have reasonable written policies and procedures in place to review the factors described in paragraphs (a) and (d) of this section.

(c) *Timing.* A card issuer that is subject to paragraph (a) of this section must review changes in factors in accordance with paragraphs (a) and (d) of this section not less frequently than once every six months after the initial rate increase.

(d) *Factors.* A card issuer is not required to base its review under paragraph (a) of this section on the same factors on which an increase in an annual percentage rate was based. The card issuer may, at its option, review the factors on which the rate increase was originally based, or may review the factors that it currently considers when determining the annual percentage rates applicable to its credit card accounts under an open-end (not home-secured) consumer credit plan.

(e) *Rate increases subject to § 226.55(b)(4).* If an issuer increases a rate applicable to a consumer's account pursuant to § 226.55(b)(4) based on the card issuer not receiving the consumer's required minimum periodic payment within 60 days after the due date, the issuer is not required to review factors pursuant to paragraph (a) of this section prior to the sixth payment due date after the effective date of the increase. However, if the annual percentage rate applicable to the consumer's account is not reduced pursuant to § 226.55(b)(4)(ii), the card issuer must review factors in accordance with paragraph (a) of this section no later than six months after the sixth payment due following the effective date of the rate increase.

(f) *Termination of obligation to review factors.* The obligation to review factors described in paragraph (a) and (d) of this section ceases to apply if:

(1) The issuer reduces the annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan to the rate applicable immediately prior to the increase, or, if the rate applicable immediately prior to the increase was a variable rate, to a variable rate determined by the same formula (index and margin) that was used to calculate the rate applicable prior to the increase; or

(2) The issuer reduces the annual percentage rate to a rate that is lower than the rate described in paragraph (f)(1) of this section.

(g) *Acquired accounts.* (1) *General.* Except as provided in paragraph (g)(2) of this section, the obligation to review changes in factors in paragraph (a) of this section applies to credit card accounts that have been acquired by the card issuer from another card issuer. A card issuer may review either the factors that the card issuer from which it acquired the accounts considered in connection with the rate increase, or

may review the factors that it currently considers in determining the annual percentage rates applicable to its credit card accounts.

(2) *Review of acquired portfolio.* If a card issuer reviews all of the credit card accounts it acquires, as soon as reasonably practicable after the acquisition of such accounts, in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts:

(i) Except as provided in paragraph (g)(2)(iii), the card issuer is required to review changes in factors in accordance with paragraph (a) of this section only for rate increases that are imposed as a result of that review. See §§ 226.9 and 226.55 for additional requirements regarding rate increases on acquired accounts.

(ii) Except as provided in paragraph (g)(2)(iii) of this section, the card issuer is not required to review changes in factors in accordance with paragraph (a) of this section for any rate increases made prior to the card issuer's acquisition of such accounts.

(iii) If as a result of the card issuer's review, an account is subject to, or continues to be subject to, an increased rate as a penalty, or due to the consumer's delinquency or default, the requirements of this section apply.

(h) *Exceptions.* (1) *Servicemembers Civil Relief Act exception.* The requirements of this section do not apply to increases in an annual percentage rate that was previously decreased pursuant to 50 U.S.C. app. 527, provided that such a rate increase is made in accordance with § 226.55(b)(6).

(2) *Charged off accounts.* The requirements of this section do not apply to accounts that the card issuer has charged off in accordance with loan-loss provisions.

7. Appendix G to part 226 is amended by revising Forms G–10(B), G–10(C), G–17(B), G–17(C), G–18(B), G–18(D), G–18(F), G–18(G), G–20, G–21, G–22, G–25(A), and G–25(B).

**Appendix G to Part 226—Open-End Model Forms and Clauses**

* * * * *

BILLING CODE 6210–01–P

## G-10(B) Applications and Solicitations Sample (Credit Cards)

| Interest Rates and Interest Charges | |
|---|---|
| **Annual Percentage Rate (APR) for Purchases** | **8.99%** to **19.99%** when you open your account, based on your creditworthiness.<br>After that, your APR will vary with the market based on the Prime Rate. |
| **APR for Balance Transfers** | **15.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **APR for Cash Advances** | **21.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **Penalty APR and When it Applies** | **28.99%**<br>This APR may be applied to your account if you:<br>1) Make a late payment;<br>2) Go over your credit limit twice in a six-month period;<br>3) Make a payment that is returned; or<br>4) Do any of the above on another account that you have with us.<br>**How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due. |
| **How to Avoid Paying Interest on Purchases** | Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. |
| **Minimum Interest Charge** | If you are charged interest, the charge will be no less than $1.50. |
| **For Credit Card Tips from the Federal Reserve Board** | To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**. |

| Fees | |
|---|---|
| **Annual Fee** | **None** |
| **Transaction Fees** | |
| • Balance Transfer | Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**). |
| • Cash Advance | Either **$5** or **3%** of the amount of each cash advance, whichever is greater. |
| • Foreign Transaction | **2%** of each transaction in U.S. dollars. |
| **Penalty Fees** | |
| • Late Payment | Up to **$XX**. |
| • Over-the-Credit Limit | Up to **$XX**. |
| • Returned Payment | Up to **$XX**. |
| **Other Fees** | |
| • Required Account Protector Plan | **$0.79** per $100 of balance at the end of each statement period. See back for details. |

**How We Will Calculate Your Balance:** We use a method called "average daily balance (including new purchases)."

## G-10(C) Applications and Solicitations (Credit Cards)

| Interest Rates and Interest Charges | |
|---|---|
| **Annual Percentage Rate (APR) for Purchases** | **8.99%, 10.99%, or 12.99%** introductory APR for one year, based on your creditworthiness.<br><br>After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate. |
| **APR for Balance Transfers** | **15.99%**<br><br>This APR will vary with the market based on the Prime Rate |
| **APR for Cash Advances** | **21.99%**<br><br>This APR will vary with the market based on the Prime Rate. |
| **Penalty APR and When it Applies** | **28.99%**<br><br>This APR may be applied to your account if you:<br>1) Make a late payment;<br>2) Go over your credit limit;<br>3) Make a payment that is returned; or<br>4) Do any of the above on another account that you have with us.<br><br>**How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due. |
| **How to Avoid Paying Interest on Purchases** | Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. |
| **Minimum Interest Charge** | If you are charged interest, the charge will be no less than $1.50. |
| **For Credit Card Tips from the Federal Reserve Board** | To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**. |

| Fees | |
|---|---|
| **Set-up and Maintenance Fees** | NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. For example, if you are assigned the minimum credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card). |
| • Annual Fee | **$20** |
| • Account Set-up Fee | **$20** (one-time fee) |
| • Participation Fee | **$12** annually ($1 per month) |
| • Additional Card Fee | **$5** annually (if applicable) |
| **Transaction Fees** | |
| • Balance Transfer | Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**). |
| • Cash Advance | Either **$5** or **3%** of the amount of each cash advance, whichever is greater. |
| • Foreign Transaction | **2%** of each transaction in U.S. dollars. |
| **Penalty Fees** | |
| • Late Payment | Up to **$XX**. |
| • Over-the-Credit Limit | Up to **$XX**. |
| • Returned Payment | Up to **$XX**. |

**How We Will Calculate Your Balance:** We use a method called "average daily balance (including new purchases)."

**Loss of Introductory APR:** We may end your introductory APR and apply the Penalty APR if you make a late payment.

* * * * *

## G-10(E) Applications and Solicitations Sample (Charge Cards)

| Payment Information |
|---|
| All charges made on this charge card are due and payable when you receive your periodic statement. |

| Fees | |
|---|---|
| **Annual Fee** | **$50** |
| **Transaction Fees** | |
| • Balance Transfer | Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**). |
| • Cash Advance | Either **$5** or **3%** of the amount of each cash advance, whichever is greater. |
| **Penalty Fees** | |
| • Late Payment | Up to **$XX**. |
| • Over-the-Credit Limit | Up to **$XX**. |
| • Returned Payment | Up to **$XX**. |

* * * * *

## G-17(B) Account-Opening Sample

| Interest Rates and Interest Charges | |
|---|---|
| **Annual Percentage Rate (APR) for Purchases** | **8.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **APR for Balance Transfers** | **15.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **APR for Cash Advances** | **21.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **Penalty APR and When it Applies** | **28.99%**<br>This APR may be applied to your account if you:<br>1) Make a late payment;<br>2) Go over your credit limit twice in a six-month period;<br>3) Make a payment that is returned; or<br>4) Do any of the above on another account that you have with us.<br>**How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due. |
| **Paying Interest** | Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date. |
| **Minimum Interest Charge** | If you are charged interest, the charge will be no less than $1.50. |
| **For Credit Card Tips from the Federal Reserve Board** | To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**. |

| Fees | |
|---|---|
| **Annual Fee** | **None** |
| **Transaction Fees** | |
| • Balance Transfer | Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**). |
| • Cash Advance | Either **$5** or **3%** of the amount of each cash advance, whichever is greater. |
| • Foreign Transaction | **2%** of each transaction in U.S. dollars. |
| **Penalty Fees** | |
| • Late Payment | Up to **$XX**. |
| • Over-the-Credit Limit | Up to **$XX**. |
| • Returned Payment | Up to **$XX**. |
| **Other Fees** | |
| • Required Account Protector Plan | **$0.79** per $100 of balance at the end of each statement period. See back for details. |

**How We Will Calculate Your Balance:** We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

**Billing Rights:** Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

**G-17(C) Account-Opening Sample**

| Interest Rates and Interest Charges | |
|---|---|
| **Annual Percentage Rate (APR) for Purchases** | **8.99%** introductory APR for one year.<br>After that, your APR will be **14.99%**. This APR will vary with the market based on the Prime Rate. |
| **APR for Balance Transfers** | **15.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **APR for Cash Advances** | **21.99%**<br>This APR will vary with the market based on the Prime Rate. |
| **Penalty APR and When it Applies** | **28.99%**<br>This APR may be applied to your account if you:<br>1) Make a late payment;<br>2) Go over your credit limit;<br>3) Make a payment that is returned; or<br>4) Do any of the above on another account that you have with us.<br>**How Long Will the Penalty APR Apply?:** If your APRs are increased for any of these reasons, the Penalty APR will apply until you make six consecutive minimum payments when due. |
| **Paying Interest** | Your due date is at least 25 days after the close of each billing cycle. We will not charge you any interest on purchases if you pay your entire balance by the due date each month. We will begin charging interest on cash advances and balance transfers on the transaction date. |
| **Minimum Interest Charge** | If you are charged interest, the charge will be no less than $1.50. |
| **For Credit Card Tips from the Federal Reserve Board** | To learn more about factors to consider when applying for or using a credit card, visit the website of the Federal Reserve Board at **http://www.federalreserve.gov/creditcard**. |

| Fees | |
|---|---|
| **Set-up and Maintenance Fees** | NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your card and will reduce the amount of credit you initially have available. Based on your initial credit limit of $250, your initial available credit will be only about $209 (or about $204 if you choose to have an additional card).<br>You may still reject this plan, provided that you have not yet used the account or paid a fee after receiving a billing statement. If you do reject the plan, you are not responsible for any fees or charges. |
| • Annual Fee | **$20** |
| • Account Set-up Fee | **$20** (one-time fee) |
| • Participation Fee | **$12** annually ($1 per month) |
| • Additional Card Fee | **$5** annually (if applicable) |
| **Transaction Fees** | |
| • Balance Transfer | Either **$5** or **3%** of the amount of each transfer, whichever is greater (maximum fee: **$100**). |
| • Cash Advance | Either **$5** or **3%** of the amount of each cash advance, whichever is greater. |
| • Foreign Transaction | **2%** of each transaction in U.S. dollars. |
| **Penalty Fees** | |
| • Late Payment | Up to **$XX**. |
| • Over-the-Credit Limit | Up to **$XX**. |
| • Returned Payment | Up to **$XX**. |

**How We Will Calculate Your Balance:** We use a method called "average daily balance (including new purchases)." See your account agreement for more details.

**Loss of Introductory APR:** We may end your introductory APR and apply the Penalty APR if you make a late payment.

**Billing Rights:** Information on your rights to dispute transactions and how to exercise those rights is provided in your account agreement.

* * * * *

**G–18(B)—Late Payment Fee Sample**

*Late Payment Warning:* If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $XX and your APRs may be increased up to the Penalty APR of 28.99%.

* * * * *

## G-18(D) Periodic Statement New Balance, Due Date, Late Payment and Minimum Payment Sample (Credit Cards)

| **Payment Information** | |
|---|---|
| New Balance | $1,784.53 |
| Minimum Payment Due | $53.00 |
| Payment Due Date | 4/20/12 |

**Late Payment Warning:** If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $XX and your APRs may be increased up to the Penalty APR of 28.99%.

**Minimum Payment Warning:** If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

| If you make no additional charges using this card and each month you pay... | You will pay off the balance shown on this statement in about... | And you will end up paying an estimated total of... |
|---|---|---|
| Only the minimum payment | 10 years | $3,284 |
| $62 | 3 years | $2,232 *(Savings=$1,052)* |

If you would like information about credit counseling services, call 1-800-xxx-xxxx.

* * * * *

## G-18(F) Periodic Statement Form

**XXX Bank Credit Card Account Statement**
**Account Number XXXX XXXX XXXX XXXX**
**February 21, 2012 to March 22, 2012**

**Summary of Account Activity**

| | |
|---|---|
| Previous Balance | $535.87 |
| Payments | -$450.00 |
| Other Credits | -$13.45 |
| Purchases | +$529.57 |
| Balance Transfers | +$785.00 |
| Cash Advances | +$318.00 |
| Past Due Amount | +$0.00 |
| **Fees Charged** | **+$66.45** |
| **Interest Charged** | **+$10.89** |
| New Balance | $1,784.53 |
| Credit limit | $2,000.00 |
| Available credit | $215.47 |
| Statement closing date | 3/22/2012 |
| Days in billing cycle | 30 |

**QUESTIONS?**
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

**Payment Information**

| | |
|---|---|
| New Balance | $1,784.53 |
| Minimum Payment Due | $63.00 |
| Payment Due Date | 4/20/12 |

**Late Payment Warning:** If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $XX and your APRs may be increased up to the Penalty APR of 28.99%.

**Minimum Payment Warning:** If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

| If you make no additional charges using this card and each month you pay | You will pay off the balance shown on this statement in about | And you will end up paying an estimated total of |
|---|---|---|
| Only the minimum payment | 10 years | $3,284 |
| $62 | 3 years | $2,232 (Savings=$1,052) |

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

**Important Changes to Your Account Terms**

The following is a summary of changes that are being made to your account terms. Changes to APRs described below are due to changes in market conditions. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

| Revised Terms, as of 5/10/12 | |
|---|---|
| APR for Purchases | 16.99% |

**Transactions**

| Reference Number | Trans Date | Post Date | Description of Transaction or Credit | Amount |
|---|---|---|---|---|
| 55841 66PS0386W6YM | 2/22 | 2/23 | Store #1 | $2.05 |
| 05444090002LV7ZYL | 2/24 | 2/25 | Store #2 | $12.11 |
| 55541860705ROYD0X | 2/24 | 2/25 | Store #3 | $4.63 |
| 55432860805WMGM0 | 2/24 | 2/25 | Store #4 | $114.95 |
| 05483007 09LHMRPT4L | 2/24 | 2/25 | Store #5 | $7.35 |
| 85433820 3FS800025 | 2/25 | 2/25 | Pymt Thank You | $450.00- |

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION



Please detach this portion and return with your payment to ensure proper credit. Retain upper portion for your records.

| | |
|---|---|
| **Account Number:** | **XXXX XXXX XXXX XXXX** |
| **New Balance** | **$1,784.53** |
| **Minimum Payment Due** | **$63.00** |
| **Payment Due Date** | **4/20/12** |

Please indicate address change and additional cardholder requests on the reverse side.

**AMOUNT ENCLOSED:** $

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

## G-18(G) Periodic Statement Form

**XXX Bank Credit Card Account Statement**
**Account Number XXXX XXXX XXXX XXXX**
**February 21, 2012 to March 22, 2012**

**Summary of Account Activity**

| | |
|---|---|
| Previous Balance | $80.52 |
| Payments | $50.00 |
| Other Credits | +$0.00 |
| Purchases | +$52.13 |
| Balance Transfers | +$0.00 |
| Cash Advances | +$0.00 |
| Past Due Amount | +$0.00 |
| **Fees Charged** | **+$37.00** |
| **Interest Charged** | **+$0.00** |
| New Balance | $119.65 |
| Credit limit | $2,000.00 |
| Available credit | $1,880.35 |
| Statement closing date | 3/22/2012 |
| Days in billing cycle | 30 |

**QUESTIONS?**
Call Customer Service 1-XXX-XXX-XXXX
Lost or Stolen Credit Card 1-XXX-XXX-XXXX

**Payment Information**

| | |
|---|---|
| New Balance | $119.65 |
| Minimum Payment Due | $10.00 |
| Payment Due Date | 4/20/12 |

**Late Payment Warning:** If we do not receive your minimum payment by the date listed above, you may have to pay a late fee of up to $XX and your APRs may be increased up to the Penalty APR of 28.99%.

**Minimum Payment Warning:** If you make only the minimum payment each period, you will pay more in interest and it will take you longer to pay off your balance. For example:

| If you make no additional charges using this card and each month you pay | You will pay off the balance shown on this statement in about | And you will end up paying an estimated total of |
|---|---|---|
| Only the minimum payment | 14 months | $130 |

If you would like information about credit counseling services, call 1-800-XXX-XXXX.

Please send billing inquiries and correspondence to:
PO Box XXXX, Anytown, Anystate XXXXX

**Notice of Changes to Your Interest Rates**

You have triggered the Penalty APR of 28.99% by making a late payment.

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

**Transactions**

| Reference Number | Trans Date | Post Date | Description of Transaction or Credit | Amount |
|---|---|---|---|---|
| | | **Payments and Other Credits** | | |
| 55433620FSSOCGZ5 | 2/25 | 2/25 | Pymt Thank You | $50.00- |
| | | **Purchases** | | |
| 5554189PSG388W51M | 2/22 | 2/23 | Store #1 | $2.05 |
| 05444900607LV72VL | 2/24 | 2/25 | Store #2 | $2.11 |
| 5554189D709RDYDDX | 2/24 | 2/25 | Store #3 | $4.63 |
| 5543289808086W90M0 | 2/24 | 2/25 | Store #4 | $4.95 |
| 05493G70QLYM6PT4L | 2/24 | 2/25 | Store #5 | $7.35 |
| 564891561545K0SHD | 2/25 | 2/26 | Store #6 | $4.35 |
| 84151737764SAKGJQ | 2/25 | 2/26 | Store #7 | $2.35 |
| 89584556156164K0H | 2/26 | 2/27 | Store #8 | $7.69 |
| 167159618046SAMKL | 2/26 | 2/27 | Store #9 | $4.76 |
| 2564994185180LKDFID | 2/27 | 2/28 | Store #10 | $2.87 |
| 5554281870SRASDDX | 3/1 | 3/2 | Store #11 | $3.76 |
| 17810541781045784 | 3/2 | 3/5 | Store #12 | $2.35 |
| 84561521561815DSA | 3/5 | 3/12 | Store #13 | $2.92 |

(transactions continued on next page)

NOTICE: SEE REVERSE SIDE FOR IMPORTANT INFORMATION



Please detach this portion and return with your payment to ensure proper credit. Retain upper portion for your records.

| | |
|---|---|
| **Account Number:** | **XXXX XXXX XXXX XXXX** |
| **New Balance** | **$119.65** |
| **Minimum Payment Due** | **$10.00** |
| **Payment Due Date** | **4/20/12** |
| **AMOUNT ENCLOSED:** | **$** |

Please indicate address change and additional cardholder requests on the reverse side.

XXX Bank
P.O. Box XXXX
Anytown, Anystate XXXXX

XXX Bank Credit Card Account Statement
Account Number XXXX XXXX XXXX XXXX
February 21, 2012 to March 22, 2012

**Transactions (cont.)**

| Reference Number | Trans Date | Post Date | Description of Transaction or Credit | Amount |
|---|---|---|---|---|
| | | | **Fees** | |
| 95251564808FD1540G | 2/23 | 2/23 | Late Fee | $35.00 |
| 564158156470JSNDS | 3/22 | 3/22 | Minimum Charge | $2.00 |
| | | | **TOTAL FEES FOR THIS PERIOD** | **$37.00** |
| | | | **Interest Charged** | |
| | | | Interest Charge on Purchases | $0.00 |
| | | | Interest Charge on Cash Advances | $0.00 |
| | | | **TOTAL INTEREST FOR THIS PERIOD** | **$0.00** |

| 2012 Totals Year-to-Date | |
|---|---|
| Total fees charged in 2012 | $90.14 |
| Total interest charged in 2012 | $19.27 |

**Interest Charge Calculation**

Your **Annual Percentage Rate (APR)** is the annual interest rate on your account.

| Type of Balance | Annual Percentage Rate (APR) | Balance Subject to Interest Rate | Interest Charge |
|---|---|---|---|
| Purchases | 14.99% (v) | $113.50 | $0.00 |
| Cash Advances | 21.99% (v) | $0.00 | $0.00 |
| Balance Transfers | 0.00% | $0.00 | $0.00 |

(v) = Variable Rate

* * * * *

## G-20 Change-in-Terms Sample (Increase in Annual Percentage Rate)

**Important Changes to Your Account Terms**

The following is a summary of changes that are being made to your account terms. Changes to APRs described below are due to changes in market conditions. For more detailed information, please refer to the booklet enclosed with this statement.

These changes will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, changes to APRs described below will apply to these transactions.

Transactions made before 4/9/12: Current APRs will continue to apply to these transactions.

If you are already being charged a higher Penalty APR for purchases: In this case, changes to APRs described below will not go into effect at this time. These changes will go into effect when the Penalty APR no longer applies to your account.

| Revised Terms, as of 5/10/12 | |
|---|---|
| **APR for Purchases** | 16.99% |

## G-21 Change-in-Terms Sample (Increase in Fees)

**Important Changes to Your Account Terms**

The following is a summary of changes that are being made to your account terms. These changes will take effect on 5/10/12. For more detailed information, please refer to the booklet enclosed with this statement.

You have the right to reject these changes, unless you become more than 60 days late on your account. However, if you do reject these changes you will not be able to use your account for new transactions. You can reject the changes by calling us at 1-800-xxx-xxxx.

| Revised Terms, as of 5/10/12 | |
|---|---|
| **Late Payment Fee** | Up to $XX. |
| **Returned Payment Fee** | Up to $XX. |

## G-22 Penalty Rate Increase Sample (Payment 60 or Fewer Days Late)

**Notice of Changes to Your Interest Rates**

You have triggered the Penalty APR of 28.99% by making a late payment. This change will impact your account as follows:

Transactions made on or after 4/9/12: As of 5/10/12, the Penalty APR will apply to these transactions. We may keep the APR at this level indefinitely.

Transactions made before 4/9/12: Current rates will continue to apply to these transactions. However, if you become more than 60 days late on your account, the Penalty APR will apply to those transactions as well.

BILLING CODE 6210–01–C

* * * * *

**G–25(A)—Consent Form for Over-the-Credit Limit Transactions**

*Your Choice Regarding Over-the-Credit Limit Coverage*

Unless you tell us otherwise, we will decline any transaction that causes you to go over your credit limit. If you want us to authorize these transactions, you can request over-the-credit limit coverage.

If you have over-the-credit limit coverage and you go over your credit limit, we will charge you a fee of up to $XX. We may also increase your APRs to the Penalty APR of XX.XX%. You will only pay one fee per billing cycle, even if you go over your limit multiple times in the same cycle.

Even if you request over-the-credit limit coverage, in some cases we may still decline a transaction that would cause you to go over your limit, such as if you are past due or significantly over your credit limit.

If you want over-the-limit coverage and to allow us to authorize transactions that go over your credit limit, please:

—Call us at [telephone number];
—Visit [Web site]; or
—Check or initial the box below, and return the form to us at [address].

__I want over-the-limit coverage. I understand that if I go over my credit limit, my APRs may be increased and I will be charged a fee of up to $XX. [I have the right to cancel this coverage at any time.]

[__I *do not* want over-the-limit coverage. I understand that transactions that exceed my credit limit will not be authorized.]

Printed Name: _____
Date: _____
[Account Number]: _____

**G–25(B)—Revocation Notice for Periodic Statement Regarding Over-the-Credit Limit Transactions**

You currently have over-the-credit limit coverage on your account, which means that we pay transactions that cause you go to over your credit limit. If you do go over your credit limit, we will charge you a fee of up to $XX. We may also increase your APRs. To remove over-the-credit-limit coverage from your account, call us at 1–800–xxxxxxx or visit [insert web site]. [You may also write us at: [insert address]. ]

[You may also check or initial the box below and return this form to us at: [insert address].

__I want to cancel over-the-limit coverage for my account.

Printed Name: _____
Date: _____
[Account Number]: _____

8. In Supplement I to Part 226:

A. Under *Section 226.5a—Credit and Charge Card Applications and Solicitations,* under *5a(a) General rules,* under *5a(a)(2) Form of disclosures; tabular format,* paragraph 5.ii. is revised.

B. Under *Section 226.9—Subsequent Disclosure Requirements:*

(i) Under *9(c) Change in terms,* under *9(c)(2)(iv) Disclosure requirements,* paragraphs 1. through 11. are revised; and

(ii) Under *9(g) Increase in rates due to delinquency or default or as a penalty,* paragraphs 1. through 7. are revised.

C. Under *Section 226.52—Limitations on Fees, 52(b) Limitations on penalty fees* is added.

D. Under *Section 226.56—Requirements for over-the-limit transactions:*

(i) Under *56(e) Content,* paragraph 1. is revised; and

(ii) Under *56(j) Prohibited practices,* paragraph 6. is added.

E. *Section 226.59—Reevaluation of Rate Increases* is added.

**Supplement I to Part 226—Official Staff Interpretations**

* * * * *

**Section 226.5a—Credit and Charge Card Applications and Solicitations**

* * * * *

*5a(a) General rules.*

* * * * *

*5a(a)(2) Form of disclosures; tabular format.*

* * * * *

5. * * *

ii. *Maximum limits on fees.* Section 226.5a(a)(2)(iv) provides that any maximum limits on fee amounts must be disclosed in bold text. For example, assume that, consistent with § 226.52(b)(3), a card issuer's late payment fee will not exceed $XX.XX. The maximum limit of $XX.XX for the late payment fee must be highlighted in bold. Similarly, assume an issuer will charge a cash advance fee of $5 or 3 percent of the cash advance transaction amount, whichever is greater, but the fee will not exceed $100. The maximum limit of $100 for the cash advance fee must be highlighted in bold.

* * * * *

**Section 226.9—Subsequent Disclosure Requirements**

* * * * *

*9(c) Change in terms.*

* * * * *

*9(c)(2)(iv) Disclosure requirements.*

1. *Changing margin for calculating a variable rate.* If a creditor is changing a margin used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new margin) in the table described in § 226.9(c)(2)(iv), and include a reminder that the rate is a variable rate. For example, if a creditor is changing the margin for a variable rate that uses the prime rate as an index, the creditor must disclose in the table the new rate (as calculated using the new margin) and indicate that the rate varies with the market based on the prime rate.

2. *Changing index for calculating a variable rate.* If a creditor is changing the index used to calculate a variable rate, the creditor must disclose the amount of the new rate (as calculated using the new index) and indicate that the rate varies and how the rate is determined, as explained in § 226.6(b)(2)(i)(A). For example, if a creditor is changing from using a prime rate to using the LIBOR in calculating a variable rate, the creditor would disclose in the table the new rate (using the new index) and indicate that the rate varies with the market based on the LIBOR.

3. *Changing from a variable rate to a non-variable rate.* If a creditor is changing a rate applicable to a consumer's account from a variable rate to a non-variable rate, the creditor must provide a notice as otherwise required under § 226.9(c) even if the variable rate at the time of the change is higher than the non-variable rate.

4. *Changing from a non-variable rate to a variable rate.* If a creditor is changing a rate applicable to a consumer's account from a non-variable rate to a variable rate, the creditor must provide a notice as otherwise required under § 226.9(c) even if the non-variable rate is higher than the variable rate at the time of the change.

5. *Changes in the penalty rate, the triggers for the penalty rate, or how long the penalty rate applies.* If a creditor is changing the amount of the penalty rate, the creditor must also redisclose the triggers for the penalty rate and the information about how long the penalty rate applies even if those terms are not changing. Likewise, if a creditor is changing the triggers for the penalty rate, the creditor must redisclose the amount of the penalty rate and information about how long the penalty rate applies. If a creditor is changing how long the penalty rate applies, the creditor must redisclose the amount of the penalty rate and the triggers for the penalty rate, even if they are not changing.

6. *Changes in fees.* If a creditor is changing part of how a fee that is disclosed in a tabular format under § 226.6(b)(1) and (b)(2) is determined, the creditor must redisclose all relevant information related to that fee regardless of whether this other information is changing. For example, if a creditor currently charges a cash advance fee of "Either $5 or 3% of the transaction amount, whichever is greater. (Max: $100)," and the creditor is only changing the minimum dollar amount from $5 to $10, the issuer must redisclose the other information related to how the fee is determined. For example, the creditor in this example would disclose the following: "Either $10 or 3% of the transaction amount, whichever is greater. (Max: $100)."

7. *Combining a notice described in § 226.9(c)(2)(iv) with a notice described in § 226.9(g)(3).* If a creditor is required to provide a notice described in § 226.9(c)(2)(iv) and a notice described in § 226.9(g)(3) to a consumer, the creditor may combine the two notices. This would occur if penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

8. *Content.* Sample G–20 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when a variable rate is being changed to a non-variable rate on a credit card account. The sample explains when the new rate will apply to new transactions and to which

balances the current rate will continue to apply. Sample G–21 contains an example of how to comply with the requirements in § 226.9(c)(2)(iv) when (i) the late payment fee on a credit card account is being increased in accordance with a formula that depends on the outstanding balance on the account, and (ii) the returned payment fee is also being increased. The sample discloses the consumer's right to reject the changes in accordance with § 226.9(h).

9. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

10. *Terminology.* See § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(c)(2)(iv)(A)(*1*).

11. *Reasons for increase.* Section 226.9(c)(2)(iv)(A)(*8*) requires card issuers to disclose the principal reason(s) for increasing an annual percentage rate applicable to a credit card account under an open-end (not home-secured) consumer credit plan. The regulation does not mandate a minimum number of reasons that must be disclosed. However, the specific reasons disclosed under § 226.9(c)(2)(iv)(A)(*8*) are required to relate to and accurately describe the principal factors actually considered by the card issuer in increasing the rate. A card issuer may describe the reasons for the increase in general terms. For example, the notice of a rate increase triggered by a decrease of 100 points in a consumer's credit score may state that the increase is due to "a decline in your creditworthiness" or "a decline in your credit score." Similarly, a notice of a rate increase triggered by a 10% increase in the card issuer's cost of funds may be disclosed as "a change in market conditions." In some circumstances, it may be appropriate for a card issuer to combine the disclosure of several reasons in one statement. For example, assume that a consumer made a late payment on the credit card account on which the rate increase is being imposed, made a late payment on a credit card account with another card issuer, and the consumer's credit score decreased, in part due to such late payments. The card issuer may disclose the reasons for the rate increase as a decline in the consumer's credit score and the consumer's late payment on the account subject to the increase. Because the late payment on the credit card account with the other issuer also likely contributed to the decline in the consumer's credit score, it is not required to be separately disclosed.

* * * * *

*9(g) Increase in rates due to delinquency or default or as a penalty.*

1. *Relationship between § 226.9(c) and (g) and § 226.55—examples.* Card issuers subject to § 226.55 are prohibited from increasing the annual percentage rate for a category of transactions on any consumer credit card account unless specifically permitted by one of the exceptions in § 226.55(b). See comments 55(a)–1 and 55(b)–3 and the commentary to § 226.55(b)(4) for examples that illustrate the relationship between the notice requirements of § 226.9(c) and (g) and § 226.55.

2. *Affected consumers.* If a single credit account involves multiple consumers that may be affected by the change, the creditor should refer to § 226.5(d) to determine the number of notices that must be given.

3. *Combining a notice described in § 226.9(g)(3) with a notice described in § 226.9(c)(2)(iv).* If a creditor is required to provide notices pursuant to both § 226.9(c)(2)(iv) and (g)(3) to a consumer, the creditor may combine the two notices. This would occur when penalty pricing has been triggered, and other terms are changing on the consumer's account at the same time.

4. *Content.* Sample G–22 contains an example of how to comply with the requirements in § 226.9(g)(3)(i) when the rate on a consumer's credit card account is being increased to a penalty rate as described in § 226.9(g)(1)(ii), based on a late payment that is not more than 60 days late. Sample G–23 contains an example of how to comply with the requirements in § 226.9(g)(3)(i) when the rate increase is triggered by a delinquency of more than 60 days.

5. *Clear and conspicuous standard.* See comment 5(a)(1)–1 for the clear and conspicuous standard applicable to disclosures required under § 226.9(g).

6. *Terminology.* See § 226.5(a)(2) for terminology requirements applicable to disclosures required under § 226.9(g).

7. *Reasons for increase.* See comment 9(c)(2)(iv)–11 for guidance on disclosure of the reasons for a rate increase for a credit card account under an open-end (not home-secured) consumer credit plan.

* * * * *

**Section 226.52—Limitations on Fees**

*52(a) Limitations during first year after account opening.*

* * * * *

*52(b) Limitations on penalty fees.*

1. *Fees for violating the account terms or other requirements.* For purposes of § 226.52(b), a fee is any charge imposed by a card issuer based on an act or omission that violates the terms of the account or any other requirements imposed by the card issuer with respect to the account, other than charges attributable to periodic interest rates. Accordingly, § 226.52(b) does not apply to charges attributable to an increase in an annual percentage rate based on an act or omission that violates the account terms.

i. The following are examples of fees that are subject to the limitations in § 226.52(b) or are prohibited by § 226.52(b):

A. Late payment fees and any other fees imposed by a card issuer if an account becomes delinquent or if a payment is not received by a particular date.

B. Returned-payment fees and any other fees imposed by a card issuer if a payment received via check, automated clearing house, or other payment method is returned.

C. Any fee or charge for an over-the-limit transaction as defined in § 226.56(a), to the extent the imposition of such a fee or charge is permitted by § 226.56.

D. Any fee or charge for a transaction that the card issuer declines to authorize. *See* § 226.52(b)(2)(i)(B).

E. Any fee imposed by a card issuer based on account inactivity (including the consumer's failure to use the account for a particular number or dollar amount of transactions or a particular type of transaction) or the closure or termination of an account. *See* § 226.52(b)(2)(i)(B).

ii. The following are examples of fees to which § 226.52(b) does not apply:

A. Balance transfer fees.

B. Cash advance fees.

C. Foreign transaction fees.

D. Annual fees and other fees for the issuance or availability of credit described in § 226.5a(b)(2), except to the extent that such fees are based on account inactivity.

E. Fees for insurance described in § 226.4(b)(7) or debt cancellation or debt suspension coverage described in § 226.4(b)(10) written in connection with a credit transaction, provided that such fees are not imposed as a result of a violation of the account terms or other requirements.

F. Fees for making an expedited payment (to the extent permitted by § 226.10(e)).

G. Fees for optional services (such as travel insurance).

H. Fees for reissuing a lost or stolen card.

2. *Rounding to nearest whole dollar.* A card issuer may round any fee that complies with § 226.52(b) to the nearest whole dollar. For example, if § 226.52(b) permits a card issuer to impose a late payment fee of $21.50, the card issuer may round that amount up to the nearest whole dollar and impose a late payment fee of $22. However, if the late payment fee permitted by § 226.52(b) were $21.49, the card issuer would not be permitted to round that amount up to $22, although the card issuer could round that amount down and impose a late payment fee of $21.

52(b)(1) General rule

1. *Amounts charged by other card issuers.* The fact that a card issuer's fees for violating the account terms or other requirements are comparable to fees assessed by other card issuers does not satisfy the requirements of § 226.52(b)(1).

*52(b)(1)(i) Fees based on costs.*

1. *Costs incurred as a result of violations of the account terms.* Section 226.52(b)(1)(i) does not require a card issuer to base a fee on the costs incurred as a result of a specific violation of the account terms or other requirements. Instead, for purposes of § 226.52(b)(1)(i), a card issuer must have determined that a fee for violating the account terms or other requirements represents a reasonable proportion of the costs incurred by the card issuer as a result of that type of violation. The factors relevant to this determination include:

A. The number of violations of a particular type experienced by the card issuer during a prior period;

B. The costs incurred by the card issuer during that period as a result of those violations; and

C. At the card issuer's option, reasonable estimates of changes in the number of violations of that type and the resulting costs during an upcoming period. *See* illustrative examples in comments 52(b)(1)(i)–4 through–6.

2. *Losses and associated costs.* Losses and associated costs (including the cost of holding reserves against potential losses) are not costs incurred by a card issuer as a result of violations of the account terms or other requirements for purposes of § 226.52(b)(1)(i).

3. *Third party charges.* As a general matter, amounts charged to the card issuer by a third party as a result of a violation of the account terms or other requirements are costs incurred by the card issuer for purposes of § 226.52(b)(1)(i). For example, if a card issuer is charged a specific amount by a third party for each returned payment, that amount is a cost incurred by the card issuer as a result of returned payments. However, if the amount is charged to the card issuer by an affiliate or subsidiary of the card issuer, the card issuer must have determined that the charge represents a reasonable proportion of the costs incurred by the affiliate or subsidiary as a result of the type of violation. For example, if an affiliate of a card issuer provides collection services to the card issuer on delinquent accounts, the card issuer must have determined that the amounts charged to the card issuer by the affiliate for such services represent a reasonable proportion of the costs incurred by the affiliate as a result of late payments.

4. *Late payment fees.*

i. *Costs incurred as a result of late payments.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of late payments include the costs associated with the collection of late payments, such as the costs associated with notifying consumers of delinquencies and resolving delinquencies (including the establishment of workout and temporary hardship arrangements).

ii. *Examples.*

A. *Late payment fee based on past delinquencies and costs.* Assume that, during year one, a card issuer experienced 1 million delinquencies and incurred $23 million in costs as a result of those delinquencies. For purposes of § 226.52(b)(1)(i), a $23 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

B. *Adjustment based on reasonable estimate of future changes.* Same facts as above except the card issuer reasonably estimates that—based on past delinquency rates and other factors relevant to potential delinquency rates for year two—it will experience a 1% decrease in delinquencies during year two (in other words, 10,000 fewer delinquencies for a total of 990,000). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of delinquencies and other factors relevant to potential costs for year two—it will experience a 3% increase in costs during year two (in other words, $690,000 in additional costs for a total of $23.69 million). For purposes of § 226.52(b)(1)(i), a $24 late payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of late payments during year two.

5. *Returned-payment fees.*

i. *Costs incurred as a result of returned payments.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of returned payments include:

A. Costs associated with processing returned payments and reconciling the card issuer's systems and accounts to reflect returned payments; and

B. Costs associated with notifying the consumer of the returned payment and arranging for a new payment.

ii. *Examples.*

A. *Returned-payment fee based on past returns and costs.* Assume that, during year one, a card issuer experienced 150,000 returned payments and incurred $3.1 million in costs as a result of those returned payments. For purposes of § 226.52(b)(1)(i), a $21 returned-payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

B. *Adjustment based on reasonable estimate of future changes.* Same facts as above except the card issuer reasonably estimates that—based on past returned payment rates and other factors relevant to potential returned payment rates for year two—it will experience a 2% increase in returned payments during year two (in other words, 3,000 additional returned payments for a total of 153,000). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of returned payments and other factors relevant to potential costs for year two—it will experience a 3% decrease in costs during year two (in other words, a $93,000 reduction in costs for a total of $3.007 million). For purposes of § 226.52(b)(1)(i), a $20 returned-payment fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of returned payments during year two.

6. *Over-the-limit fees.*

i. *Costs incurred as a result of over-the-limit transactions.* For purposes of § 226.52(b)(1)(i), the costs incurred by a card issuer as a result of over-the-limit transactions include:

A. Costs associated with determining whether to authorize over-the-limit transactions; and

B. Costs associated with notifying the consumer that the credit limit has been exceeded and arranging for payments to reduce the balance below the credit limit.

ii. *Examples.*

A. *Over-the-limit fee based on past fees and costs.* Assume that, during year one, a card issuer authorized 600,000 over-the-limit transactions and incurred $4.5 million in costs as a result of those over-the-limit transactions. However, because of the affirmative consent requirements in § 226.56, the card issuer was only permitted to impose 200,000 over-the-limit fees during year one. For purposes of § 226.52(b)(1)(i), a $23 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

B. *Adjustment based on reasonable estimate of future changes.* Same facts as above except the card issuer reasonably estimates that—based on past over-the-limit transaction rates, the percentages of over-the-limit transactions that resulted in an over-the-limit fee in the past (consistent with § 226.56), and factors relevant to potential changes in those rates and percentages for year two—it will authorize approximately the same number of over-the-limit transactions during year two (600,000) and impose approximately the same number of over-the-limit fees (200,000). The card issuer also reasonably estimates that—based on past changes in costs incurred as a result of over-the-limit transactions and other factors relevant to potential costs for year two—it will experience a 6% decrease in costs during year two (in other words, a $270,000 reduction in costs for a total of $4.23 million). For purposes of § 226.52(b)(1)(i), a $21 over-the-limit fee would represent a reasonable proportion of the total costs incurred by the card issuer as a result of over-the-limit transactions during year two.

*52(b)(1)(ii) Fees based on deterrence.*

1. *Deterrence of violations.* Section 226.52(b)(1)(ii) does not require a card issuer to determine that a fee for violating the account terms or other requirements is reasonably necessary to deter violations by a specific consumer or with respect to a specific account. Instead, for purposes of § 226.52(b)(1)(ii), a card issuer must have determined that the dollar amount of a fee for violating the account terms or other requirements is reasonably necessary to deter the type of violation for which the fee is imposed.

2. *Use of models.* Section 226.52(b)(2)(ii) provides that, in order to determine that the dollar amount of a fee for violating the account terms or other requirements is reasonably necessary to deter that type of violation, the card issuer must use an empirically derived, demonstrably and statistically sound model that reasonably estimates the effect of the dollar amount of the fee on the frequency of the type of violation. A model that reasonably estimates a statistical correlation between the imposition of a fee and the frequency of a type of violation is not sufficient to satisfy the requirements of § 226.52(b)(1)(ii). Instead, in order to support a determination that the dollar amount of a fee is reasonably necessary to deter a particular type of violation, a model must reasonably estimate that, independent of other variables, the imposition of a lower fee amount would result in a substantial increase in the frequency of that type of violation. The parameterization of the model used for this purpose must be sufficiently flexible to allow for the identification of a lower fee level above which additional fee increases have no marginal effect on the frequency of violations.

52(b)(2) Prohibited fees

1. *Relationship to § 226.52(b)(1) and (b)(3).* A card issuer does not comply with § 226.52(b)(1) if it imposes a fee that is inconsistent with the prohibitions in § 226.52(b)(2). Similarly, the prohibitions in § 226.52(b)(2) apply even if a fee is consistent with the safe harbor in § 226.52(b)(3). For example, even if a card issuer has determined for purposes of § 226.52(b)(1) that a $25 fee represents a reasonable proportion of the total costs incurred by the card as a result of a particular type of violation or that a $25 fee

is reasonably necessary to deter that type of violation, § 226.52(b)(2)(i) prohibits the card issuer from imposing that fee if the dollar amount associated with the violation is less than $25.

*52(b)(2)(i) Fees that exceed dollar amount associated with violation.*

1. *Late payment fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with a late payment is the amount of the required minimum periodic payment that was not received on or before the payment due date. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a late payment fee that exceeds the amount of the required minimum periodic payment on which that fee is based. For example, assume that an account has a balance of $1,000. If the card issuer does not receive the $20 required minimum periodic payment on or before the payment due date, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a late payment fee that exceeds $20 (even if a higher fee would be permitted under § 226.52(b)(1) or (b)(3)).

2. *Returned-payment fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due during the billing cycle in which the payment is returned to the card issuer. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing a returned-payment fee that exceeds the amount of that required minimum periodic payment. However, if a payment has been returned and is submitted again for payment by the card issuer, there is no additional dollar amount associated with a subsequent return of that payment and § 226.52(b)(2)(i)(B) prohibits the card issuer from imposing an additional returned-payment fee. The following examples illustrate the application of § 226.52(b)(2)(i) to returned-payment fees:

i. Assume that the billing cycles for an account begin on the first day of the month and end on the last day of the month and that the payment due date is the twenty-fifth day of the month. A minimum payment of $20 is due on March 25. The card issuer receives a check for $100 on March 23, which is returned to the card issuer for insufficient funds on March 26. Section 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned-payment fee that exceeds $20 (even if a higher fee would be permitted under § 226.52(b)(1) or (b)(3)). Furthermore, § 226.52(b)(2)(ii) prohibits the card issuer from assessing both a late payment fee and a returned-payment fee in these circumstances. *See* comment 52(b)(2)(ii)–1.

ii. Same facts as above except that the card issuer receives the $100 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is $30. Section 226.52(b)(2)(i)(A) prohibits the card issuer from imposing a returned-payment fee that exceeds $30 (even if a higher fee would be permitted under § 226.52(b)(1) or (b)(3)).

iii. Same facts as paragraph i. above except that, on March 28, the card issuer presents the $100 check for payment a second time. On April 1, the check is again returned for insufficient funds. Section 226.52(b)(2)(i)(B) prohibits the card issuer from imposing a returned-payment fee based on the return of the payment on April 1.

3. *Over-the-limit fees.* For purposes of § 226.52(b)(2)(i), the dollar amount associated with extensions of credit in excess of the credit limit for an account is the total amount of credit extended by the card issuer in excess of the credit limit as of the date on which the over-the-limit fee is imposed. Thus, § 226.52(b)(2)(i)(A) prohibits a card issuer from imposing an over-the-limit fee that exceeds that amount. Although § 226.56(j)(1)(i) prohibits a card issuer from imposing more than one over-the-limit fee per billing cycle, the card issuer may choose the date during the billing cycle on which to impose an over-the-limit fee so long as the dollar amount of the fee does not exceed the total amount of credit extended in excess of the limit as of that date. The following examples illustrate the application of § 226.52(b)(2)(i)(A) to over-the-limit fees:

i. Assume that the billing cycles for a credit card account with a credit limit of $5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On March 1, the account has a $4,950 balance. On March 6, a $60 transaction is charged to the account, increasing the balance to $5,010. If the card issuer chooses to impose an over-the-limit fee on March 6, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee that exceeds $10 (even if a higher fee would be permitted under § 226.52(b)(1) or (b)(3)).

ii. Same facts as above, except that the card issuer chooses not to impose an over-the-limit fee on March 6. On March 25, a $5 transaction is charged to the account, increasing the balance to $5,015. If the card issuer chooses to impose an over-the-limit fee on March 25, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee that exceeds $15 (even if a higher fee would be permitted under § 226.52(b)(1) or (b)(3)).

iii. Same facts as in paragraph ii. above, except that the card issuer chooses not to impose an over-the-limit fee on March 25. On March 26, the card issuer receives a payment of $20, reducing the balance below the credit limit to $4,995. In these circumstances, § 226.52(b)(2)(i)(A) prohibits the card issuer from imposing an over-the-limit fee (even if a fee would be permitted under § 226.52(b)(1) or (b)(3)). Furthermore, § 226.52(b)(2)(i)(A) does not permit the card issuer to impose a fee at the end of the billing cycle (March 31) based on the total amount of credit extended in excess of the credit limit on an earlier date (such as March 6 or 25).

*52(b)(2)(ii) Multiple fees based on single event or transaction.*

1. *Single event or transaction.* Section 226.52(b)(2)(ii) prohibits a card issuer from imposing more than one fee for violating the account terms or other requirements based on a single event or transaction. The following examples illustrate the application of § 226.52(b)(2)(ii). Assume for purposes of these examples that the billing cycles for a credit card account begin on the first day of the month and end on the last day of the month and that the payment due date for the account is the twenty-fifth day of the month.

i. Assume that the required minimum periodic payment due on March 25 is $20. On March 26, the card issuer has not received any payment and imposes a late payment fee. Section 226.52(b)(2)(ii) prohibits the card issuer from imposing an additional late payment fee if the $20 minimum payment has not been received by a subsequent date (such as March 31). However, § 226.52(b)(2)(ii) does not prohibit the card issuer from imposing an additional late payment fee if the required minimum periodic payment due on April 25 (which may include the $20 due on March 25) is not received on or before that date.

ii. Assume that the required minimum periodic payment due on March 25 is $20.

A. On March 25, the card issuer receives a check for $50, but the check is returned for insufficient funds on March 27. Consistent with § 226.52(b)(2)(i)(A), the card issuer may impose a late payment fee of $20 or a returned-payment fee of $20 (assuming that these amounts comply with § 226.52(b)(1) or (b)(3)). However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

B. Same facts as paragraph ii.A. above except that that card issuer receives the $50 check on March 27 and the check is returned for insufficient funds on March 29. Consistent with § 226.52(b)(2)(i)(A), the card issuer may impose a late payment fee of $20 or a returned-payment fee of $20 (assuming that these amounts comply with § 226.52(b)(1) or (b)(3)). However, § 226.52(b)(2)(ii) prohibits the card issuer from imposing both fees because those fees would be based on a single event or transaction.

iii. Assume that the credit limit for an account is $1,000. On March 31, the balance on the account is $975 and the card issuer has not received the $20 required minimum periodic payment due on March 25. On that same date (March 31), a $50 transaction is charged to the account, which increases the balance to $1,025. Consistent with § 226.52(b)(2)(i)(A), the card issuer may impose a late payment fee of $20 and an over-the-limit fee of $25 (assuming that these amounts comply with § 226.52(b)(1) or (b)(3)). Section 226.52(b)(2)(ii) does not prohibit the imposition of both fees because those fees are based on different events or transactions.

52(b)(3) Safe harbor.

1. *Relationship to § 226.52(b)(1) and (b)(2).* A fee that complies with the safe harbor in § 226.52(b)(3) complies with the requirements of § 226.52(b)(1). However, the safe harbor in § 226.52(b)(3) does not permit a card issuer to impose a fee that is inconsistent with the prohibitions in § 226.52(b)(2). For example, if § 226.52(b)(2)(i) prohibits the card issuer from imposing a late payment fee that exceeds $15, § 226.52(b)(3) does not permit the card issuer to impose a higher late payment fee.

2. *Adjustments based on Consumer Price Index.* For purposes of § 226.52(b)(3)(i) and (b)(3)(ii), the Board shall calculate each year

price level adjusted amounts using the Consumer Price Index in effect on June 1 of that year. When the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 226.52(b)(3)(i) and (b)(3)(ii) has risen by a whole dollar, those amounts will be increased by $1.00. In contrast, when the cumulative change in the adjusted minimum value derived from applying the annual Consumer Price level to the current amounts in § 226.52(b)(3)(i) and (b)(3)(ii) has decreased by a whole dollar, those amounts will be decreased by $1.00. The Board will publish adjustments to the amounts in § 226.52(b)(3)(i) and (b)(3)(ii).

3. *Fees as percentages of dollar amount associated with transaction.*

i. *Late payment fee.* For purposes of § 226.52(b)(3)(ii), the dollar amount associated with a late payment is the amount of the required minimum periodic payment that was not received on or before the payment due date. Thus, § 226.52(b)(3)(ii) generally permits a card issuer to impose a late payment fee that does not exceed 5% of the required minimum periodic payment on which that fee is based. For example, assume that, under the terms of a credit card account, the card issuer must receive a minimum payment of $450 on or before June 15. If the card issuer does not receive the $450 payment on or before June 15, § 226.52(b)(3)(ii) permits the card issuer to impose a late payment fee of $23 (which equals 5% of the $450 required minimum periodic payment, rounded to the nearest whole dollar).

ii. *Returned-payment fee.* For purposes of § 226.52(b)(3)(ii), the dollar amount associated with a returned payment is the amount of the required minimum periodic payment due during the billing cycle in which the payment is returned to the card issuer. *See* comment 52(b)(2)(i)–2. Thus, § 226.52(b)(3)(ii) generally permits a card issuer to impose a returned-payment fee that does not exceed 5% of the amount of that required minimum periodic payment. For example:

A. Assume that a $500 required minimum periodic payment is due on March 25. On that date, the card issuer receives a check for $700, but the check is returned to the card issuer for insufficient funds on March 27. Section 226.52(b)(3)(ii) permits the card issuer to impose a returned-payment fee of $25 (which equals 5% of $500 required minimum periodic payment), provided this amount does exceed the limitation in § 226.52(b)(3)(ii).

B. Same facts as above except that the card issuer receives the $700 check on March 31 and the check is returned for insufficient funds on April 2. The minimum payment due on April 25 is $800. Section 226.52(b)(3)(ii) permits the card issuer to impose a returned-payment fee of $40 (which equals 5% of $800 required minimum periodic payment), provided this amount does exceed the limitation in § 226.52(b)(3)(ii).

iii. *Over-the-limit fee.* For purposes of § 226.52(b)(3)(ii), the dollar amount associated with extensions of credit in excess of the credit limit for an account is the total amount of credit extended by the card issuer in excess of the credit limit as of the date on which the over-the-limit fee is imposed. Thus, § 226.52(b)(3)(ii) generally permits a card issuer to impose an over-the-limit fee that does not exceed 5% of that amount. Although § 226.56(j)(1)(i) prohibits a card issuer from imposing more than one over-the-limit fee per billing cycle, a card issuer may choose the date during the billing cycle on which to impose an over-the-limit fee. For example, assume that the billing cycles for a credit card account with a credit limit of $5,000 begin on the first day of the month and end on the last day of the month. Assume also that, consistent with § 226.56, the consumer has affirmatively consented to the payment of transactions that exceed the credit limit. On September 1, the account has a balance of $4,900. On September 15, a $500 transaction is charged to the account, increasing the balance to $5,400. The card issuer chooses not to impose an over-the-limit fee at this time. On September 20, a $200 transaction is charged to the account, increasing the balance to $5,600. If the card issuer chooses to impose an over-the-limit fee on September 20, § 226.52(b)(3)(ii) permits the issuer to impose a fee of $30 (which equals 5% of the $600 extensions of credit in excess of the $5,000 credit limit), provided this amount does exceed the limitation in § 226.52(b)(3)(ii).

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**Section 226.56—Requirements for Over-the-Limit Transactions**

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*56(e) Content*

1. *Amount of over-the-limit fee.* See Model Forms G–25(A) and G–25(B) for guidance on how to disclose the amount of the over-the-limit fee.

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*56(j) Prohibited Practices*

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6. *Additional restrictions on over-the-limit fees.* See § 226.52(b).

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**Section 226.59–Reevaluation of Rate Increases**

*59(a) General Rule*

1. *Types of rate increases covered.* Section 226.59(a) applies both to increases in annual percentage rates imposed on a consumer's account based on that consumer's credit risk or other circumstances specific to that consumer and to increases in annual percentage rates applied to the account due to factors such as changes in market conditions or the issuer's cost of funds.

2. *Rate increases actually imposed.* Under § 226.59(a), a card issuer must review changes in factors only if the increased rate is actually imposed on the consumer's account. For example, if a card issuer increases the penalty rate for a credit card account under an open-end (not home-secured) credit plan and the consumer's account has no balances that are currently subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(c) of the change in terms, but the requirements of § 226.59 do not apply. However, if the consumer's account later becomes subject to the penalty rate, the card issuer is required to provide a notice pursuant to § 226.9(g) and the requirements of § 226.59 begin to apply upon imposition of the penalty rate. Similarly, if a card issuer raises the cash advance rate applicable to a consumer's account but the consumer engages in no cash advance transactions to which that increased rate is applied, the card issuer is required to provide a notice pursuant to § 226.9(c) of the change in terms, but the requirements of § 226.59 do not apply. If the consumer subsequently engages in a cash advance transaction, the requirements of § 226.59 begin to apply at that time.

3. *Rate increases prior to effective date of rule.* For increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010, § 226.59(a) requires the card issuer to review changes in factors and reduce the rate, as appropriate, if the rate increase is of a type for which 45 days' advance notice would currently be required under § 226.9(c)(2) or (g). For example, 45 days' notice is not required under § 226.9(c)(2) if the rate increase results from the increase in the index by which a properly-disclosed variable rate is determined in accordance with § 226.9(c)(2)(v)(C) or if the increase occurs upon expiration of a specified period of time and disclosures complying with § 226.9(c)(2)(v)(B) have been provided. The requirements of § 226.59 do not apply to such rate increases.

*59(b) Consideration of Factors*

1. *Amount of rate decrease.* Even in circumstances where a rate reduction is required, § 226.59 does not require that a card issuer decrease the rate that applies to a credit card account to the rate that was in effect prior to the rate increase subject to § 226.59(a). The amount of the rate decrease that is required must be determined based upon the card issuer's reasonable policies and procedures for consideration of factors described in § 226.59(a) and (d). For example, a consumer's rate on new purchases is increased from a variable rate of 15.99% to a variable rate of 23.99% based on the consumer's making a required minimum periodic payment five days late. The consumer makes all of the payments required on the account on time for the six months following the rate increase. The card issuer is not required to decrease the consumer's rate to the 15.99% that applied prior to the rate increase. However, the card issuer's policies and procedures for performing the review required by § 226.59(a) must be reasonable and should take into account any reduction in the consumer's credit risk based upon the consumer's timely payments.

*59(c) Timing*

1. *In general.* The issuer may review all of its accounts subject to paragraph (a) of this

section at the same time once every six months, may review each account once each six months on a rolling basis based on the date on which the rate was increased for that account, or may otherwise review each account not less frequently than once every six months.

2. *Example.* A card issuer increases the rates applicable to one half of its credit card accounts on June 1, 2010. The card issuer increases the rates applicable to the other half of its credit card accounts on September 1, 2010. The card issuer may review the rate increases for all of its credit card accounts on or before December 1, 2010, and at least every six months thereafter. In the alternative, the card issuer may first review the rate increases for the accounts that were repriced on June 1, 2010 on or before December 1, 2010, and may first review the rate increases for the accounts that were repriced on September 1, 2010 on or before March 1, 2011.

3. *Rate increases prior to effective date of rule.* For increases in annual percentage rates applicable to a credit card account under an open-end (not home-secured) consumer credit plan on or after January 1, 2009 and prior to August 22, 2010, § 226.59(c) requires that the first review for such rate increases be conducted prior to February 22, 2011.

*59(d) Factors*

1. *Change in factors.* A creditor that complies with § 226.59(a) by reviewing the factors it currently considers in determining the annual percentage rates applicable to its credit card accounts may change those factors from time to time. When a creditor changes the factors it considers in determining the annual percentage rates applicable to its credit card accounts from time to time, it may comply with § 226.59(a) by reviewing the set of factors it considered immediately prior to the change in factors for a brief transition period, or may consider the new factors. For example, a creditor changes the factors it uses to determine the rates applicable to new credit card accounts on January 1, 2011. The creditor reviews the rates applicable to its existing accounts that have been subject to a rate increase pursuant to § 226.59(a) on January 25, 2011. The creditor complies with § 226.59(a) by reviewing, at its option, either the factors that it considered on December 31, 2010 when determining the rates applicable to its new credit card accounts, or may consider the factors that it considers as of January 25, 2011.

2. *Comparison of existing account to factors used for new accounts.* Under § 226.59(a), if a creditor evaluates its existing accounts using the same factors that it uses in determining the rates applicable to new accounts, the review of factors need not result in existing accounts being subject to the same rates and rate structure as a creditor imposes on new accounts. For example, a creditor may offer variable rates on new accounts that are computed by adding a margin that depends on various factors to the value of the LIBOR index. The account that the creditor is required to review pursuant to § 226.59(a) may have variable rates that were determined by adding a different margin, depending on different factors, to the prime rate. In performing the review required by § 226.59(a), the creditor may review the factors it uses to determine the rates applicable to its new accounts. If a rate reduction is required, however, the creditor need not base the variable rate for the existing account on the LIBOR index but may continue to use the prime rate. Section 226.59(a) requires, however, that the rate on the existing account after the reduction, as determined by adding the prime rate and margin, be comparable to the rate, as determined by adding the margin and LIBOR, charged on a new account (except for any promotional rate) for which the factors are comparable.

3. *Multiple product lines.* If a card issuer uses different factors in determining the applicable annual percentage rates for different types of credit card plans, § 226.59(d) requires the card issuer to review those factors that it uses in determining the annual percentage rates for the consumer's specific type of credit card plan. For example, a card issuer may review different factors in determining the annual percentage rate that applies to credit card plans for which the consumer pays an annual fee and receives rewards points than it reviews in determining the rates for credit card plans with no annual fee and no rewards points. Similarly, a card issuer may review different factors in determining the annual percentage rate that applies to private label credit cards than it reviews in determining the rates applicable to credit cards that can be used at a wider variety of merchants. However, a card issuer must review the same factors for credit card accounts with similar features that are offered for similar purposes and may not consider different factors for each of its individual credit card accounts.

*59(g) Acquired Accounts*

59(g)(2) Review of Acquired Portfolio

1. *Example—general.* A card issuer acquires a portfolio of accounts that currently are subject to annual percentage rates of 12%, 15%, and 18%. As soon as reasonably practicable after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts. As a result of that review, the card issuer decreases the rate on the accounts that are currently subject to a 12% annual percentage rate to 10%, leaves the rate applicable to the accounts currently subject to a 15% annual percentage rate at 15%, and increases the rate applicable to the accounts currently subject to a rate of 18% to 20%. Section 226.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts for which the rate has been increased to 20%. The card issuer is not required to review the accounts subject to 10% and 15% rates pursuant to § 226.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

2. *Example—penalty rates.* A card issuer acquires a portfolio of accounts that currently are subject to standard annual percentage rates of 12% and 15%. In addition, several acquired accounts are subject to a penalty rate of 24%. As soon as reasonably practicable after the acquisition of such accounts, the card issuer reviews all of these accounts in accordance with the factors that it currently uses in determining the rates applicable to its credit card accounts. As a result of that review, the card issuer leaves the standard rates applicable to the accounts at 12% and 15%, respectively. The card issuer decreases the rate applicable to the accounts currently at 24% to its penalty rate of 23%. Section 226.59(g)(2) requires the card issuer to review, no less frequently than once every six months, the accounts that are subject to a penalty rate of 23%. The card issuer is not required to review the accounts subject to 12% and 15% rates pursuant to § 226.59(a), unless and until the card issuer makes a subsequent rate increase applicable to those accounts.

By Order of the Board of Governors of the Federal Reserve System, March 3, 2010.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 2010–4859 Filed 3–12–10; 8:45 am]

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**Monday,**
**March 15, 2010**

## Part III

# Department of the Interior

**43 CFR Part 10**

**Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains; Final Rule**

**DEPARTMENT OF THE INTERIOR**

**Office of the Secretary**

**43 CFR Part 10**

**RIN 1024–AD68**

## Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Final rule with request for comments.

**SUMMARY:** This final rule implements the Native American Graves Protection and Repatriation Act by adding procedures for the disposition of culturally unidentifiable Native American human remains in the possession or control of museums or Federal agencies. This rule also amends sections related to purpose and applicability of the regulations, definitions, inventories of human remains and related funerary objects, civil penalties, and limitations and remedies.

**DATES:** This rule is effective May 14, 2010. Comments must be received by May 14, 2010.

**ADDRESSES:** You may submit comments on this final rule, identified by the number 1024–AD68, by any of the following methods:

- *Federal rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail or hand delivery:* Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th Floor, Washington, DC 20005.

**FOR FURTHER INFORMATION CONTACT:** Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th Floor, Washington, DC 20005, Telephone: (202) 354–1479, Fax: (202) 371–5197.

**SUPPLEMENTARY INFORMATION:**

### Background

The Native American Graves Protection and Repatriation Act of 1990 (the Act) addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. Among other things, the Act:

—Established the Native American Graves Protection and Repatriation Review Committee, composed of representatives from museum and scientific organizations and from Indian tribes and Native Hawaiian organizations (the Review Committee) to monitor and review inventory, identification, and repatriation activities.

—Required the Review Committee to consult with the Secretary of the Interior in developing regulations to implement the Act.

—Charged the Review Committee with compiling an inventory of culturally unidentifiable human remains in museums or Federal agencies and recommending actions for disposition of these remains.

In 1995, during initial development of the regulations to implement the Act, the Department decided to reserve several sections for later development. This decision ensured that development of more complex provisions would not delay implementation of the basic regulations needed to guide compliance with impending deadlines for inventory submissions. We are implementing this long-term publication plan as follows:

—We published the first rules to implement the Act on December 4, 1995 (43 CFR part 10, 60 FR 62158).

—We published rules for assessing civil penalties under the Act on April 3, 2003 (43 CFR 10.12, 68 FR 16354).

—We published rules for new collections and continuing obligations for compliance on March 21, 2007 (43 CFR 10.13, 72 FR 13189).

—We are publishing this rule today.

—We are developing additional rules to cover disposition of unclaimed Native American human remains and cultural items from Federal and Indian lands (future 43 CFR 10.7).

Publication of this rule furthers the Department's goal of publication in phases.

On October 16, 2007, we published in the **Federal Register** the proposed rule to specify procedures for disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies. At that time, we invited public comment for a 90-day period, ending on January 14, 2008, and posted the proposed rule on the National NAGPRA Program Web site.

During the comment period, we received 138 written comments from 51 Indian tribes, 19 Indian organizations, 30 museums, 12 museum or scientific organizations, 3 Federal entities, 15 members of the public, and the Review Committee. The comments addressed all sections of the proposed rule. We fully considered all of these comments and this final rule includes extensive revisions that we have made response to the concerns raised by commenters.

As required by the Act, the Review Committee sent comments to the Secretary in 2000, 2003, and 2008. During its January 2008 teleconference, the Review Committee suggested that the Department extend the comment period for the proposed rule or reissue a revised proposed rule for further comment. After the close of the comment period, we worked with the Office of the Solicitor to prepare a draft final rule and preamble responding to comments. The following brief chronology outlines the reviews that have occurred since we developed the rule:

—The Assistant Secretary—Fish and Wildlife and Parks and the Assistant Secretary—Indian Affairs reviewed the draft final rule and considered the recommendations of the Review Committee.

—The Assistant Secretaries determined that the draft final rule and preamble were responsive to comments, and that, given the lengthy comment period, there was no need or basis to extend the comment period or to repropose the rule.

—The Department identified a procedural problem with publication of the final rule relating to the Paperwork Reduction Act, which resulted in additional delays totaling 6 months.

—With the change of administration, the Department's management conducted additional review by the Assistant Secretary—Fish and Wildlife and Parks and the Assistant Secretary—Indian Affairs.

As the preceding summary illustrates, this final rule has undergone extensive review in multiple administrations. Each of these reviews was conducted independently, and both the current and previous administrations agreed that this rule is appropriate for implementation. In addition to the opportunities for comment that we have already offered, we are accepting comments on this rule until May 14, 2010.

The current Assistant Secretary—Fish and Wildlife and Parks and the current Assistant Secretary—Indian Affairs have determined that this final rule and preamble are fully responsive to the comments received on the proposed rule and that the ten-year process of developing the rule, as well as the substantive provisions of the rule, fit well with the Administration's goals of transparency in decision making and open consultation with Indian tribes. Comments to this rule covered myriad issues that have arisen in the 20 years since NAGPRA became law. Although

many of the comments went beyond the scope of this rulemaking, the preamble to this rule provides detailed responses to each of the comments.

In brief, this rule pertains to those human remains, in collections, determined by museums and Federal agencies to be Native American, but for whom no relationship of shared group identity can be reasonably traced, historically or prehistorically, between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group. These individuals are listed on inventories as culturally unidentifiable Native American human remains. The rule requires consultation on the culturally unidentifiable human remains by the museum or Federal agency with Indian tribes and Native Hawaiian organizations whose tribal lands or aboriginal occupancy areas are in the area where the remains were removed. If cultural affiliation still cannot be determined and repatriation achieved, then the Indian tribe or Native Hawaiian organization may request disposition of the remains. The museum or Federal agency would then publish a notice and transfer control to the tribe, without first being required to appear before the Review Committee to seek a recommendation for disposition approval from the Secretary of the Interior. Disposition requests, which do not meet the parameters of the rule, would still require approval from the Secretary, who may request a recommendation from the Review Committee.

Therefore, the Department is issuing this final rule to be effective May 14, 2010.

**Summary of Comments**

The proposed rule to specify procedures for the disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies was published in the **Federal Register** on October 16, 2007 (72 FR 58582). Public comment was invited for a 90-day period, ending on January 14, 2008. The proposed rule was also posted on the National NAGPRA Program Web site. The Review Committee commented on the proposed rule at its January 8, 2008 public teleconference. In addition, 138 written comments were received during the comment period, representing 51 Indian tribes, 19 Indian organizations, 30 museums, 12 museum or scientific organizations, 3 Federal entities, 15 members of the public, and the Review Committee. Comments addressed all sections of the proposed rule. All comments were fully considered when revising the proposed rule as a final rulemaking.

**General Comments**

*Authority*

*Comment 1:* Fifteen commenters stated that the Department of the Interior does not have the authority to promulgate regulations governing the disposition of culturally unidentifiable human remains and associated funerary objects and that Congressional action is necessary to effect the disposition of such remains and objects. Eleven commenters stated that the Department of the Interior does have authority to promulgate such regulations.

*Our Response:* In section 13 of the Act (25 U.S.C. 3011), Congress explicitly authorized the Secretary of the Interior to promulgate regulations implementing the Act. As an initial matter, consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. Section 5 of the Act (25 U.S.C. 3003) requires Federal agencies and museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible based on information possessed by each museum or Federal agency, identify the geographical and cultural affiliation of such items. Congress anticipated that not all items could be geographically or culturally affiliated and, in section 8 of the Act (25 U.S.C. 3006), assigned the role of recommending specific actions for developing a process for the disposition of culturally unidentifiable human remains to the Review Committee. Congress intended that the Review Committee be an advisory committee which makes recommendations to the Secretary (Senate Report 101–473 at 13). An earlier version of the bill that preceded the final version of NAGPRA directed the Review Committee to provide its recommendations regarding the disposition of culturally unidentifiable human remains to the Secretary and to the Congress (H.R. 5237, Section (7)(d), July 10, 1990). However, the provision regarding Congress was ultimately stricken from the version of the bill that was signed into law. The sequence of changes in a statute prior to enactment provides strong evidence of the meaning of the enacted statute (*INS* v. *Cardoza-Fonseca,* 480 U.S. 421 (1987)). It would thus appear that while Congress may have considered limiting the Secretary's authority to promulgate regulations regarding the disposition of culturally unidentifiable human remains, this restriction was ultimately rejected. This regulation, promulgated in the exercise of Congress' delegated authority, implements many of the Review Committee's recommendations and effectuates the goals of the Act. Even if Congress may not have expressly delegated authority or responsibility to implement a particular provision of the Act or fill a particular gap in the law, it can still be apparent from an agency's generally conferred authority and other statutory directives that Congress would expect the agency to be able to speak with the force of law when the agency addresses ambiguities in the statute or fills a gap in the enacted law (*United States* v. *Mead,* 533 U.S. 218 (2001)).

*Comment 2:* Five commenters consider the rule to be contrary to the plain language of the Act and against the original intent of Congress.

*Our Response:* Typically, the Congress expects the Federal agency charged with the implementation of a statute to establish the specific process by which the statute's objectives are to be achieved. By regulation, the Department directed each museum and Federal agency to complete "a listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined" (43 CFR 10.9(d)(2)), and, after considering the Review Committee's recommendations, the Secretary proposed these regulations to address the Congressional silence with respect to procedures for disposition of the culturally unidentifiable human remains and associated funerary objects. Under *Chevron* v. *Natural Resources Defense Council* (467 U.S. 837 (1984)), if a statute is silent or ambiguous with respect to a particular issue, then deference is accorded to the agency's interpretation of the provisions of the Act so long as the agency's interpretation is not arbitrary, capricious, or manifestly contrary to the statute. As discussed above, the promulgation of regulations for the disposition of culturally unidentifiable human remains and associated funerary objects is consistent with the plain language and intent of the Act. Culturally unidentifiable human remains and associated funerary objects were previously addressed in the regulations promulgated by the Department in December 1995 (60 FR 62134). 43 CFR 10.9(e)(6) requires Federal agencies and museums to provide a list of culturally unidentifiable human remains and

associated funerary objects to the Department and to retain possession of such items pending promulgation of this rule unless legally required to do otherwise or the Secretary recommends otherwise. Promulgation of this rule provides for additional treatment and ultimate disposition of culturally unidentifiable human remains and associated funerary objects, and fills the regulatory gap contemplated by the current regulations.

*Comment 3:* Two commenters stated that Congress intended to allow study of ancient, unaffiliated remains.

*Our Response:* The Act does not draw a distinction between "ancient" and more recent remains. The Act covers historic or prehistoric "Native American" human remains. "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States" (25 U.S.C. 3001(9)). The statute states that the Act shall not be construed to be an authorization for the initiation of new scientific studies of Native American human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects (25 U.S.C. 3003(b)(2)).

*Comment 4:* One commenter indicated that the proposed rule bypasses the language of the Act as the Review Committee is given the role of making recommendations regarding culturally unidentifiable remains.

*Our Response:* In section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), Congress assigned the Review Committee the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains. Congress also authorized the Review Committee to consult with the Secretary in the development of regulations to carry out the Act. The Secretary has interpreted the intent of Congress in this section as authorizing the Secretary to promulgate regulations governing the disposition of culturally unidentifiable human remains after considering the Review Committee's recommendations on these matters. This interpretation is reflected in the Department of the Interior's regulations at § 10.9(6) which states, "Section 10.11 of these regulations will set forth procedures for disposition of culturally unidentifiable human remains of Native American origin. Museums or Federal Agencies must retain possession of such human remains pending promulgation of § 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary. Recommendations regarding the disposition of culturally unidentifiable human remains may be requested prior to final promulgation of § 10.11." Prior to the completion of § 10.11, the Secretary has referred such individual requests to the Review Committee, as authorized under section 8(c)(8) of the Act (25 U.S.C. 3006(c)(8)) ("performing such other related functions as the Secretary may assign to the committee") and has requested the Review Committee's advice before making recommendations on the disposition of human remains.

**Constitutionality**

*Comment 5:* One commenter was concerned that compliance with the proposed rule could place a museum in violation of unspecified state statutes.

*Our Response:* NAGPRA is Federal law, and, as such, under the Supremacy Clause of the Constitution (Art. VI, cl. 2; *Lorillard Tobacco Co.* v. *Reilly,* 533 US 525 (2001)) preempts any state law on the same subject matter. This is especially true in the field of Federal Indian law, where the United States has plenary and exclusive power (U.S. Constitution, Art. I, Sec. 8, cl. 3; *Worcester* v. *Georgia,* 31 US 515, 6 Pet 515 (1832)). Moreover, in section 7(f) of the Act (25 U.S.C. 3005(f)), Congress specifically provided that "[a]ny museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter."

*Comment 6:* Two commenters alleged that the proposed regulations would violate the Establishment Clause of the First Amendment to the Constitution, focusing on a sentence in the preamble to the proposed regulations which suggests that the voluntary repatriation by a museum or Federal agency of funerary objects associated with culturally unidentifiable human remains would be consistent with "customary religious and spiritual beliefs." The commenters stated that this suggestion demonstrated unconstitutional special treatment for the "creationist viewpoint" of many Indian people and that such beliefs are not evidence of a cultural relationship or cultural affiliation under the Act.

*Our Response:* The commenters have misconstrued and misapplied the sentence in the preamble. First, the use of religious or spiritual beliefs is not being invoked to determine whether a specific group of human remains is Native American. The rule allows a museum or Federal agency to voluntarily repatriate associated funerary objects with human remains (which it has already determined to be Native American). Considerations of a religious or spiritual belief system are not used to determine the origin of the human remains and are not relevant to such a voluntary determination by the museum or Federal agency. Further, "funerary objects" are defined by both the NAGPRA statute and current regulations as "items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later" (43 CFR 10.2(d)(2)). This definition is taken from the definition of "associated funerary objects" in the Act (25 U.S.C. 3001(3)(A)). The statement referred to by commenters in the preamble to the proposed rule is a recognition that "the death rite or ceremony of a culture" is an inherently spiritual or religious act, whether the belief system involved is traditionally Indian or Christian (also broadly represented in Indian country), or another belief system. Such a recognition in the context of a voluntary action by a museum or Federal agency (to which the commenters did not object) does not constitute support of a particular religious point of view or excessive entanglement with religion in the context of the Establishment Clause (*Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970)).

*Comment 7:* Three commenters stated that the proposed rule, if finalized, would constitute a "taking" by the United States of the property of museums in violation of the Fifth Amendment to the United States Constitution.

*Our Response:* To determine whether a governmental procedure has deprived a party of its rights without due process, the first inquiry must be whether that party has protected property or liberty interests (American *Manufacturing Mutual Insurance Co.* v. *Sullivan,* 526 U.S. 40, 59 (1999), and *Federal Lands Legal Consortium* v. *United States,* 195 F.3d 1190 (10th Cir. 1999)). Under the common law, however, human remains are not "property" (See, e.g., 2 William Blackstone, Commentaries, 429). Thus, a museum would not have a property interest in culturally unidentifiable human remains that could be "taken," unless the museum has received the right to possess the remains from a person or entity with authority to confer that right on the museum. The next of kin of the deceased (25 U.S.C. 3001(13)) (see *Whaley* v. *Tuscola,* 58 F.3d 1111, 1117 (6th Cir. 1995); *Brotherton* v. *Cleveland,* 923 F.2d 477, 482 (6th Cir. 1991)) and the official governing body of the appropriate Indian tribe or Native Hawaiian organization (25 U.S.C.

3001(13) and (3002(e)) are the only parties who possess such a property right for purposes of the Fifth Amendment. If a museum could prove, therefore, that the human remains were "excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization" (25 U.S.C. 3001(13)), or were remains for which "the governing body of an Indian tribe or Native Hawaiian organization [has] expressly relinquished control" (25 U.S.C. 3002(e)), it may have a property right that could be protected. That is the purpose of the definition of right of possession under the Act (25 U.S.C. 3001(13)), and, to the extent that a museum can prove a right of possession for culturally unidentifiable human remains, that right is protected by § 10.11(c)(1) of the regulations as well as the Constitution.

*Comment 8:* Two commenters asserted that the proposed rule, if finalized, would violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. One of these commenters noted that the requirement in § 10.11(b)(2) to consult with "all Indian tribes and Native Hawaiian organizations" with certain connections to land (which, in the commenter's view, would include Indian groups that are not federally-recognized) would violate the Act's insulation from equal protection challenges based on the government-to-government relationship between the United States and federally-recognized Indian tribes. The other commenter asserted that the proposed rule illegally favored one "cultural lineage" over others.

*Our Response:* The first commenter's concern raises an issue common to many of the comments on the proposed rule. When agencies publish proposed and final rules in the **Federal Register** that are amending existing regulations, the agency is only required to publish the portion of the regulations that would change. Unless the agency states otherwise, all portions of existing regulations that are not proposed for change in the notice of proposed rulemaking remain the same, and still apply. Thus, when this proposed rule refers to "Indian tribes," the drafters are using the existing definition of that term, which is not proposed for changes. That definition, at § 10.2(b)(2), only refers to federally-recognized Indian tribes. The drafters of the proposed rule have been very careful to distinguish tribes that are not federally-recognized Indian groups when those groups are included in a provision of the rule in order to maintain a clear distinction. The only mandatory consultation or disposition in the rule, consistent with the Act, is to Indian tribes (i.e., federally-recognized) or Native Hawaiian organizations. This preference in both the regulations and the statute is based not on "cultural lineage" but on the plenary power of Congress to "regulate commerce * * * with the Indian Tribes" (U.S. Constitution Art. I, Sec. 8, cl. 3), and the unique government-to-government relationship between the United States and Indian tribes (*Morton* v. *Mancari,* 417 U.S. 535, 551–52 (1974)).

*Statutory Amendment*

*Comment 9:* Three commenters recommended that Congress consider amending the statute. Two commenters recommended expanding who has a right to claim cultural items under the Act from lineal descendants, Indian tribes, and Native Hawaiian organizations to also include state recognized Indian groups, Indian groups currently seeking Federal acknowledgement, and indigenous groups located beyond the boundaries of the United States. One commenter recommended amending the statute to apply to collections held by the Smithsonian Institution. One commenter recommended that the composition of the Review Committee be changed to ensure a ratio of no less than two Native American members for each non-Native American member.

*Our Response:* Statutory amendments are the exclusive purview of the Congress.

*Compliance With Other Statutes and Policies*

*Comment 10:* The preamble of the proposed rule states that the rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. Fifteen commenters projected that the financial burden of consultation and disposition on museums will be "tremendous," "onerous," "impossible," "overwhelming," "ruinous," or "significant." Two commenters predicted that the rule will result in costly litigation. Seven commenters estimated that the cost of implementing the proposed rule will exceed $100 million per year. One commenter recalled that some museums raised similar financial concerns prior to passage of the Act in 1990, but noted that the claims have never been substantiated in fact. Two commenters recommended that the Department of the Interior provide detailed cost estimates.

*Our Response:* Costs to comply with this rule will be seen in the costs of consultation and decision-making. Museums and Federal agencies are only required to consult upon receipt of a claim from an Indian tribe or Native Hawaiian organization. In the last five years, there have been approximately 14 requests per year for Review Committee consideration of claims for disposition of culturally unidentifiable Native American human remains. Although there are numerous human remains subject to this rule, it is reasonable to assume that tribes will make requests at a constant rate, given the capacity of tribes to do so. A single claim may involve many human remains from one site, requiring one notice. Absent a claim, a museum or Federal agency may also voluntarily offer to transfer control. The costs of decision making include exchange of information between museums and tribes, and preparation of a notice by a museum. Using current rates of compensation for museum clerical, curator and executive staffs, there is a weighted cost average for their efforts of $30.00 an hour. Assuming approximately 100 hours of information exchange and six hours to prepare a notice, the cost per claim is less than $5,000 on average and the annual cost of all claims in a year, subject to this rule, is less than $100,000. Since there are no deadlines for claims or for offering to transfer control, the required consultations will likely extend over multiple year periods, thus reducing the total cost of consultation in any particular year. Since 1994, Congress has provided grant funds for consultation and repatriation activities of approximately $2 million dollars per year to account for NAGPRA compliance, including this rule. Since NAGPRA became law in 1990, there have been almost 40,000 Native American human remains accounted for in notices and no indication that a single museum has suffered overwhelming or ruinous consequences from compliance with the law.

There are also cost savings in the reduction of inventory maintenance costs and elimination of the pre-rule need to present matters at Review Committee meetings, which may involve travel costs. Under current regulations, museums and Federal agencies must retain possession of culturally unidentifiable human remains, with all of the attendant curatorial costs estimated in the millions of dollars per year (S. Terry Childs and Karolyn Kinsey, Costs for Curating Archeological Collections: A

Study of Repository Fees in 2002 and 1997/1998. National Park Service (2003)). Museums and Federal agencies that wish to effect the disposition of culturally unidentifiable human remains under current regulations must either request a recommendation from the Secretary of the Interior, which involves preparation of materials and presentations before the Review Committee, or request involvement in proceedings before a United States District Court.

*Comment 11:* One commenter requested that the Department of the Interior consider the rule significant under Executive Order 12866 on the grounds that it raises novel legal or policy issues.

*Our Response:* The Office of Management and Budget has determined that this rule is significant under EO 12866.

*Comment 12:* One commenter stated that Federal agencies should be required to conduct review under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321, *et seq.*), for each disposition of culturally unidentifiable human remains, with or without associated funerary objects, under the final rule.

*Our Response:* NAGPRA does not exempt Federal agencies from the requirements of any other statutes that may be applicable, such as NEPA. The appropriate level of NEPA review required would depend on the NEPA procedures of the agency proposing the disposition.

*Relationships to Other Sections of These Regulations*

*Comment 13:* One commenter requested clarification as to whether the proposed rule applies to culturally unidentifiable human remains and associated funerary objects excavated or removed from Federal or tribal lands after November 16, 1990.

*Our Response:* Neither the proposed rule nor this final rule apply to culturally unidentifiable human remains and associated funerary objects excavated or removed from Federal or tribal lands after November 16, 1990. This final rule applies to human remains in museum and Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified. For museums, these human remains may have been acquired either before or after 1990 when the statute was enacted. For Federal agencies, disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony removed from Federal lands after November 16, 1990 is effected pursuant to section 3 of the Act (25 U.S.C. 3002), and §§ 10.3–10.7 of the existing regulations. Culturally unidentifiable human remains acquired by a Federal agency after November 16, 1990 from other than Federal or tribal lands would be covered by the provisions of this rule.

*Comment 14:* One commenter recommended that the terms "unclaimed" and "culturally unidentifiable" be clearly distinguished.

*Our Response:* There may be some confusion between the terms "culturally unidentifiable" and "unclaimed." As specified in section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5) and these regulations, "culturally unidentifiable" refers to Native American human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been determined. "Unclaimed" only refers to Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on Federal or tribal lands after November 16, 1990 and not claimed under section 3(a) of the Act (25 U.S.C. 3002(a)). A proposed rule regarding the disposition of unclaimed cultural items is currently under development (43 CFR 10.7).

*Comment 15:* One commenter recommended that unclaimed human remains which can reasonably be associated with a recognized tribe should be returned to that Indian tribe.

*Our Response:* Unclaimed remains are governed under section 3(a) of the Act (25 U.S.C. 3002(a). A separate proposed rule regarding the disposition of unclaimed cultural items is currently under development (43 CFR 10.7). Please see Comment 14 for a related response.

*Development Process*

*Comment 16:* Ten commenters recommended adopting the Review Committee's 2000 recommendations in lieu of the proposed rule. Three commenters recommended adopting the Review Committee's 2002 recommendations in lieu of the proposed rule. Five commenters recommended taking the Review Committee's 2000 and 2002 recommendations into account in revising the proposed rule. Three commenters rejected the Review Committee's 2000 recommendations.

*Our Response:* There appears to be some confusion regarding the Review Committee's involvement in the development of the proposed regulations. Sections 8(c)(5) and (c)(7) of the Act (25 U.S.C. 3006(c)(5) and (c)(7)), authorize the Review Committee to recommend specific actions for developing a process for the disposition of culturally unidentifiable human remains and consulting with the Secretary of the Interior in the development of regulations to carry out the Act. After circulating three drafts for public comment and considering specific case-by-case requests, the Review Committee developed its final recommendations regarding the disposition of culturally unidentifiable human remains in May 2000. These recommendations were reported in detail in the preamble to the 2007 proposed rule. The Review Committee also considered drafts of the proposed rule at its May 31–June 2, 2002 and November 8–9, 2002 meetings. Meeting minutes are available at: *http://www.nps.gov/history/nagpra/REVIEW/meetings/MINUTES.HTM.*

At its November 8–9, 2002 meeting, the Review Committee specifically compared the draft regulatory text with the text of its 2000 recommendations and recommended several changes, most of which, though purely advisory, were reflected in the 2007 proposed rule. The drafters gave full consideration to the Review Committee's final recommendations regarding the disposition of culturally unidentifiable human remains (2000) as well as to the Review Committee's review of drafts of the proposed rule on May 31–June 2, 2002 and November 8–9, 2002, and the actual proposed rule on January 8, 2008.

*Comment 17:* Fourteen commenters made general or specific recommendations regarding the establishment or composition of "regional consortia."

*Our Response:* The concept of "regional consortia" was proposed in the Review Committee's 2000 final recommendations regarding the disposition of culturally unidentifiable human remains (65 FR 36462). According to the Review Committee, such regional consortia would consist of Federal agencies, museums, Indian tribes, and Native Hawaiian organizations within a given geographic area that would consult together and propose a framework and schedule for the disposition of culturally unidentifiable human remains. The drafters recognize the establishment of such regional consortia as a potentially useful step in arriving at generally applicable disposition agreements. However, the establishment or composition of such consortia are clearly matters to be determined by

those who elect to be participants in a consortium. As a result, the concept was not addressed in the proposed rule. Indian tribes may choose to participate in such regional consortia, but it is not required.

*Administration*

*Comment 18:* One commenter recommended that the National Park Service establish a permanent office to focus specifically on the disposition of the culturally unidentifiable human remains and associated funerary objects. One commenter recommended that the National Park Service establish training for museums and Federal agencies on how to determine cultural affiliation.

*Our Response:* The National NAGPRA Program will continue to provide technical assistance and training to museums, Federal agencies, lineal descendants, Indian tribes, and Native Hawaiian organizations regarding the disposition of culturally unidentifiable human remains and associated funerary objects, as well as other aspects of the Act.

*Comment 19:* Seventeen commenters recommended providing additional funds to museums and Indian tribes to assist in the disposition of culturally unidentifiable human remains.

*Our Response:* All activities required under the proposed rule are eligible for Federal grants authorized under section 10 of the Act. The Review Committee has asked Congress to consider the appropriation of additional funding.

*Comment 20:* One commenter recommended that Federal funds be appropriated to assist Indian tribes with the protection of Indian cemeteries, historic sites, and artifacts during or after an emergency.

*Our Response:* The scope of grants authorized under section 10 of the Act (25 U.S.C. 3008) is limited to assisting museums in conducting the required inventories and identification and to assisting Indian tribes and Native Hawaiian organizations in the repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony (25 U.S.C. 3008). Funds for the protection of Indian cemeteries, historical sites, and artifacts are available through other Federal programs.

*Comment 21:* One commenter recommended that the rule address the need to expand existing tribal and family cemeteries.

*Our Response:* The Act addresses the protection of current Native American burial sites on Federal or tribal lands that are inadvertently discovered or intentionally excavated and the repatriation of cultural items in museum or Federal agency collections or holdings. The Act does not address the creation of new burial sites or the expansion of existing sites.

*Comment 22:* One commenter recommended that forensic audits of all Federal agency inventories be conducted by the General Accounting Office to ensure that this requirement of the Act has been fulfilled.

*Our Response:* The Review Committee has asked Congress to have the Government Accountability Office review Federal compliance with the Act.

*Comment 23:* One commenter recommends that State governments be given the authority to supervise and issue directives to the federally-recognized Indian tribes in returning Native American human remains back to Mother Earth.

*Our Response:* Authorizing State governments to direct the actions of federally-recognized Indian tribes is beyond the Secretary's jurisdiction and inconsistent with both the plenary power of Congress to "regulate commerce * * * with the Indian Tribes" (U.S. Constitution Art. I, Sec. 8, cl. 3), and the unique government-to-government relationship between the United States and Indian tribes (*Morton* v. *Mancari,* 417 U.S. 535, 551–52 (1974)).

*Section 10.1(b)(3) Final Determinations*

Section 10.1(b)(3) describes decision points throughout the regulations which constitute "final determinations." The proposed rule added one sentence to provide clarification to Federal agencies as to when a determination constitutes "final agency action" as used in the Administrative Procedure Act (5 U.S.C. 704).

*Comment 24:* Eight commenters generally supported this proposed revision with some modification. One commenter recommended revising the section to stipulate that failure to affirmatively respond to a request within a specified time period would be considered a denial of the request for purposes of judicial review, unless the museum or agency extends the time period in writing for good cause and specifies a specific and reasonable timetable. Five commenters recommended clarifying that "an agency denial of such a request is final when the lineal descendant, Indian tribe or Native Hawaiian organization has exhausted any required administrative appeals within the agency. Neither the fact that the Review Committee may review the matter nor the fact that an agency denial is subject to reconsideration upon submission of new information affects its status as final agency action under the Administrative Procedure Act. After a final agency denial, a lineal descendant, Indian tribe or Native Hawaiian organization may make a new request for repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony under the Act on the basis of the findings or recommendations of the Review Committee or new information."

*Our Response:* Congress did not provide that requests would be deemed denied based on a failure to respond. The drafters agree that the language suggested by the five commenters is consistent with case law, but consider that the proposed revision adequately addresses when a determination constitutes a final agency action as used in the Administrative Procedure Act (5 U.S.C. 704). The drafters have also added the text previously proposed in § 10.1(b)(3) into § 10.15(c) to reiterate that the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony constitutes final agency action under the Administrative Procedure Act.

*Section 10.2(e)(1) Definition of Cultural Affiliation*

Section 10.2(e)(1) revises the definition of "cultural affiliation" to include "anthropological" evidence. The term, which is specifically included in section 7(a)(4) of the Act (25 U.S.C. 3005(a)(7)), was inadvertently omitted from the previous regulatory text. Two commenters agreed with the proposed revision of the definition of "cultural affiliation."

*Comment 25:* One commenter recommended including the phrase "cultural or geographic relationship" within the list of evidence relevant to determining cultural affiliation in the second sentence of § 10.2(e)(1).

*Our Response:* Both geographical and anthropological (cultural) evidence are already specifically identified as relevant to determining cultural affiliation (25 U.S.C. 3005(a)(4)).

*Comment 26:* One commenter recommended that human remains should not be returned without clear, indisputable physical (archeological) linkage to a present-day Indian tribe or Native Hawaiian organization.

*Our Response:* Archeological evidence is one of several types of relevant information or expert opinion that must be considered in determining whether cultural affiliation can be established (25 U.S.C. 3005(a)(4)).

Culturally affiliation must be "reasonably traced" (25 U.S.C. 3001(2)). Requiring an "indisputable linkage" would be inconsistent with the Act.

*Comment 27:* One commenter recommended including language in § 10.2(e)(1) stipulating that ambiguities in determining cultural affiliation must be resolved in the favor of Indian tribes.

*Our Response:* The Act was enacted for the benefit of Indians, therefore the canon of construction applies that statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" (*Yankton Sioux Tribe* v. *United States Army Corps of Engineers,* 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)). These regulations are subject to the same canon of construction. "The trust relationship and its application to all Federal agencies that may deal with Indians necessarily requires the application of a similar canon of construction to the interpretation of Federal regulations" (*HRI, Inc.* v. *EPA,* 198 F.3d 1224, 1245 (10th Cir. 2000)). This principle of Indian law is so well-established, however, that the drafters consider additional regulatory text unnecessary.

*Comment 28:* One commenter questioned whether the proposed change would impact the American Indian Religious Freedom Act.

*Our Response:* The proposed change revised the regulatory definition of cultural affiliation to reflect the statutory text and has no implications related to the American Indian Religious Freedom Act.

*Section 10.2(e)(2) Definition of Culturally Unidentifiable*

Section 10.2(e)(2) defines the term "culturally unidentifiable."

*Comment 29:* One commenter objected to the term "unidentifiable" given the likelihood that in many cases, cultural affiliation can be determined through additional consultation with Indian tribes. The commenter stated that the term thus places a false sense that there is no existing Native American group legitimately related to prehistoric human beings. Another commenter felt the term limits tribal sovereign rights and misappropriates the Federal trust responsibility to American Indians. Three commenters recommended including separate definitions of "unidentifiable" and "unidentified."

*Our Response:* Section 8 of the Act (25 U.S.C. 3006) directs the Review Committee to compile an inventory of "culturally unidentifiable" human remains. The drafters recognize that additional considerations (e.g., consultation and disposition as required by this rule) may result in the determination of cultural affiliation for some of these human remains. Provisions to carry out the repatriation of human remains and associated funerary objects previously determined to be culturally unidentifiable are included at §§ 10.11(b)(6), 10.9(e) and 10.10(b) of the existing regulations, as amended by this rule.

*Comment 30:* One commenter recommended specifying in the definition of "culturally unidentifiable" that such identifications are made through the inventory process.

*Our Response:* The phrase " * * * through the inventory process" has been added to the end of this definition.

*Comment 31:* Three commenters recommended deleting the phrase "and associated funerary objects" from the definition of culturally unidentifiable.

*Our Response:* While disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, § 10.9(d)(2) of these regulations requires museums and Federal agencies to prepare an inventory of both human remains and associated funerary objects that cannot be identified as affiliated with a particular individual, Indian tribe, or Native Hawaiian organization. The phrase "and associated funerary objects" has been retained.

*Comment 32:* One commenter recommended redefining "culturally unidentifiable" to refer "to human remains for which a relationship of shared group identity cannot be reasonably traced historically or prehistorically between members of present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group."

*Our Response:* The drafters consider the recommended text less clear than the proposed rule text because it omits reference to associated funerary objects, lineal descendants, and museum and Federal agency collections, all necessary elements of this definition.

*Comment 33:* One commenter recommended including reference in the definition of "culturally unidentifiable" at § 10.2(e)(2) that claims could be made for these human remains based on tribal land, aboriginal land, or cultural relationship.

*Our Response:* The basis for disposition of culturally unidentifiable human remains are set forth at § 10.11(c)(1) of this rule.

*Comment 34:* One commenter was concerned that the proposed definition of "culturally unidentifiable" at § 10.2(e)(2) would require museum staff to make judgment calls without adequate professional expertise.

*Our Response:* Current regulations require museum and Federal agency officials to "prepare a listing of all culturally unidentifiable human remains and associated funerary objects for which no culturally affiliated present-day Indian tribe or Native Hawaiian organization can be determined" (43 CFR 10.9(e)(6)). Completion of this listing was required by November 16, 1995, or a later date specifically determined by the Secretary on a case-by-case basis. Museum and Federal agency officials may wish to retain outside professional expertise to assist in these determinations, but are not required to do so. Museum and Federal agency officials are required to consult with representatives of Indian tribes and Native Hawaiian officials.

*Section 10.2(g) Definition of Disposition*

Section 10.2(g)(5) provides a definition of disposition and identifies procedures to effectuate this process in various situations.

*Comment 35:* One commenter recommended deleting the phrase "with or without associated funerary objects" from § 10.2(g)(iii).

*Our Response:* While disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, the Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them. The phrase has been retained.

*Comment 36:* Four commenters recommended revisions to the definition of "disposition" at § 10.2(g)(5) to provide museums and Federal agencies with the option of retaining possession and control of culturally unidentifiable human remains. One commenter recommended inserting the phrase "or other mutually acceptable alternative" after "transfer or control."

*Our Response:* Section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)) directs the Review Committee to recommend specific actions for developing a process for disposition of culturally unidentifiable human remains. In its 2000 recommendations, the Review Committee specified three types of appropriate disposition solutions, including transfer of control based on the recovery of the human remains from a particular Indian tribe or Native Hawaiian organization's tribal land or aboriginal land or on a relationship of shared group identity between the human remains and an Indian group which is not federally-recognized (65 FR 36463, June 8, 2000). The governing body of an Indian tribe or Native

Hawaiian organization is free to relinquish control of human remains or negotiate "other mutually acceptable alternatives" (25 U.S.C. 3002(e)).

*Comment 37:* Five commenters recommended reviewing the term "control" as it relates to the term "repatriate," and to consider language that holds a museum or Federal agency harmless if a right of possession comes to light after disposition has been effected.

*Our Response:* The term "control" means having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection for purposes of these regulations whether or not the human remains, funerary objects, sacred objects or objects of cultural patrimony are in the physical custody of the museum or Federal agency (43 CFR 10.2(a)(3)(ii)). The Act and these regulations provide that any museum which repatriates or effects the disposition of Native American human remains in good faith pursuant to the Act and these regulations shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with these provisions (25 U.S.C. 3005(f)).

*Section 10.2 Other Definitions*

*Comment 38:* One commenter recommended defining "nonfederally-recognized Indian group" in § 10.2.

*Our Response:* The Act requires a museum or Federal agency to repatriate Native American cultural items upon receipt of a valid claim from a lineal descendant, Indian tribe, or Native Hawaiian organization. The latter three terms are defined at § 10.2(b)(1), (b)(2), and (b)(3), respectively. We have chosen to clarify by using the term "not federally-recognized" for any Indian group that does not meet the definition in § 10.2(b)(2).

*Comment 39:* Three commenters indicated that the proposed rule is inconsistent with the Ninth Circuit's opinion in *United States* v. *Bonnichsen* (357 F.3d 962 (9th Cir. 2004)).

*Our Response:* The Court's opinion in *Bonnichsen* addressed whether the remains of "Kennewick Man" constituted Native American remains within the Act's definition of that term. The proposed rule does not affect the definition of "Native American." The proposed rule only applies after a determination is made, consistent with applicable law, that the human remains or associated funerary objects are Native American.

*Comment 40:* Seven commenters recommended inserting the phrase "Native American" before each occurrence of "human remains" throughout the regulations.

*Our Response:* Since the drafters did not propose to modify the definition of "human remains" at § 10.2(d)(1), the meaning of the term throughout these regulations remains "the physical remains of a human body of a person of Native American ancestry."

*Comment 41:* One commenter recommended including a definition of "preponderance of the evidence."

*Our Response:* Determinations within the Act are based on standard rules of civil procedure. Museums and Federal agencies are initially required to determine by a reasonable belief if human remains and associated funerary objects are culturally affiliated with an Indian tribe or Native Hawaiian organization (25 U.S.C. 3003(d)(2)). Thereafter, human remains and associated funerary objects must be expeditiously repatriated where an Indian tribe or Native Hawaiian organization can demonstrate cultural affiliation by the preponderance of the evidence (25 U.S.C. 3005(a)(4)). The preponderance of the evidence generally means that a decision maker must be persuaded that the evidence is sufficient to make it more likely than not that the fact the claimant seeks to prove is true.

*Section 10.9(e)(2) Content of Notice of Inventory Completion*

Section 10.9(e)(2) details the contents of notices of inventory completion. Additional text was proposed at § 10.9(e)(2)(v) to clarify that such notices must include information regarding culturally unidentifiable human remains, with or without associated funerary objects, that may be transferred under § 10.11.

*Comment 42:* One commenter recommended deleting the phrase "with or without associated funerary objects" from § 10.9(e)(2)(v).

*Our Response:* While disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, the Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude such transfers. The phrase has been retained.

*Comment 43:* One commenter recommended replacing the phrase "that may be transferred under § 10.11" at the end of § 10.9(e)(2)(v) with "that are subject to disposition under § 10.11."

*Our Response:* The recommended change is consistent with the language in section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)) and § 10.2(g)(5)(iii) of these regulations. The regulations have been changed as suggested.

*Comment 44:* Two commenters recommended that the listing of culturally unidentifiable human remains and associated funerary objects specify whether they are: (1) Those for which cultural affiliation could be determined but that the appropriate Indian group is not federally-recognized as an Indian tribe; (2) those that represent an identifiable earlier group, but for which no present-day Indian tribe has been identified by the museum or Federal agency; and (3) those for which the museum or Federal agency believes that evidence is insufficient to identify an earlier group. Another commenter specifically recommended that these categories should not be used.

*Our Response:* The suggested categories of culturally unidentifiable human remains are derived from the Review Committee's 2000 recommendations (65 FR 36463). However, the Review Committee recommendations did not make any distinction regarding disposition of any of the three categories. The three categories were not used in the proposed rule and no comments were received recommending different dispositions on that basis.

*Comment 45:* Two commenters recommended that the inventory or notice of inventory completion include a "record of origin" or "basis of reasoning" for determining that human remains are Native American and culturally unidentifiable.

*Our Response:* The contents of the inventory (10.9(d)) and notice of inventory completion (43 CFR 10.9(e)) apply only to human remains already determined to be "Native American" under 43 CFR 10.2(d)(1) and the Act. The inventory includes a summary of the evidence used to determine cultural affiliation. By definition in 43 CFR 10.2(e)(2), remains for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process are considered culturally unidentifiable and, thus, do not require a further basis of reasoning when included on the notice of inventory completion as culturally unidentifiable.

*Section 10.9(e)(5) Additional Documentation*

Section 10.9(e)(5) directs museums or Federal agencies to supply additional available documentation upon the request of an Indian tribe or Native Hawaiian organization. Additional text was proposed for inclusion in

§ 10.9(e)(5)(ii) to clarify that such documentation when supplied by a Federal agency or to a Federal agency shall be considered a public record subject to disclosure except when exempted under applicable law, such as the Freedom of Information Act and the Privacy Act. Further, as required by section 5(b)(2) of the Act (25 U.S.C. 3003(b)(2)), neither a request for such documentation nor any provisions of the regulations shall be construed as authorizing the initiation of new scientific studies of such human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

*Comment 46:* Six commenters recommended deleting § 10.9(e)(5)(A) and (e)(5)(B) on the grounds that they create a seemingly impossible conundrum, would severely hinder the scientific study of ancient remains, and are "an obvious attempt to end-run Congressional intent and a Federal court ruling in the long-fought Kennewick Man case." One commenter recommended including language confirming that "studies or other means of acquiring or preserving information are not prohibited, but NAGPRA cannot be used as the authorization for them" or "additional study may be authorized, requested, or otherwise developed as part of the consultation and affiliation process." One commenter recommended adding a new paragraph to read as follows: "In consultation with the tribes identified in § 10.11(b)(2), the museum or Federal agency may undertake additional documentation of human remains and associated funerary objects prior to their transfer under § 10.11(c). This documentation shall be completed within two years of an offer to transfer culturally unidentifiable human remains unless the consulting tribes agree that additional time (beyond two years) is needed." Eleven commenters recommended including language specifying that "culturally unidentifiable human remains that have not yet been repatriated should be treated with great respect and should not be subject to any further scientific research or used for teaching purposes." One commenter recommended that museums and Federal agencies should upgrade their testing to include total DNA, not just patrilineal DNA.

*Our Response:* The language in this section is drawn directly from the Act and thus clearly represents Congressional intent.

*Comment 47:* Fifteen commenters generally supported this section. One commenter requested clarification as to whether a museum or Federal agency is required to provide additional documentation upon request of an Indian group that is not federally-recognized.

*Our Response:* The Act stipulates that a museum or Federal agency must supply additional available documentation upon request by an Indian tribe or Native Hawaiian organization (25 U.S.C. 3003(b)(2)). This requirement does not apply to requests from an Indian group that is not federally-recognized.

A museum or Federal agency may be required to supply such documentation under other applicable law and is encouraged to voluntarily do so if not otherwise required.

*Comment 48:* Nine commenters recommended including language that this section is not meant to preclude the withholding from the public of information that is specifically exempted from disclosure under applicable law.

*Our Response:* The drafters have added language to clarify that some information may be exempt from disclosure under applicable law, such as the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), Archaeological Resources Protection Act (16 U.S.C. 470hh), and National Historic Preservation Act (16 U.S.C. 470w–3), and any other legal authority exempting such information from public disclosure.

*Section 10.9(e)(6) Removing Retention Requirement*

Section 10.9(e)(6) is rewritten to remove the last three sentences that required a museum or Federal agency to retain possession of culturally unidentifiable human remains pending promulgation of § 10.11.

*Comment 49:* Three commenters recommended deleting the phrase "with or without associated funerary objects" from § 10.9(e)(6).

*Our Response:* The phrase occurs twice in this paragraph. The first sentence refers to associated funerary objects that are in the possession or control of a museum or Federal agency. The last sentence refers to items that are subject to disposition under § 10.11. The phrase "with or without associated funerary objects" is used throughout the regulations to indicate that disposition of such items, though encouraged, is not required. Usage of the term in the last sentence of this section is thus appropriate. The phrase "with or without" has been replaced with "and" in the first sentence to make it clear that associated funerary objects must be included in the inventory of culturally unidentifiable human remains provided to the Manager, National NAGPRA Program.

*Comment 50:* One commenter recommended revising the text in § 10.9(e)(6) to require a museum or Federal agency to provide the listing of culturally unidentifiable human remains in its possession or control to both the Manager, National NAGPRA Program and the Departmental Consulting Archeologist.

*Our Response:* A separate program to administer some of the Secretary of the Interior's responsibilities to implement the Act was established in 2000. The Departmental Consulting Archeologist is no longer responsible for those duties, as reflected in a technical amendment to the regulations published in the **Federal Register** on September 30, 2005 (70 FR 57177).

*Comment 51:* One commenter recommended that the inventory of culturally unidentifiable human remains provided to the Manager, National NAGPRA Program and the Review Committee pursuant to § 10.9(e)(6) also be made available to all interested parties. One commenter considered the Review Committee's publicly accessible database to provide sufficient notice to all Indian tribes to determine their interest in submitting a claim.

*Our Response:* Current regulations require museums and Federal agencies to provide a listing of all culturally unidentifiable human remains and associated funerary objects to the manager, National NAGPRA Program, who will make this information available to the Review Committee. The Culturally Unidentifiable Native American Human Remains Database is publicly posted at *http://64.241.25.6/CUI/index.cfm.* Although museums and Federal agencies are required to consult with Indian tribes and Native Hawaiian organizations in preparing the list, the Database is the primary means by which lineal descendants, Indian tribes, and Native Hawaiian organizations learn that a museum or Federal agency has determined particular human remains to be culturally unidentifiable.

*Comment 52:* One commenter recommended clarifying whether the requirement at § 10.9(e)(2)(v) that notices of inventory completion must describe human remains, with or without associated funerary objects, that are culturally unidentifiable applies only after promulgation of the final rule.

*Our Response:* Current regulations require publication of a notice of inventory completion prior to the repatriation of culturally affiliated human remains and associated funerary

objects (43 CFR 10.9(e)(2)). The Secretary has also required publication of a notice of inventory completion prior to the disposition of culturally unidentifiable human remains, with or without associated funerary objects. The proposed text formalizes as regulation the administrative notice requirement for culturally unidentifiable human remains, with or without associated funerary objects. This rule will have no effect on museums and Federal agencies that previously published notices for disposition of culturally unidentifiable human remains, with or without associated funerary objects, pursuant to a recommendation from the Secretary.

*Section 10.9 Other General Comments*

*Comment 53:* Two commenters stated that the proposed rule puts museums in the position of determining whether human remains and associated funerary objects are "Native American."

*Our Response:* Under the Act, museums and Federal agencies already have the role and responsibility of determining what constitutes "Native American" cultural items in their possession or control. While the statute contemplates consultation on this determination and other topics related to cultural items, the final determination is the museum or Federal agency's alone. Challenges to such determinations may be raised as disputes before the Review Committee or litigated in a U.S. District Court.

*Comment 54:* Two commenters requested clarification as to who is responsible for determining the geographic or cultural affiliation of Native American human remains and associated funerary objects.

*Our Response:* The statute (25 U.S.C. 3003(a)) and current regulations (43 CFR 10.9(a)) are clear that each museum or Federal agency that has possession or control over holdings or collections of human remains and associated funerary objects must compile an inventory of such objects, and, to the fullest extent possible based on information possessed by the museum or Federal agency, must identify the geographical and cultural affiliation of each item. While these decisions must be made in consultation with Indian tribes and Native Hawaiian organizations, the museum or Federal agency is responsible for identifying the geographical and cultural affiliation of each item.

*Comment 55:* One commenter recommended that current inventories of culturally unidentifiable human remains be reevaluated in light of *U.S.* v. *Bonnichsen* (357 F.3d 962 (9th Cir. 2004)).

*Our Response:* The proposed rule does not change the definition of "Native American" or "human remains." To come within the scope of the Act, a Federal agency or museum must make a threshold determination that the culturally unidentifiable remains or funerary objects are Native American before they may include culturally unidentifiable human remains or funerary objects with which they are associated in the inventories that are submitted to the Review Committee pursuant to § 10.9(d)(2).

*Comment 56:* One commenter recommended that the regulations reaffirm that Federal agencies, like museums, must comply with the inventory, consultation, and repatriation requirements of the Act.

*Our Response:* Like museums, Federal agencies must comply with the summary, inventory, consultation, notice, and repatriation process of the Act and the regulations.

*Comment 57:* Seven commenters requested a clear and explicit explanation of how the proposed rule takes into account the potential interests of the public in scientific research and education.

*Our Response:* The issue of scientific research is specifically addressed by Congress. Section 5(b)(2) of the Act states that "[Documentation] does not mean, and this Act shall not be construed to be an authorization for the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects." The rule repeats this language at § 10.9(5)(ii).

*Comment 58:* Eight comments recommended that Indian tribes and Native Hawaiian organizations should have the primary role in determining whether human remains are "culturally unidentifiable."

*Our Response:* Museum and Federal agency officials, in consultation with Indian tribes and Native Hawaiian organizations, are required to determine the cultural affiliation of all Native American human remains and associated funerary objects in their possession or control (43 CFR 10.9).

*Section 10.11 Disposition of Culturally Unidentifiable Human Remains*

This new section fulfills the Secretary's responsibility to promulgate regulations under sections 8(c)(5) and 13 of the Act (25 U.S.C. 3006(c)(5) and 3011)) and 25 U.S.C. 9 regarding the process for the disposition of culturally unidentifiable human remains. The Department of the Interior developed this section after full and careful consideration of the Review Committee's recommendations and other relevant legislation and policy.

*Comment 59:* Thirty-two commenters generally supported this section. Twenty-four commenters generally opposed this section. One commenter recommended retaining the term "disposition" in the title of this section.

*Our Response:* The term has been retained.

*Comment 60:* One commenter recommended removing any timelines or deadlines from this section.

*Our Response:* The proposed rule includes only two deadlines. Section 10.11(b)(1) requires that the museum or Federal agency official initiate consultation within ninety days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains or, absent such a request, before making any offer to transfer control of culturally unidentifiable human remains. Section 10.11(d)(2) requires the manager of the National NAGPRA Program to update and make accessible the Review Committee's inventory of culturally unidentifiable human remains within 30 days of publishing a notice of inventory completion for culturally unidentifiable human remains. Both deadlines seem reasonable and necessary for the effective implementation of this section.

*Comment 61:* The preamble to the proposed rule specifically requested comments regarding the meaning of the term "cultural relationship" which is used in Section 3 of the Act (25 U.S.C. 3002) as a basis for the disposition of Native American human remains, funerary objects, sacred objects or objects of cultural patrimony excavated or removed from Federal or tribal land after 1990 (25 U.S.C. 3002(a)(2)(C)(2)), and was included in the proposed rule as a basis for consultation (43 CFR 10.11(b)) and disposition (43 CFR 10.11(c)) of culturally unidentifiable human remains. Only four commenters offered specific recommendations on how the term should be defined. One proposed a definition that is indistinguishable from that of cultural affiliation—"a relationship that exists between federally-recognized tribes and earlier Native American groups with which those federally-recognized tribes have a relationship of shared group identity."

*Our Response:* As a matter of regulatory drafting, different terms should not be accorded the same meaning when this can be avoided.

*Comment 62:* Three other commenters recognized that from its context in

section 3 of the Act the term "cultural relationship" connotes a weaker connection than "cultural affiliation," but differed on how the former connection should be proved. Two commenters recommended that the same types of evidence applicable to showing cultural affiliation—"geographical, kinship, biological, archeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion" [25 U.S.C. 3005(a)(4)]—should also be used to determine cultural relationship, but at some standard less than the preponderance of the evidence. Another commenter specified additional evidence that should be considered in determining cultural relationship, including habitation, tribal history, migration and creation stories, and evidence from tribal elders.

*Our Response:* The drafters note that all of the specified types of evidence for "cultural relationship" are already subsumed under the broader categories identified in the Act for "cultural affiliation."

*Comment 63:* Three commenters generally supported using "cultural relationship" as a basis for disposition of culturally unidentifiable human remains. Seven commenters recommended that "cultural relationship" be defined prior to finalization of the rule. Four commenters recommended finalizing the rule with a section reserved to define "cultural relationship" at a later date. One commenter recommended that the Review Committee be tasked with developing a definition of "cultural relationship." Thirteen commenters recommended not defining "cultural relationship" by regulation, instead allowing museums, Federal agencies, Indian tribes, and Native Hawaiian organizations to interpret the term on a case-by-case basis. Nineteen commenters recommended removing "cultural relationship" from the priority structure entirely.

*Our Response:* The diversity of opinion regarding the meaning of "cultural relationship" convinced the drafters to remove it as a required criterion for consultation and disposition of culturally unidentifiable human remains in § 10.11(b) and § 10.11(c).

*Section 10.11(a) General Intent*

Paragraph (a) states the general intent of § 10.11.

*Comment 64:* One commenter recommended it be made explicit that the rule only applies to human remains determined to be "Native American."

*Our Response:* Section 10.11(a) has been changed to read: "This section implements section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)) and applies to human remains previously determined to be Native American pursuant to § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified."

*Section 10.11(b) Consultation*

Paragraph (b) establishes procedures for consultation regarding the disposition of culturally unidentifiable human remains.

*Comment 65:* Six commenters recommended making it very clear that the appropriate disposition of culturally unidentifiable human remains can only occur within the framework of consultation and collaboration.

*Our Response:* Section 10.11(b) is intended to provide such a framework.

*Comment 66:* Six commenters were concerned that the initial listing of culturally unidentifiable human remains and associated funerary objects was completed without consultation.

*Our Response:* Inventory preparation under § 10.9 required consultation with lineal descendants and Indian tribal officials and traditional religious leaders (1) from whose tribal lands the human remains and associated funerary objects originated; (2) that are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and (3) from whose aboriginal lands the human remains and associated funerary objects originated. Failure to consult with all of the above-referenced parties constitutes a failure to comply with the requirements of the Act and may result in assessment of a civil penalty under § 10.12(b)(1)(vii). It is anticipated that consultation as required in § 10.11(b) will result in determinations that some human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization.

*Comment 67:* Four commenters considered the consultation requirements at § 10.11(b) to be impractical, burdensome, likely to cause irreparable damage to the strong, highly productive collaborative relationships between Indians and the scientific community, and likely to lead to rushed decisions regarding disposition of culturally unidentifiable human remains. Six commenters recommended including additional guidance on how to conduct meaningful consultation. One commenter requested clear guidelines on exactly when a particular consultation process reaches a definitive conclusion. Five commenters recommended including a definition of "consultation" consistent with House Report 101–877.

*Our Response:* Consultation is a critical component of implementing this section and the Act as a whole. The committee report accompanying the Act (House Report 101–877 (October 15, 1990)) defined consultation as "a process involving the open discussion and joint deliberations with respect to potential issues, changes, or actions by all interested parties." Consultation is not defined in the Act itself. These regulations require museums and Federal agencies to initiate consultation within ninety days of receipt of a request from an Indian tribe or Native Hawaiian organization, or before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects. Required consultation would generally conclude once control of the culturally unidentifiable human remains, with or without associated funerary objects, has been transferred to the Indian tribe or Native Hawaiian organization.

*Section 10.11(b)(1) When To Consult*

Section 10.11(b)(1) identifies when museums and Federal agencies must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

*Comment 68:* Two commenters recommended that § 10.11(b)(1) provide clear guidelines for the circumstances under which a museum or Federal agency must initiate consultation. One commenter recommended that a museum or Federal agency's obligation to initiate consultation be triggered only by receipt of a claim. One commenter asked whether a Federal agency should invite consultation if no claim is received from a federally-recognized Indian tribe or Native Hawaiian organization. One commenter recommended that there be clear guidelines on exactly when the consultation process may conclude.

*Our Response:* This paragraph requires a museum or Federal agency official to initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects in two separate instances. Consultation must be initiated within ninety days of receipt of a request from an Indian tribe or Native Hawaiian organization to transfer control. Absent such a request, consultation must also be initiated before the museum or Federal agency makes any offer to transfer control. Required consultation would generally

conclude once the control and possession of the culturally unidentifiable human remains, with or without associated funerary objects, has been transferred to the Indian tribe or Native Hawaiian organization.

*Section 10.11(b)(2) Who To Consult*

Section 10.11(b)(2) identifies who must be consulted regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

*Comment 69:* Three commenters recommended that consultation not be required with all of the Indian tribes and Native Hawaiian organizations specified at § 10.11(b)(2), in part because Indian tribes and Native Hawaiian organizations will be inundated with requests to consult.

*Our Response:* The drafters have removed the requirement to consult with Indian tribes and Native Hawaiian organizations with a cultural relationship to the region from which the human remains and associated funerary objects were removed (43 CFR 10.11(b)(2)(iii)). Museums and Federal agencies were already required to consult with Indian tribes and Native Hawaiian organizations from whose tribal lands or aboriginal lands the human remains and associated funerary objects were removed in preparing their initial inventories (43 CFR 10.9(b)).

*Comment 70:* One commenter recommended that the Department compile a list of Native Hawaiian organizations that should be consulted regarding disposition of culturally unidentifiable human remains.

*Our Response:* Contact information is available for some Native Hawaiian organizations from two sources within the Department of the Interior. The National Park Service, National NAGPRA Program maintains the Native American Consultation Database (*http://home.nps.gov/nacd/*). The Department of the Interior, Office of Hawaiian Relations maintains the Native Hawaiian Organization List (*http://www.doi.gov/ohr/*). Other sources should also be considered.

*Comment 71:* One commenter considered inclusion of treaties, acts of Congress, and Executive Orders at § 10.11(b)(2)(ii), along with final determinations of the Indian Claims Commission and the U.S. Court of Claims to be a fair and equitable way of identifying aboriginal lands. Three commenters recommended deleting treaties, acts of Congress, and Executive Orders as a basis for determining aboriginal lands. One commenter considered the cited documents too limiting, and recommended adding the "testimony of experts." One commenter requested clarification as to who determines whether or not a specific tribe was the aboriginal occupant of an area.

*Our Response:* While Section 3(a)(2)(C) of the Act (25 U.S.C. 3002(a)(2)(C)) identifies only a final judgment of the Indian Claims Commission or United States Court of Claims as the basis for determining aboriginal lands, the drafters intend to include the full range of relevant and authoritative governmental determinations in this section to provide additional evidence relating to an Indian tribe or Native Hawaiian Organization (or, possibly, an Indian group that is not federally-recognized) with the closest connection to the culturally unidentifiable human remains. These include final judgments of the Indian Claims Commission and the United States Court of Claims, as well as treaties, Acts of Congress, or Executive Orders. Treaties signed before the establishment of the United States between the various colonial governments and Indian tribes may be used to identify areas aboriginally occupied by Indian tribes. Maps of the territory ceded under United States treaties were originally published in the 18th Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896–1897 (Government Printing Office, 1899) and are available online at *http://memory.loc.gov/ammem/amlaw/lwss-ilc.html.* Judgments of the Indian Claims Commission are available at *http://digital.library.okstate.edu/icc/index.html.* The drafters note that pursuant to provisions of the Indian Claims Commission Act, compromises (settlements) have the same effect of final judgments of the Indian Claims Commission ((605 Stat. 1060, 25 U.S.C. 70a *et seq.*).

*Comment 72:* Two commenters recommended including a mechanism at § 10.11(b)(2) requiring notification of Indian groups that are not federally-recognized or foreign based groups that may have a shared group identity with culturally unidentifiable human remains.

*Our Response:* The Act and regulations require museums and Federal agencies to consult with lineal descendants, Indian tribes, and Native Hawaiian organizations. Museum and Federal agencies may consult or provide notification to foreign based groups or Indian groups that are not federally-recognized as well.

*Comment 73:* One commenter considered the § 10.11(b)(2)(iii) requirement to consult with Indian tribes and Native Hawaiian organizations with a cultural relationship to the region from which culturally unidentifiable human remains and associated funerary objects were removed to be reasonable and appropriate. Three commenters recommended deleting the requirement. Two commenters recommended defining the term "region." One commenter recommended clarifying the term "lacking geographic affiliation." One commenter recommended including provisions to incorporate study results, particularly of the age of the human remains, and the results of consultation.

*Our Response:* The diversity of opinion regarding the meaning of "cultural relationship" convinced the drafters to remove it as a required criteria for consultation regarding the disposition of culturally unidentifiable human remains in § 10.11(b)(2)(iii).

*Comment 74:* Five commenters recommended that Indians must not be viewed as simply one voice among many, but as the primary voice in determining the disposition of culturally unidentifiable human remains.

*Our Response:* These regulations require museum and Federal agency officials to make certain decisions regarding the disposition of culturally unidentifiable human remains. While the regulations require that these decisions are made in consultation with Indian tribes and Native Hawaiian organizations, the responsibility for making the decision remains with the museum or Federal agency official. Indian tribes and Native Hawaiian organizations assume sole responsibility for disposition once the museum or Federal agency transfers control of culturally unidentifiable human remains.

*Comment 75:* Two commenters requested clarification as to whether the requirements of § 10.11(b)(1) and (b)(2) were independent of each other.

*Our Response:* The two sections are related. Section 10.11(b)(1) specifies *when* consultation must begin: either within 90 days of receipt of a request to transfer control or, absent such a request, before any offer to transfer control. Section 10.11(b)(2) specifies *who* must be consulted in either situation.

*Section 10.11(b)(3) Information Provided*

Section 10.11(b)(3) outlines the information that museum or Federal agency officials must provide to all consulted Indian tribes and Native Hawaiian organizations.

*Comment 76:* One commenter recommended revising § 10.11(b)(3) to clarify that the specified information must be provided to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency is consulting "or should have consulted."

*Our Response:* Refusing to provide the specified information to one of the Indian tribes identified in § 10.11(b)(2) would constitute a failure to comply under § 10.12(b)(vii).

*Comment 77:* Two commenters suggested that § 10.11(b)(3) require museums and Federal agencies to send information as part of consultation to Indian groups that are not federally-recognized. Two commenters questioned the legal basis for requiring a museum or Federal agency to provide a list of Indian groups that are not federally-recognized that are known to have a relationship of shared group identity with the particular human remains and associated funerary objects.

*Our Response:* In the two sections of the Act that impose mandatory priorities for control or disposition of human remains (25 U.S.C. 3002 and 3005), Congress limited the recipients to federally-recognized Indian tribes (in addition to lineal descendants and Native Hawaiian organizations) in recognition of the government-to-government relationship between such tribes and the United States. In expanding the possible recipients of culturally unidentifiable human remains, with or without associated funerary objects, the Secretary followed the lead of Congress both in assuring that such cultural items went to the Indian group that had the closest cultural connection to the items, even if that group is not federally-recognized, and in maintaining the priority position of the government-to-government relationship, by not making such a disposition mandatory. In keeping with the voluntary nature of such disposition, consultation with Indian groups that are not federally-recognized is at the discretion of the museum or Federal agency.

*Comment 78:* One commenter recommended that the Secretary provide a list of Indian groups that are not federally-recognized to facilitate the consultation efforts of museums and Federal agencies.

*Our Response:* Museums and Federal agencies are not required to consult with Indian groups that are not federally-recognized. However, they may wish to consult with Indian groups that are not federally-recognized, particularly if such groups are known to have a relationship of shared group identity with culturally unidentifiable human remains and associated funerary objects in the possession or control of the museum or Federal agency. Section 10.11(b)(3)(ii) requires museums and Federal agencies to provide consulted Indian tribes and Native Hawaiian organizations with a list of any Indian groups that are not federally-recognized and is known to have a relationship of shared group identity with such human remains and associated funerary objects in order to facilitate consultation regarding appropriate disposition. Thus, the museum or Federal agency, and not the Secretary, would possess the list of such groups on a case by case basis.

*Comment 79:* One commenter suggested that the Secretary require a museum or Federal agency to state its reasoning for consultation with an Indian group that is not federally-recognized.

*Our Response:* Because the regulations do not require such consultation, they do not require a museum or Federal agency to provide the basis for such consultation. However, under § 10.11(b)(4)(iv), the museum or Federal agency must request the names and addresses of Indian groups that are not federally-recognized during consultation with relevant Indian tribes or Native Hawaiian organizations. An appropriate subject for the consultation in the context of such a request would be the reason why the museum or Federal agency needs to consult with those groups.

*Comment 80:* One commenter suggested rewording § 10.11(b)(3)(ii) to remove the passive voice and clarify that the subject list is of the "Indian groups that are not federally-recognized that the museum or Federal agency knows shares" a group identity with the particular human remains and associated funerary objects.

*Our Response:* The drafters agree that, generally, any such knowledge would be within the museum or Federal agency, but prefer to leave the requirement in the passive voice to allow for other sources, such as the general literature.

*Comment 81:* One commenter requested clarification in § 10.11(b)(3)(ii) of what is a legitimate Indian group that is not federally-recognized and what makes such a group "known."

*Our Response:* Consultation with Indian groups that are not federally-recognized is not required by the Act or these regulations. Museums and Federal agencies are required to provide consulted Indian tribes and Native Hawaiian organizations with a list of any Indian groups that are not federally-recognized that are known to have a relationship of shared group identity with particular human remains and associated funerary objects. Determinations as to whether such a relationship of shared group identity exists may be done on a case-by-case basis relying upon the types of evidence outlined at § 10.14 of these regulations.

*Section 10.11(b)(4) Information Requested*

Section 10.11(b)(4) outlines the information that museum and Federal agency officials must request from consulted Indian tribes and Native Hawaiian organizations.

*Comment 82:* One commenter was concerned that § 10.11(b)(4)(iii) gives Indian tribes and Native Hawaiian organizations complete authority to determine the criteria to be used in identifying groups of human remains and associated funerary objects for consultation.

*Our Response:* Museum and Federal agency officials are required to request temporal and/or geographic criteria to be used to identify groups of human remains and associated funerary objects for consultation. Additional criteria may also be used to identify the focus of consultation.

*Comment 83:* Two commenters were concerned that § 10.11(b)(4)(v) gives Indian tribes and Native Hawaiian organizations authority to single-handedly and unilaterally determine the consultation schedule and process.

*Our Response:* Museum and Federal agency officials are required to request consultation schedules and process preferences from Indian tribes and Native Hawaiian organizations. The consultation schedule and process that is actually used will depend on other factors as well.

*Section 10.11(b)(5) Disposition Proposals*

Section 10.11(b)(5) directs museum and Federal agency officials to seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties and consistent with this part.

*Comment 84:* Six commenters recommended revising § 10.11(b)(5) to require the museum or Federal agency official to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in § 10.11(b)(2). One commenter recommended that the museum or Federal agency official should consider proposed dispositions developed by and mutually agreeable to the parties specified in § 10.11(b)(2).

One commenter recommended that this paragraph address what would happen if the parties do not agree on a proposed disposition. One commenter recommended that if no agreement is reached, the museum or Federal agency should be able to determine disposition in good faith and be protected from liability.

*Our Response:* This paragraph strongly encourages museum and Federal agency officials to seek to develop proposed dispositions that are mutually agreeable to the parties specified in § 10.11(b)(2). It is recognized that the interests of the various parties may differ and that obtaining a mutually agreeable proposal is beyond the ability of any single party.

*Comment 85:* One commenter recommended revising § 10.11(b)(5) to clarify that disposition of funerary objects associated with culturally unidentifiable human remains is advised but not required.

*Our Response:* Section 10.11(c)(5) which has been renumbered as § 10.11(c)(4) clarifies that a museum or Federal agency may transfer control of funerary objects that are associated with culturally unidentifiable human remains and that the Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude transfers.

*Comment 86:* One commenter recommended revising § 10.11(b)(5) to establish a basis for determining the right of claim or strength of relationship among the parties specified in § 10.11(b)(2).

*Our Response:* The priority of claim is established by § 10.11(b)(2). A claim for culturally unidentifiable human remains made by an Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed has a higher priority than a claim made by an Indian tribe that is recognized as aboriginally occupying the area from which the human remains were removed.

*Comment 87:* One commenter was concerned that limiting agreement in § 10.11(b)(5) to only those parties identified in § 10.11(b)(2) will vitiate the careful consideration of evidence required by the Act and leave the door wide open to transfers of control to groups with no significant relationship to the human remains.

*Our Response:* Museum and Federal agency officials are free to consult with any party that may help inform the development of a proposed disposition. However, the parties identified in § 10.11(b)(2) must be consulted and the museum or Federal agency official should, at a minimum seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties.

*Comment 88:* One commenter recommended revising § 10.11(b)(5) to indicate that a museum or Federal agency and involved Indian parties should be free to reach any agreement as to disposition that is permitted by all applicable laws.

*Our Response:* Museum and Federal agency officials may be bound by other Federal, state, or local ordinances regarding the disposition of culturally unidentifiable human remains and associated funerary objects in their possession or control. Section 10.11(b)(5) stipulates that all such agreements must be consistent with these regulations at a minimum.

*Section 10.11(b)(6) Determinations of Lineal Descent or Cultural Affiliation*

Section 10.11(b)(6) stipulates that the notification and repatriation provisions of §§ 10.9(e) and 10.10(b) apply if human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization.

*Comment 89:* One commenter recommended that the language in § 10.11(b)(6) be clarified to indicate that the notification and repatriation provisions would also apply if consultation resulted in the identification of a lineal descendant. One commenter recommended rephrasing the section for clarity.

*Our Response:* The text has been revised with additional text indicating that the notification and repatriation provisions would apply if consultation resulted in the identification of a lineal descendant.

*Comment 90:* One commenter objected to what he considered a presumption in § 10.11(b)(6) that skeletal materials that have not been identified with a cultural group can never be correctly identified.

*Our Response:* The drafters anticipate that the consultation process will result in decisions that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with Indian tribes and Native Hawaiian organizations. This paragraphs makes it clear that the notification and repatriation requirements of § 10.9(e) and § 10.10(b) apply when a determination of cultural affiliation is made.

*Section 10.11(c) Disposition*

Paragraph(c) establishes a priority listing and procedures for the disposition of culturally unidentifiable human remains.

*Comment 91:* The preamble to the proposed rule specifically requested comments regarding the appropriateness of using a priority structure in determining the disposition of culturally unidentifiable human remains. The priority structure proposed in § 10.11(c) was based on the similar priority structure in section 3 of the Act. Sixteen commenters generally supported use of the proposed priority structure. Nine commenters objected to use of any priority structure based on criteria other than lineal descent or cultural affiliation.

*Our Response:* The Review Committee is responsible for recommending specific actions for developing a process for disposition of culturally unidentifiable human remains (25 U.S.C. 3006 (c)(5)). Since 1992, the Review Committee has recommended the disposition of specific culturally unidentifiable human remains based on their removal from the aboriginal land of an Indian tribe, their shared group identity with an Indian group that is not federally-recognized, and reburial pursuant to otherwise applicable state burial law. The Review Committee's recommendations in these cases have been reviewed by the Secretary of the Interior and generally endorsed. Such dispositions are clearly within the Secretary's authority under current regulations. The proposed rule would simply authorize museums and Federal agencies to effect such dispositions to Indian tribes and Native Hawaiian organizations without direct reliance upon the Secretary.

*Comment 92:* Three commenters recommended that the "priority structure" should not be the only factor for determining the disposition of either culturally affiliated or culturally unidentifiable human remains, such as agreements between Indian tribes regarding disposition.

*Our Response:* Agreements between a Federal agency or museum and culturally affiliated Indian tribes or Native Hawaiian organizations regarding the disposition of, or control over, Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony are specifically authorized by section 11(1)(B) of the Act (25 U.S.C. 3009(1)(B)). Agreements regarding the return of culturally unidentifiable human remains and associated funerary objects to Indian tribes, Native Hawaiian

organizations, or individuals are also authorized by section 11(1)(A) of the Act (25 U.S.C. 3009(1)(A)). The drafters have added a new subsection at § 10.11(c)(2)(i) to facilitate such voluntary dispositions.

*Comment 93:* One commenter urged inclusion of guidelines clearly specifying the level of effort that will be required to determine if culturally unidentifiable human remains fit the proposed priority categories.

*Our Response:* Guidelines specifying the level of effort necessary to determine the applicability of these, or other definitions within the regulations, are already provided by the statute and regulations. For instance, determinations regarding the cultural affiliation of human remains, or the lack thereof, are to be made, to the extent possible, based on information possessed by a museum or Federal agency (25 U.S.C. 3003(a)). New scientific studies of such remains and associated funerary objects, or other means of acquiring or preserving additional scientific information from such remains and objects, are not required by the statute (25 U.S.C. 3003(b)(2)).

*Comment 94:* One commenter urged consideration of a single unified effort to specifically identify and map tribal and aboriginal lands.

*Our Response:* Maps of tribal land, Indian Claims Commission decisions, and treaty areas are currently posted at: *http://www.nps.gov/history/nagpra/*.

*Comment 95:* Three commenters were concerned that assigning disposition of culturally unidentifiable human remains to a particular culture group might result in some skeletal remains being transferred to a group to which they do not belong, including some of European, African, and Asian ancestry.

*Our Response:* All museums and Federal agencies were required to compile inventories of human remains and associated funerary objects. Each museum and Federal agency was responsible for determining if the human remains and associated funerary objects were Native American in the first instance. Human remains that were not identified as Native American were not to be included on the inventory. Museums and Federal agencies that wish to amend a previous decision may do so pursuant to § 10.13(e).

*Section 10.11(c)(1) Required Offers to Transfer Control*

Section 10.11(c)(1) requires a museum or Federal agency to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession to Indian tribes or Native Hawaiian organizations according to two priority categories.

*Comment 96:* One commenter recommended that the "offer to transfer control" referred to in § 10.11(c)(1) must be developed in consultation with Indian tribes and Native Hawaiian organizations.

*Our Response:* Any offer to transfer control must be developed in consultation with the Indian tribes and Native Hawaiian organizations identified in § 10.11(b)(2).

*Comment 97:* Two commenters recommended that museums and Federal agencies should not be required to initiate efforts to transfer control of culturally unidentifiable human remains absent a request from an Indian tribe or Native Hawaiian organization with the right to make such a claim.

*Our Response:* Under § 10.11(b)(1)(i), a museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects within 90 days of receipt of a request from an Indian tribe or Native Hawaiian organization to transfer control of such items. Absent such a request, the museum or Federal agency official may voluntarily offer to transfer control, in which case they must initiate consultation prior to making such an offer.

*Comment 98:* Nine commenters supported the proposed provision in § 10.11(c)(1) requiring that a museum or Federal agency offer to transfer culturally unidentifiable human remains to certain classes of Indian tribes unless it can prove that it has the right of possession to the remains. Seven commenters generally opposed the same provision, claiming that museums and Federal agencies should not have to prove that right to keep their collections.

*Our Response:* The opportunity for a museum or Federal agency to assert that it has the right of possession to culturally unidentifiable human remains is consistent with the provisions in § 10.15 of the regulations concerning repatriation of culturally affiliated human remains and the intent of Congress to recognize such a right as an exception to repatriation of human remains under section 7 of the Act (25 U.S.C. 3003)). The Secretary believes that it is appropriate to recognize that right as an exception for these remains as well.

*Comment 99:* One commenter questioned the use of the term "right of possession" with respect to human remains, stating that one person cannot own another person, alive or dead.

*Our Response:* Although the use of this term, as well as the term "culturally unidentifiable" is sensitive, Congress used both of these terms with specific meanings and consequences in the Act, so they must be used in the regulations with respect to those same meanings and consequences.

*Comment 100:* Eight commenters stated that proving right of possession to culturally unidentifiable human remains would be "impossible" since only a culturally affiliated Indian tribe can grant consent.

*Our Response:* Under NAGPRA, "the original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains" (25 U.S.C. 3001(13)). Further, "the governing body of an Indian tribe or Native Hawaiian organization [may] expressly relinquish * * * control over any Native American human remains" acquired pursuant to the ownership provisions of the Act (25 U.S.C. 3002(e)). Thus, Congress has defined the right of possession for these cultural items, and the Secretary cannot change that definition. The Secretary does note, however, that the "full knowledge and consent of the next of kin" would bring freely donated organs and other body parts within the right of possession. Furthermore, the exception listed at § 10.10(c)(3) applies to the requirements of § 10.11(c)(1).

*Comment 101:* Four commenters requested that the final rule be very clear that the burden of proof for the right of possession of culturally unidentifiable human remains is on the museum or Federal agency.

*Our Response:* The Secretary agrees that the burden of proof is on the museum or Federal agency, and that, as the proposed and final rule states, if a museum or Federal agency "is unable to prove that it has right of possession", it must offer to transfer the remains, with or without associated funerary objects (25 U.S.C. 3005(c)) upon receipt of a request.

*Comment 102:* Three commenters stated that a museum or Federal agency should be presumed to have the legal right of possession to its collection, unless shown to be otherwise. The commenters asserted that such a presumption would be consistent with the treatment of archaeological resources as property of the United States under the Archaeological Resources Protection Act (ARPA) and

with state laws relating to property rights and private ownership of human remains and artifacts taken from private property. Culturally unidentifiable human remains should be retained by museums and Federal agencies in the public trust.

*Our Response:* Congress specifically chose to change the ownership presumption in ARPA when it enacted NAGPRA, as evidenced by the requirement for a museum or Federal agency to prove that it has the right of possession to culturally affiliated human remains under section 7 of NAGPRA. With respect to state property laws and presumptions of ownership, NAGPRA is Federal law, and, as such, under the Supremacy Clause of the Constitution (Art. VI, cl. 2; *Lorillard Tobacco Co.* v. *Reilly,* 533 US 525 (2001)) would preempt any state law on the same subject matter. This is especially true in Indian affairs, where the United States has plenary and exclusive power (Art. I, Sec. 8, cl. 3; *Worcester* v. *Georgia,* 31 US 515, 6 Pet 515 (1832)).

*Comment 103:* Two commenters recommended excluding human anatomical collections used by medical schools for training.

*Our Response:* Though not excluded from the inventory provisions, medical schools that receive Federal funds would not be required to repatriate Native American human remains obtained with the voluntary consent of an individual or group that had authority of alienation.

*Comment 104:* Six commenters supported the provision at § 10.11(c)(1)(i) requiring museums and Federal agencies to offer to transfer control of culturally unidentifiable human remains to the Indian tribe or Native Hawaiian organization from whose tribal land, at the time of excavation or removal, the human remains were removed. One commenter objected to the provision since it may force a museum or Federal agency to transfer human remains to an Indian tribe or Native Hawaiian organization with which they are not culturally affiliated.

*Our Response:* Disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes based on criteria other than cultural affiliation was clearly anticipated by Congress. Section 3(a)(2)(A) of the Act (25 U.S.C. 3002(a)(2)(A)), which was used as the model for the proposed provision, specifically authorizes disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on tribal lands after November 16, 1990 to the Indian tribe or Native Hawaiian organization in control of that tribal land. Significantly, under section 3 of the Act, ownership or control based on tribal land is given a higher priority order than cultural affiliation. The drafters consider disposition of culturally unidentifiable human remains to the Indian tribe or Native Hawaiian organization from whose tribal land, at the time of excavation or removal, the human remains were removed, to be reasonable and appropriate.

*Comment 105:* One commenter recommended revising § 10.11(c)(1)(i) to require an offer to transfer control of culturally unidentifiable human remains to the Indian tribe or Native Hawaiian organization on whose tribal land the remains were originally buried, and not just to the Indian tribe or Native Hawaiian organization from whose tribal land the remains were excavated.

*Our Response:* The concept of tribal land as used in these regulations applies to all lands which are currently within the exterior boundary of any Indian reservation, comprise a dependent Indian community, or are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act (25 U.S.C. 3001 (15)). Human remains that were buried on tribal land which was subsequently transferred to another party are likely to be of relatively recent age, making it very likely that a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization can be determined.

*Comment 106:* One commenter requested clarification of what constitutes "tribal lands" in Oklahoma.

*Our Response:* "Tribal lands" are defined at § 10.2(f)(2) and include all lands which (1) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; (2) comprise dependent Indian communities; or (3) are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act. Given the diversity of Indian land ownership, the determination of whether a particular parcel or area is "tribal lands" for purposes of this definition is made on a case-by-case basis, consistent with case law developed by the Supreme Court and other Federal courts, for example, *Alaska* v. *Native Village of Venetie Tribal Government,* 522 U.S. 520 (1998). That determination is especially difficult in certain parts of the United States, such as Oklahoma and California.

*Comment 107:* Five commenters supported the provision at § 10.11(c)(1)(ii) requiring museums and Federal agencies to offer to transfer control of culturally unidentifiable human remains to the Indian tribe or tribes from whose aboriginal land the human remains were removed. Two commenters opposed such returns that are not based on cultural affiliation.

*Our Response:* Disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Indian tribes based on criteria other than cultural affiliation was clearly anticipated by Congress. Section 3(a)(2)(C) of the Act (25 U.S.C. 3002(a)(2)(C)), which was used as the model for the proposed provision, specifically authorizes disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on aboriginal lands after November 16, 1990 to the Indian tribe that aboriginally occupied the area in which the cultural items were discovered. Consistent with the terms of the statute, the drafters consider disposition of culturally unidentifiable human remains to the Indian tribe or tribes that are recognized as aboriginally occupying the area from which the human remains were recovered to be reasonable and appropriate given that often the designation of culturally unidentifiable is due to a lack of information occasioned by less than optimal collection practices.

*Comment 108:* One commenter recommended changing the phrase "Indian tribe or tribes that are recognized * * *" in § 10.11(c)(1)(ii) to "Indian tribe that is recognized * * *" One commenter requested clarification as to whether this provision would apply to an Indian group that is not federally-recognized.

*Our Response:* The drafters included both the singular and plural forms of the term "Indian tribe" to acknowledge that many United States treaties were signed by representatives of more than one Indian tribe. Regardless, when interpreting a statute words importing the singular include and apply to several persons, parties, or things (1 U.S.C. 1). When Federal agencies publish proposed and final rules in the **Federal Register** that amend existing regulations, the agency only publishes the portion of the regulations that would change. Unless the Federal agency states otherwise, all portions of existing regulations that are not proposed for change in the notice of proposed rulemaking remain the same, and still apply. Thus, when this final rule refers to "Indian tribes", the drafters are using

the existing definition of that term, for which no change was proposed. That definition, at § 10.2(b)(2), only refers to federally-recognized Indian tribes. The drafters of the final rule were very careful to use the term "Indian group that is not federally-recognized" when those groups were included in a provision to try to keep the distinction clear.

*Comment 109:* One commenter objected to authorizing the use of more than a final judgment of the Indian Claims Commission or United States Court of Claims to determine aboriginal land in § 10.11 (c)(1)(ii).

*Our Response:* While section 3 (a)(2)(C) of the Act (25 U.S.C. 3002 (a)(2)(C)) identifies only a final judgment of the Indian Claims Commission or United States Court of Claims as the basis for determining aboriginal lands, the drafters intend to include the full range of relevant and authoritative governmental determinations in this section. To provide additional evidence relating to an Indian tribe or Native Hawaiian Organization (or, possibly, an Indian group that is not federally-recognized) with the closest connection to the culturally unidentifiable human remains. These include final judgments of the Indian Claims Commission and the United States Court of Claims, as well as treaties, Acts of Congress, or Executive Orders. Treaties signed before the establishment of the United States between the various colonial governments and Indian tribes may be used to identify areas aboriginally occupied by Indian tribes based on the acknowledgement of the validity of these treaties by the United States. Maps of the territory ceded under United States treaties were originally published in the 18th Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896–1897 (Government Printing Office, 1899) and are available online at *http://memory.loc.gov/ammem/amlaw/lwss-ilc.html*. Judgments of the Indian Claims Commission are available at *http://digital.library.okstate.edu/icc/index.html*. The drafters note that pursuant to provisions of the Indian Claims Commission Act, settlements have the same effect as final judgments of the Indian Claims Commission (605 Stat. 1060, 25 U.S.C. 70a *et seq.*).

*Comment 110:* One commenter recommended provisions be included to resolve conflicts over dispositions based on aboriginal lands pursuant to § 10.11(c)(1)(ii).

*Our Response:* Section 10.11(e) addresses the resolution of disputes regarding the disposition of culturally unidentifiable human remains and associated funerary objects, including disputes regarding identification of aboriginal lands.

*Comment 111:* Three commenters recommended that determinations of aboriginal occupation should not be limited to the sources outlined in § 10.11(c)(1)(ii), but should be defined at the discretion of the Native communities and/or based on the "testimony of experts." One commenter recommended including provisions recognizing final judgments of other Federal courts.

*Our Response:* The drafters intend to include the full range of relevant and authoritative governmental determinations in this section. These may include final judgments from Federal Courts, including the United States Court of Claims. Museum and Federal agency officials may also consider other information, such as expert testimony, but are not required to do so.

*Comment 112:* One commenter generally supported the disposition of culturally unidentifiable human remains based on "cultural relationship." Eleven commenters raised concerns about using "cultural relationship" as the basis for disposition of culturally unidentifiable human remains.

*Our Response:* As noted in the response to comment 63 above, the diversity of opinion regarding the meaning of "cultural relationship" convinced the drafters to remove it as a required criterion for consultation and disposition of culturally unidentifiable human remains.

*Comment 113:* One commenter was concerned that some museums might urge Indian tribes and Native Hawaiian organizations to accept human remains to which they may not have any ancestral connection in order to prevent turning over such human remains to groups with more attenuated "cultural relationships."

*Our Response:* The drafters have removed the term "cultural relationship" as a basis for disposition under § 10.11(c)(1). Consultation may result in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually culturally affiliated with an Indian tribe or Native Hawaiian organization (43 CFR 10.11(b)(6)).

*Comment 114:* One commenter recommended that an Indian tribe's decision regarding the disposition of culturally unidentifiable human remains should not be contingent upon the agreement of other lower priority claimants.

*Our Response:* Under § 10.11(c)(1), a request to transfer control of culturally unidentifiable human remains from an Indian tribe or Native Hawaiian organization from whose tribal land, at the time of excavation or removal, the human remains were removed is given priority and is not contingent upon any agreement with another Indian tribe that is recognized as aboriginally occupying the area from which the human remains were removed.

*Comment 115:* One commenter considered the Review Committee's case-by-case consideration of requests for disposition of culturally unidentifiable human remains to be working well and to be superior to the proposed system.

*Our Response:* Under current regulations (43 CFR 10.9(e)(6)), museums must retain possession of culturally unidentifiable human remains unless legally required to do otherwise or recommended to do otherwise by the Secretary. For over a decade, the Secretary has given full consideration to the Review Committee's case-by-case deliberations in deciding to make such a recommendation. These regulations were developed with this case-by-case experience in mind, as well as after careful consideration of the Review Committee's 2000 final recommendations. Dispositions involving Indian groups that are not federally-recognized or reinterment according to State or other law will still require a recommendation from the Secretary, who may request the Review Committee's advice.

*Section 10.11(c)(2) Voluntary Dispositions*

Section 10.11(c)(3) (renumbered as § 10.11(c)(2)) establishes a process for the voluntary disposition of culturally unidentifiable human remains that are not transferred under provisions of § 10.11(c)(1).

*Comment 116:* Four commenters stated that the claims to culturally unidentifiable human remains, with or without associated funerary objects, by a federally-recognized Indian tribe must take priority over any other group.

*Our Response:* The Secretary agrees. To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian

tribes, with no objection of any of those tribes, and upon receiving a recommendation from the Secretary. Such Indian groups that are not federally-recognized would be identified through consultation with all relevant federally-recognized Indian tribes. The Secretary considers that these provisions adequately respect and protect the sovereignty and rights of federally-recognized tribes.

*Comment 117:* Seven commenters were concerned that any disposition to Indian groups that are not federally-recognized was voluntary and that the proposed rule would not force a museum or Federal agency to transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized to which the cultural items are clearly culturally connected.

*Our Response:* In the two sections of the Act that impose mandatory priorities for control or disposition of human remains (Sections 3 and 7), Congress limited the recipients to federally-recognized Indian tribes (in addition to lineal descendants and Native Hawaiian organizations) in recognition of the government-to-government relationship between such tribes and the United States. In expanding the universe of possible recipients of culturally unidentifiable human remains, with or without associated funerary objects, the Secretary followed the lead of Congress both in assuring that such cultural items went to the Indian group that had the closest cultural connection to the items, even if that group is not federally-recognized, and in maintaining the priority of the government-to-government relationship, by not making such a disposition mandatory to an Indian group that is not federally-recognized.

*Comment 118:* Eleven commenters were concerned that the provision in § 10.11(c)(3) for voluntary disposition of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized would put a museum or Federal agency in the position of determining whether a particular entity is a "valid" Indian group that is not federally-recognized, which the commenters asserted that a Federal agency or museum lacks the authority to make. Some of the commenters requested that the Secretary define "an Indian group that is not federally-recognized."

*Our Response:* Section 10.11(c)(3) has been renumbered as § 10.11(c)(2). The proposed and final rules do not require a museum or Federal agency to make such a determination. Rather, during consultation, the museum or Federal agency supplies relevant federally-recognized Indian tribes and Native Hawaiian organizations with "a list of any Indian groups that are not federally-recognized that are *known to have* a relationship of shared group identity with the particular human remains and associated funerary objects" (43 CFR 10.11(b)(3)(ii) (emphasis added), i.e., those groups that would be culturally affiliated with the human remains and associated funerary objects if the group was recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. Then, the museum or Federal agency requests from the federally-recognized Indian tribe or Native Hawaiian organization "the names and addresses of other * * * Indian groups that are not federally-recognized that should be included in the consultations." (43 CFR 10.11(b)(4)(iv)). Thus, the museum or Federal agency must only identify on its own any Indian groups that are not federally-recognized that the museum or Federal agency knows have a relationship of shared group identity with the culturally unidentifiable human remains and associated funerary objects. The museum or Federal agency can rely on the relevant federally-recognized Indian tribe or Native Hawaiian organization for identification of any other relevant groups. A definition of "Indian group that is not federally-recognized" is not, therefore, needed.

*Comment 119:* Two commenters suggested that Indian groups that are not federally-recognized should be required to submit a claim for culturally unidentifiable human remains, with or without associated funerary objects, through, or in association with, a federally-recognized tribe.

*Our Response:* To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those Indian tribes following consultation, and upon receiving a recommendation from the Secretary. Such Indian groups that are not federally-recognized would be identified through consultation with all relevant federally-recognized Indian tribes. The Secretary considers that these provisions adequately respect and protect the sovereignty and rights of federally-recognized tribes. The commenters' suggestion might work in some areas of the country, but would be less effective in other areas, for example, California and parts of the eastern United States where the number of Indian groups that are not federally-recognized far exceeds the number of federally-recognized Indian tribes.

*Comment 120:* One commenter was concerned that the consultation with, and possible transfer of control to, Indian groups that are not federally-recognized would be used by those groups as leverage for Federal recognition. Another commenter considers requiring each museum and Federal agency to prepare and distribute a list of Indian groups that are not federally-recognized inconsistent with the Federal acknowledgement process.

*Our Response:* Congress specifically stated in the Act that it "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government," (25 U.S.C. 3010), which would include an Indian group that is not federally-recognized. The preamble to the proposed rule clearly stated, and this preamble again emphasizes, that "the Secretary's recommendation regarding the disposition of culturally unidentifiable human remains or associated funerary objects to an Indian group that is not federally-recognized does not indicate Federal recognition of the group's status as an Indian tribe or the existence of a government-to-government relationship" (72 FR 58586). Finally, the Federal acknowledgement process addressed in 25 CFR part 83 is detailed and rigorous, and it is highly unlikely, especially given the disclaimers from both Congress and the Secretary, that consultation with, or possible transfer of control to, an Indian group that is not federally recognized would satisfy any of the criteria required in that process.

*Comment 121:* One commenter was concerned that transfer of control of culturally unidentifiable human remains, with or without associated funerary objects, to unaffiliated Indian tribes or to Indian groups that are not federally-recognized would preclude future transfer of human remains to affiliated tribes and thereby cause injury to museums and Federal agencies.

*Our Response:* In section 7(f) of the Act (25 U.S.C. 3005), Congress specifically provided in that "[a]ny museum which repatriates any item in good faith pursuant to this chapter shall

not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter." To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection of any of those tribes, and upon receiving a recommendation from the Secretary. Such Indian groups that are not federally-recognized would be identified through consultation with all relevant federally-recognized Indian tribes. The Secretary considers that these provisions adequately respect and protect the sovereignty and rights of federally-recognized tribes.

*Comment 122:* One commenter suggested that Indian groups that are not federally-recognized, Indian regional organizations, and Indian national organizations should be able to make a claim for culturally unidentifiable human remains, with or without associated funerary objects, when no federally-recognized Indian tribe does so.

*Our Response:* In the two sections of NAGPRA that impose mandatory priorities for control or disposition of human remains (Sections 3 and 7), Congress intentionally limited the recipients to federally-recognized Indian tribes (in addition to lineal descendants and Native Hawaiian organizations) in recognition of the government-to-government relationship between such tribes and the United States. In expanding the universe of possible recipients of culturally unidentifiable human remains, with or without associated funerary objects, the Secretary followed the lead of Congress in making sure that such cultural items went to the Indian group that had the closest cultural connection to the items, even if that group is not federally-recognized. In recognition of the importance of that cultural connection, and of tribal sovereignty, the Secretary has not expanded the definition or the scope of the parties that are eligible to make claims to include regional and national Indian organizations. The ultimate disposition of culturally unidentifiable human remains, with or without associated funerary objects, control of which is not transferred under these regulations, is outside the scope of these regulations and reserved for § 10.15(b).

*Comment 123:* Twelve commenters generally supported the inclusion in the proposed rule of the disposition of culturally unidentifiable human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized. Thirteen commenters generally opposed the proposal to allow for disposition of culturally unidentifiable human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized.

*Our Response:* As noted in the Review Committee's 2000 Recommendations, and reflected in the preamble of the proposed rule, one of the categories of culturally unidentifiable human remains is those remains "for which cultural affiliation could be determined except that the appropriate Indian organization is not federally-recognized as an Indian tribe" (65 FR 36462, 36463 (2000)). In attempting to find a solution for the disposition of this category of human remains, the Secretary considered the overall intent of Congress in section 7 of the Act (25 U.S.C. 3005) to return control of Native American human remains in the possession of museums and Federal agencies to persons or entities with the closest cultural connection to those remains. While a mandate for return of control to Indian groups that are not federally-recognized would be contrary to the terms of NAGPRA and to the government-to-government relationship between the United States and federally-recognized Indian tribes, nothing in the Act prohibits the voluntary transfer of human remains, with or without associated funerary objects, to "culturally affiliated" Indian groups that are not federally-recognized, with appropriate safeguards for the rights of federally-recognized Indian tribes.

*Comment 124:* Seven commenters were concerned that disposition of culturally unidentifiable human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized would be voluntary and recommended that any such disposition should be (1) addressed through regional tribal consultation; and (2) brought before the Review Committee.

*Our Response:* To ensure that the rights of federally-recognized Indian tribes are protected, a museum or Federal agency may only transfer control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those tribes, and upon receiving a recommendation from the Secretary. Although, in respect of tribal sovereignty and the government-to-government relationship, the Secretary cannot mandate that museums and Federal agencies consult only on a regional basis, tribes may make arrangements for such consultations. In the past, the Secretary has referred requests for the disposition of culturally unidentifiable human remains to the Review Committee, under section 8(c)(8) of the Act (25 U.S.C. 3006(c)(8)) ("performing such other related functions as the Secretary may assign to the committee") and requested the Review Committee's advice before making recommendations on the disposition request. In formulating his or her recommendation concerning a disposition to an Indian group that is not federally-recognized, the Secretary will decide, on a case-by-case basis, whether the advice of the Review Committee would be useful, and, if so, will seek that advice.

*Comment 125:* Three commenters objected to the proposed provision in § 10.11(c)(3)(ii) that provides authority for voluntary reinterment under state law of culturally unidentifiable human remains, with or without associated funerary objects, stating that such reburial by non-tribal people would be considered inappropriate by tribal leaders and members.

*Our Response:* Section 10.11(c)(3)(ii) has been renumbered as § 10.11(c)(ii)(B). The Secretary notes that any such reinterment would only occur after full consultation with relevant federally-recognized Indian tribes, with no objection from any of those tribes, and upon receiving a recommendation from the Secretary under § 10.11(c)(3).

*Comment 126:* One commenter suggested that the final rule should include a disposition process that involves consultation with regional consortia and appropriate state agencies, citing the California law providing for repatriation to federally-recognized Indian tribes and Indian groups that are not federally-recognized (Health and Safety Code 8010, et seq.). Another commenter encouraged museums and Federal agencies to work with state officials since they are the most responsive to local needs and issues.

*Our Response:* Although, in respect of tribal sovereignty and the government-to-government relationship, the Secretary cannot mandate that museums and Federal agencies consult on a regional basis, tribes may make arrangements for such consultations. California, Iowa, New Mexico, and several other states have put in place or are considering state processes similar

to NAGPRA. Federal agencies and museums are encouraged to consult with their appropriate state agencies, especially if they propose to voluntarily transfer control to an Indian group that is not federally-recognized under § 10.11(c)(2)(ii)(A) or reinter culturally unidentifiable human remains, with or without associated funerary objects, pursuant to state law under § 10.11(c)(2)(ii)(B).

*Comment 127:* One commenter stated that, if culturally unidentifiable human remains, with or without associated funerary objects, are not claimed, the remains should continue to be in the care of the museum or Federal agency, without precluding future repatriation.

*Our Response:* In such a situation, the museum or Federal agency may, under the final rule, transfer control of the remains, with or without the funerary objects, to an Indian group that is not federally-recognized, reinter them under state law, or enter into an agreement with a federally-recognized Indian tribe for other disposition. The ultimate disposition of culturally unidentifiable human remains, with or without associated funerary objects, control of which is not transferred under these regulations, is outside the scope of these regulations and reserved for Section 10.15(b).

*Comment 128:* One commenter recommended clarification that once all efforts to transfer control to an Indian tribe, Native Hawaiian organization, or an Indian group that is not federally-recognized have been exhausted, the museum or Federal agency should reinter culturally unidentifiable human remains at their place of discovery.

*Our Response:* Under § 10.11(c)(2)(ii)(B), museums and Federal agencies may reinter culturally unidentifiable human remains upon receiving a recommendation from the Secretary or authorized representative.

*Section 10.11(c)(4) Secretary's Recommendation*

Section 10.11(c)(4) (renumbered as § 10.11(c)(3)) stipulated that the Secretary may make a recommendation under § 10.11(c)(3) (renumbered as § 10.11(c)(2)) only with the written consent of all Indian tribes and Native Hawaiian organizations stipulated in § 10.11(c)(1).

*Comment 129:* Three commenters supported the § 10.11(c)(4) language requiring the written consent of all Indian tribes and Native Hawaiian organizations stipulated in §§ 10.11(c)(1) and (c)(2) before the Secretary can make a recommendation under § 10.11(c)(3). Seven commenters stated that § 10.11(c)(4) of the proposed rule would create an unfair burden on both federally-recognized Indian tribes that are not interested in a disposition and Indian groups that are not federally-recognized that may lack the resources to meet the requirement of obtaining the consent of all relevant federally-recognized Indian tribes before a museum or Federal agency may transfer control of culturally unidentifiable human remains to a an Indian group that is not federally-recognized. Some of the commenters suggest that the final rule require that the museum or Federal agency make a good faith effort to consult with all of the relevant federally-recognized tribes, and, if no federally-recognized tribe has objected, then the disposition to the "culturally affiliated" Indian group that is not federally-recognized should be permitted to go forward.

*Our Response:* The Secretary agrees with these commenters, and has revised the final rule to incorporate their suggestions. Sections 10.11(c)(2), (c)(3), and (c)(4) have been renumbered as § 10.11(c)(6), (c)(2), and (c)(3) respectively.

*Comment 130:* Four commenters stated that § 10.11(c)(4) of the proposed rule unduly restricts the flexibility of museums and Federal agencies by requiring that they receive a recommendation from the Secretary before transferring control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized or reinterment of the remains under State law.

*Our Response:* Congress enacted NAGPRA in furtherance of the government-to-government relationship with federally-recognized Indian tribes. Also in furtherance of that relationship, the Secretary has the obligation to ensure that the rights of those tribes under the statute and under these regulations are fully supported. Therefore, in the case of a proposed disposition to an Indian group that is not federally-recognized or a proposed reinterment under State law, the recommendation of the Secretary is needed to make sure that the museum or Federal agency has consulted with the relevant federally-recognized Indian tribes and none of the tribes have objected. This is also consistent with the current practice that the Review Committee and the Secretary have developed for disposition (even to federally-recognized tribes) of culturally unidentifiable human remains.

*Comment 131:* One commenter recommended that the Secretary only authorize reburial pursuant to State law after the museum or Federal agency has attempted in good faith to transfer control of the culturally unidentifiable human remains to an affiliated Indian group that is not federally-recognized.

*Our Response:* A museum or Federal agency may voluntarily transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized or reinter culturally unidentifiable human remains according to state or other law only after receiving a recommendation from the Secretary or authorized representative. The Secretary will consider evidence related to both options prior to making such a recommendation.

*Comment 132:* One commenter requested that the Secretary offer a process for seeking the recommendations of the Review Committee concerning proposed dispositions.

*Our Response:* Under section 8(c) of the Act (25 U.S.C. 3006(c)), the Review Committee is charged with reviewing and making findings concerning the return of cultural items upon the request of any party and with facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable. The process for bringing requests and disputes before the Review Committee is found on the National NAGPRA Web site at *http://www.nps.gov/history/nagpra/REVIEW/Procedures.htm.* In addition, § 10.11(e) specifically identifies the Review Committee as a possible forum to assist in the informal resolution of disputes regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

*Section 10.11(c)(5) Voluntary Transfer of Associated Funerary Objects*

Section 10.11(c)(5), which has been renumbered as § 10.11(c)(4), clarifies that a museum or Federal agency may voluntary transfer control of funerary objects that are associated with culturally unidentifiable human remains.

*Comment 133:* Twenty-two commenters stated that the disposition of culturally unidentifiable associated funerary objects should be mandatory. Three commenters indicated that sufficient legal authority and congressional intent exist to require the mandatory disposition of culturally unidentifiable associated funerary objects. Three commenters stated that disposition of culturally unidentifiable associated funerary objects should be

mandatory because different treatment of such objects is contrary to American common law and Indian funeral traditions. One commenter stated that disposition of such objects should be mandatory because some institutions will not voluntarily transfer objects. One commenter supported the disposition of funerary objects associated with culturally unidentifiable human remains on a voluntary basis. Three commenters recommended deleting § 10.11(c)(5) and amending § 10.11(c)(1) to read, "A museum or Federal agency that is unable to prove that it has right of possession, as defined at 10.11(a)(2) [sic], to culturally unidentifiable human remains and associated funerary objects must offer to transfer control of the human remains and associated funerary objects to Indian tribes and Native Hawaiian organizations in the following priority order * * *".

*Our Response:* Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. In section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), Congress assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress did not indicate the same intent regarding culturally unidentifiable associated funerary objects. Mandatory disposition for this category of items raises right of possession and takings issues that are not clearly resolved in the statute or the legislative history. American common law generally recognizes that human remains cannot be owned. The common law regarding associated funerary objects that are not culturally identifiable is not well established. According to the committee report accompanying the Senate NAGPRA bill, the Senate Committee on Indian Affairs intended that the legal framework regarding right of possession would operate in a manner consistent with general property law (S. Report 101–473 at 8). Considering the lack of precedent in the common law and Congress' direction to develop a process only with respect to culturally unidentifiable human remains, the Secretary does not consider it appropriate to make the provision to transfer culturally unidentifiable associated funerary objects mandatory.

*Comment 134:* Seven commenters recommended deleting § 10.11(c)(5) on the grounds that the Secretary does not have authority to address funerary objects associated with culturally unidentifiable human remains.

*Our Response:* Section 10.11(c)(5) has been renumbered as § 10.11(c)(4). In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. section 5 of the Act (25 U.S.C. 3003) requires Federal agencies and museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item. Regulations promulgated in 1995 initially addressed culturally unidentifiable associated funerary objects to which there was no public objection. 43 CFR 10.9(e)(6) required museums and Federal agencies to provide notice and a copy of the list of culturally unidentifiable human remains and associated funerary objects to the National Park Service which in turn made this information available to the Review Committee. Congress anticipated that not all items would be geographically or culturally affiliated and, in section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress intended that the Review Committee be an advisory committee which makes recommendations to the Secretary (S. Rep. No. 101–473 at 13). In section 8(c)(7) of the Act (25 U.S.C. 3006(c)(7)), Congress also authorized the Review Committee to consult with the Secretary in the development of regulations to carry out the Act. As part of its recommendations under section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), the Review Committee addressed funerary objects associated with culturally unidentifiable remains and recommended their transfer along with the associated remains. This regulation, promulgated in the exercise of Congress' delegated authority, implements many of the Review Committee's recommendations made pursuant to section 8(c)(5) and 8(c)(7) and effectuates the goals of the Act. Even if Congress may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap, it can still be apparent from an agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to address ambiguities in the statute or fill a gap in the enacted law, even one about which Congress may not have actually had an intent as to a particular result (*U.S.* v. *Mead,* 533 U.S. 218 (2001)). In addition, 25 U.S.C. 9 authorizes the Secretary to make "such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." Because NAGPRA is Indian law (*Yankton Sioux Tribe* v. *United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate any regulations needed to implement it under the broad authority to supervise and manage Indian affairs given by Congress (*United States* v. *Eberhardt,* 789 F.2d 1354, 1360 (9th Cir. 1986)).

*Comment 135:* Two commenters objected to the "required" disposition of funerary objects associated with culturally unidentifiable human remains.

*Our Response:* The subsection addressing this category of objects, § 10.11(c)(4), does not require disposition. The proposed text states, "A museum or Federal agency *may* also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them" (emphasis added).

*Comment 136:* One commenter requested clarification on whether it is discretionary for museums and Federal agencies to make disposition of culturally unidentifiable associated funerary objects.

*Our Response:* Subsection 10.11(c)(4) does not mandate the transfer of culturally unidentifiable associated funerary objects. This provision is voluntary and any decision to transfer such objects is based on the discretion of the museum or Federal agency.

*Section 10.11(c) Other Issues*

*Comment 137:* Two commenters suggested the establishment of national or regional repositories, controlled by Indian tribes, where culturally unidentifiable human remains that are unclaimed may be voluntarily reinterred.

*Our Response:* The Secretary cannot mandate that Indian tribes enter into such arrangements. Indian tribes may make arrangements for such repositories on their own.

*Comment 138:* Two commenters recommended that the statutory exemptions to repatriation be explicitly identified in this section.

*Our Response:* Section 10.10(c) of these regulations stipulates four exceptions to repatriation, including circumstances where (1) Human remains and funerary objects are indispensible to the completion of a specific scientific study, the outcome of which is of major benefit to the United States; (2) there are multiple requests for repatriation of the human remains and associated funerary objects and the museum or Federal agency cannot determine by a preponderance of the evidence which requesting party is the most appropriate claimant; (3) a court of competent jurisdiction has determined that the repatriation would result in a taking of property without just compensation within the meaning of the Fifth Amendment of the United States Constitution; and (4) the repatriation is not consistent with other repatriation limitations identified in § 10.15. The drafters intend that each of these exemptions also apply to claims made for the disposition of culturally unidentifiable human remains, and additional text has been included at § 10.11(c)(5) to that effect.

*Comment 139:* Three commenters recommended addressing the recourse available to museums and Federal agencies if they cannot transfer control of culturally unidentifiable human remains.

*Our Response:* Section 10.15(b) of these regulations has been reserved to address situations where no claim has been made.

*Section 10.11(d) Notification*

Paragraph (d) establishes procedures to ensure that Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies are notified of intended dispositions of culturally unidentifiable human remains and associated funerary objects.

*Comment 140:* One commenter recommended adding a provision to document the final disposition of culturally unidentifiable human remains.

*Our Response:* Section 10.10(f) directs museums and Federal agencies to adopt internal procedures adequate to permanently document the content and recipients of all repatriations.

*Comment 141:* One commenter recommended clarifying that the notice requirement for culturally unidentifiable human remains would commence after consultation (43 CFR 10.11(b)) and determination (43 CFR 10.11(c)).

*Our Response:* Section 10.11(d) stipulates that disposition of culturally unidentifiable human remains pursuant to § 10.11(c) may not occur until at least thirty days after publication of a notice of inventory completion. Section 10.11(b)(1) stipulates that the museum or Federal agency official must initiate consultation within ninety days of receipt of a request for disposition or, absent such a request, before any offer to transfer control of culturally unidentifiable human remains.

*Comment 142:* One commenter recommended lengthening the notification time period from 30 to 60 or 90 days to allow Indian tribes and Native Hawaiian organizations to respond before disposition occurs.

*Our Response:* The thirty day (minimum) period following publication of a notice of inventory completion during which other lineal descendants, Indian tribes, or Native Hawaiian organizations may claim human remains and associated funerary objects has been in effect since 1996 (43 CFR 10.10(b)(2)). No Indian tribe or Native Hawaiian organization recommended this change.

*Comment 143:* One commenter requested clarification of how the Review Committee database of culturally unidentifiable human remains and associated funerary objects will be made "accessible" to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

*Our Response:* The Culturally Unidentifiable Native American Inventories Database is available at: *http://64.241.25.6/CUI/index.cfm.*

*Comment 144:* Five commenters recommended revising the Review Committee's inventory as follows: (1) Create and include an online tutorial on how to use the database; (2) include fields in the main table to discern whether the repository is reporting on a museum or Federal agency collection; (3) update the existing contact information, and list contact information for each Federal Agency NAGPRA Contact; (4) add search functions to the database to search/sort by keyword e.g. "Hohokam"; (5) add search functions to the database so that it is possible to search/sort by county; (6) add search functions to the database so that it is possible to search/sort by date; (7) separate the collection history, age/culture, and associated funerary object fields for clarity; (8) link the database to the notices of inventory completion and notices of intent to repatriate. Two commenters recommended that the original paperwork supporting a published notice of inventory completion be posted on the Web site as part of the Review Committee's inventory.

*Our Response:* The National NAGPRA Program will consider implementing these recommendations.

*Section 10.11(e) Disputes*

Section 10.11(e) clarifies that disputes regarding the disposition of culturally unidentifiable human remains may be resolved through informal negotiations, with the assistance of the Review Committee, or before a United States District Court.

*Comment 145:* One commenter asked for clarification of what is meant by "informal negotiations."

*Our Response:* While the Review Committee is specifically charged with facilitating the resolution of disputes, the Committee also stated that disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums should be resolved at the lowest organizational level and at the earliest time possible and strongly encourages the use of alternative methods of dispute resolution (Native American Graves Protection and Repatriation Review Committee Dispute Procedures, September 2006).

*Comment 146:* One commenter recommended that the Review Committee only attempt to facilitate disputes regarding the disposition of culturally unidentifiable human remains when requested by all involved parties.

*Our Response:* Under the Review Committee's Dispute Procedures, the decision to involve the Review Committee in a dispute is made only after all involved parties have been contacted. Disputing parties are under no obligation to participate in Review Committee meetings. Review Committee recommendations are purely advisory.

*Comment 147:* One commenter recommended that the Review Committee's existing policies and procedures be formalized into this final regulation.

*Our Response:* The Review Committee's Dispute Procedures are posted at: *http://www.nps.gov/history/nagpra/REVIEW/Dispute_procedures.0609.pdf.* Formalization of these procedures as regulations would likely limit the ability

of the Review Committee to generate unique and innovative resolutions on a case-by-case basis.

*Comment 148:* One commenter asked for clarification as to whether the proposal would give binding legal force to Review Committee advisory opinions. One commenter asked for clarification as to whether the proposal would allow lawsuits by any aggrieved person against museums ad infinitum.

*Our Response:* Review Committee findings and recommendations are purely advisory in nature. However, any records and findings made by the Review Committee relating to the identity or cultural affiliation of human remains, funerary objects, sacred objects, or objects of cultural patrimony may be admissible in actions brought before a Federal court (25 U.S.C. 3006(d)). While neither Congress nor the Secretary can stop anyone from filing a lawsuit, in section 7(f) of the Act (25 U.S.C. 3005), Congress specifically provided in that "[a]ny museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this chapter."

*Section 10.12(b) Definition of "Failure to Comply"*

Revisions to this section clarify the definition of "failure to comply" in the context of the possible assessment of civil penalties.

*Comment 149:* Fourteen commenters generally supported the proposed text at § 10.12(b)(1)(ix) to allow for the assessment of civil penalties for failure of a museum to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession under § 10.11. Two commenters generally opposed the proposed text. One commenter urged that no civil penalty should be imposed on a museum for failing to offer to transfer human remains when no group has requested a transfer.

*Our Response:* The drafters consider the recommendation concerning the inadvisability of civil penalties when no Indian tribe or Native Hawaiian organization has requested a transfer to be reasonable because, absent a claim, the regulations do not specify when a museum must offer to transfer control of culturally unidentifiable human remains to Indian tribe and Native Hawaiian organizations. Section 10.12(b)(ix) has been revised to read "Upon receipt of a claim consistent with § 10.11(c)(1), refuses to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession."

*Comment 150:* Four commenters requested clarification in § 10.12(b)(1)(ix) that the burden of proof for right of possession of culturally unidentifiable human remains rests with the museum or Federal agency.

*Our Response:* The burden of proof is on the museum or Federal agency, and that, as the proposed and final rule states, if a museum or Federal agency "is unable to prove that it has right of possession", it must offer to transfer the remains, with or without associated funerary objects (43 CFR 10.11(c)(1)).

*Comment 151:* One commenter recommended revising § 10.12 to mandate that Federal agencies comply with the Act and its regulations.

*Our Response:* Section 9 of the Act (25 U.S.C. 3007) authorizes the Secretary to assess civil penalties only against museums.

*Comment 152:* Two commenters recommended adding another type of failure to comply at § 10.12(b) for museums that refuse to provide additional available documentation upon the request of an Indian tribe or Native Hawaiian organization that received notice or should have received notice and an inventory under § 10.9(e)(1) and (e)(2).

*Our Response:* Section 5(b)(2) of the Act (25 U.S.C. 3003(b)(2)), requires that a museum or Federal agency supply additional available documentation upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice. Refusing to provide the specified information to one of the Indian tribes identified in § 10.11(b)(2) would constitute a failure to comply under § 10.12(b)(vii).

**Changes to the Proposed Rule**

Based on the preceding comments and responses, the drafters have made the following changes to the proposed rule language:

- Section 10.2(e)(2). We have added text to clarify that determinations of cultural affiliation are made "through the inventory process." Section 10.9(e)(2)(v). We revised the text to clarify that the notice of inventory completion must describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that "are subject to disposition under § 10.11."
- Section 10.9(e)(5)(ii). We added text to provide examples of the type of Federal legal authority that exempt disclosure of Federal documentation to the public.
- Section 10.9(e)(6). We deleted text to make it clear that while disposition of funerary objects associated with culturally unidentifiable human remains is voluntary, museums and Federal agencies must provide notice and a list of such objects to the Manager, National NAGPRA Program.
- Section 10.11(a). We revised the text to clarify that this section applies to human remains previously determined to be Native American pursuant to § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.
- Section 10.11(b)(2)(iii). We deleted this section that required consultation with all Indian tribes or Native Hawaiian organizations with a cultural relationship to the region from which culturally identifiable human remains were removed or, in the case of human remains lacking geographic affiliation, to the region in which the museum or Federal agency repository is located. The diversity of opinion regarding the meaning of "cultural relationship" convinced the drafters to remove the term as a required criterion for consultation.
- Section 10.11(b)(6). We added text to this paragraph to clarify that the notification and repatriation provisions of §§ 10.9(e) and 10.10(b) apply if human remains previously determined to be culturally unidentifiable are actually related to a lineal descendant.
- Section 10.11(c)(1)(iii). We deleted this section that required a museum or Federal agency that is unable to prove it has right of possession to culturally unidentifiable human remains to offer to transfer control of such remains to the Indian tribe or Native Hawaiian organization with a cultural relationship to the region from which culturally identifiable human remains were removed or, in the case of human remains lacking geographic affiliation, to the region in which the museum or Federal agency repository is located. The diversity of opinion regarding the meaning of "cultural relationship" convinced the drafters to remove the term as a required criterion for disposition of culturally unidentifiable human remains.
- Section 10.11(c)(1)(iv). We deleted this section that required a museum or Federal agency that is unable to prove it has right of possession to culturally unidentifiable human remains to offer to transfer control of such remains to the Indian tribe or Native Hawaiian organization with a stronger cultural relationship with the human remains than an entity specified in § 10.11(c)(1)(ii) or (c)(1)(iii). The

diversity of opinion regarding the meaning of "cultural relationship" convinced the drafters to remove the term as a required criterion for disposition of culturally unidentifiable human remains.

• Section 10.11(c)(2). We moved and renumbered this paragraph as § 10.11(c)(6).

• Section 10.11(c)(3)(i) (renumbered as § 10.11(c)(2)(i)). We added text to allow a museum or Federal agency to voluntarily transfer control of culturally unidentifiable human remains to Indian tribes or Native Hawaiian organizations other than those specified in § 10.11(c)(1). The change is consistent with statutory requirements that nothing in the Act shall be used to limit the authority of any Federal agency or museum to return or repatriate Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian tribes, Native Hawaiian organizations, or individuals (25 U.S.C. 3009(1)(A)).

• Section 10.11(c)(4) (renumbered as § 10.11(c)(3)). We revised this provision to remove the requirement that all relevant Indian tribes and Native Hawaiian organizations must consent to a proposed disposition to an Indian group that is not federally-recognized or to a proposed reinterment under State law and to require instead that the museum or Federal agency prove to the Secretary that it has consulted with the relevant Indian tribes and Native Hawaiian organizations and none of them has objected. This change was prompted by comments on the proposed rule and the Secretary's effort to be sensitive to concerns of Indian tribes that may be culturally prohibited from discussing or possessing human remains.

• Section 10.11(c)(5) (renumbered as § 10.11(c)(4)).

• Section 10.11(c)(5). We added this new section to clarify that the exemptions to repatriation listed at § 10.10(c) also apply to dispositions of culturally unidentifiable human remains under § 10.11(c)(1).

• Section 10.12(b)(1)(ix). We added text to clarify that upon receipt of a claim consistent with § 10.11(c)(1), a museum refuses to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession, will be considered to have failed to comply with the Act. Absent a claim, the regulations do not specify when a museum must offer to transfer control of culturally unidentifiable human remains to Indian tribes and Native Hawaiian organizations.

• Section 10.15(c). We inserted text previously proposed for inclusion in § 10.1(b)(3) into this paragraph to reiterate that the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony constitutes a final agency action under the Administrative Procedure Act.

**Compliance With Other Laws and Executive Orders**

*Regulatory Planning and Review (Executive Order 12866)*

This document is a significant rule and has been reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights or obligations of their recipients.

(4) OMB has determined that this rule raises novel legal or policy issues.

*Regulatory Flexibility Act*

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The requirement to consult with Indian tribes and Native Hawaiian organizations is minimal, as very few small entities have collections of Native American human remains that would subject them to this rule. Of those having Native American human remains, the collections are small. Small entities can transfer those human remains to large museums having NAGPRA obligations and they can benefit from the published decisions of large museums. Thus, this rule does not constitute a significant economic burden. This rule will require the disposition of only those Native American human remains for which the controlling entity cannot prove right of possession (25 U.S.C. 3005).

*Small Business Regulatory Enforcement Fairness Act*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, local or tribal government agencies, or geographic regions; or (3) have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

*Takings (Executive Order 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. A takings implication assessment is not required. This rule will require the disposition of only those Native American human remains for which the controlling museum or Federal agency cannot prove right of possession [25 U.S.C. 3005(c)].

*Federalism (Executive Order 13132)*

In accordance with Executive Order 13132, the rule does not have sufficiently significant federalism implications to warrant the preparation of a Federalism Assessment. This final rule will not substantially and directly affect the relationship between the Federal and State governments. To the extent that State and local governments have a role in NAGPRA activities, this final rule will not affect that role. A Federalism Assessment is not required.

*Civil Justice Reform (Executive Order 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

*Paperwork Reduction Act*

The Office of Management and Budget has approved the information collection requirements associated with this rule under OMB Control No. 1024–0144.

The public reporting burden for the collection of information for § 10.11 is expected to average 20 hours per year, for those costs within the scope of the Paperwork Reduction Act, as follows:

(1) Ten state and local museums producing notifications and information requests to Indian tribes and Native Hawaiian organizations at 30 minutes for each museum, a total of 5 hours;

(2) Four private museums producing notifications and information requests to Indian tribes and Native Hawaiian organizations at 30 minutes for each museum, a total of 2 hours.

(3) Response by Indian tribes and Native Hawaiian organizations to requests for information from museums, 16 responses (14 to non-Federal museums and 2 to Federal museums) at 48 minutes per response for a total of 13 hours.

The reporting burden includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information. Comments regarding this burden estimate or any other aspects of this collection of information, including suggestions for reducing the burden, may be sent to the address in the **ADDRESSES** section and to: Information Collection Officer, Attn: Docket No. 1024–0144, National Park Service, Department of Interior Building, 1849 C Street NW., Room 3317, Washington, DC 20240.

*National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment and can be categorically excluded under 43 CFR 46.210(i), "Policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act. Any NEPA review required for a disposition of culturally unidentifiable human remains by a Federal agency will be conducted by that agency under its NEPA procedures.

*Government-to-Government Relationship With Indian Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government to Government Relations with Native American Tribal Governments" [59 FR 22951], Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" [65 FR 218], and 512 DM 2, "Departmental Responsibilities for Indian Trust Resources," this rule has a potential effect on federally-recognized Indian tribes. The proposed rule was developed in consultation with the Native American Graves Protection and Repatriation Review Committee, which includes members nominated by Indian tribes. The Review Committee consulted with Indian tribes in the development of the Review Committee's recommendations regarding the disposition of culturally unidentifiable human remains that form the basis of this proposed rule. The Review Committee, at the direction of the Secretary of the Interior, consulted with tribal representatives regarding its recommendations on February 16–18, 1995, in Los Angeles, CA; June 9–11, 1996, in Billings, MT; June 25–27, 1998, in Portland, OR; and May 2–4, 2000, in Juneau, AK. Tribal representatives were also consulted regarding draft text for these regulations at Review Committee meetings on May 2–4, 2000, in Juneau, AK; May 31–June 2, 2002, in Tulsa, OK; and November 8–9, 2002, in Seattle, WA. Consultation between tribal representatives and the Department also occurred during the public comment period for the proposed rule. In addition to comments from tribes that we received through members of the Review Committee and at Review Committee meetings, we received comments from tribes on the proposed rule in training sessions and in initial consultations on the draft rule that we are preparing for 43 CFR 10.7. We will conduct ongoing consultation with tribes on the implementation of this and other NAGPRA regulations through semiannual Review Committee meetings, outreach and training events approximately twenty times annually, and formal consultation sessions on further amendments to the regulations.

*Public Availability of Comments*

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

*Drafting Information*

The proposed rule was prepared in consultation with the Native American Graves Protection and Repatriation Review Committee as directed by section 8(c)(7) of the Act. The principal contributors to this final rule are C. Timothy McKeown and Sherry Hutt of the National NAGPRA Program, National Park Service; Carla Mattix and Stephen Simpson of the Office of the Solicitor, U.S. Department of the Interior; Jennifer Lee, Office of the Director, National Park Service and Philip Selleck, Chief, Regulations and Special Park Uses, National Park Service.

**List of Subjects in 43 CFR Part 10**

Administrative practice and procedure, Hawaiian natives, Historic preservation, Indians-claims, Indians-lands, Museums, Penalties, Public lands, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, 43 CFR part 10 is amended as follows:

## PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

■ 1. The authority for part 10 is revised to read as follows:

**Authority:** 25 U.S.C. 3001 *et seq.,* 16 U.S.C. 470dd (2), 25 U.S.C. 9.

■ 2. Amend § 10.1 by revising the section heading and paragraph (b)(3), and adding paragraph (c) to read as follows:

### § 10.1 Purpose, applicability, and information collection.

* * * * *

(b) * * *

(3) Throughout this part are decision points which determine how this part applies in particular circumstances, e.g., a decision as to whether a museum "controls" human remains and cultural objects within the meaning of the regulations, or a decision as to whether an object is a "human remain," "funerary object," "sacred object," or "object of cultural patrimony" within the meaning of the regulations. Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human

remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

(c) The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control number 1024–0144. A Federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

■ 3. Amend § 10.2 by revising paragraph (e) and adding paragraph (g)(5) to read as follows:

**§ 10.2 Definitions.**

* * * * *

(e)(1) What is *cultural affiliation*? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion.

(2) What does *culturally unidentifiable* mean? Culturally unidentifiable refers to human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process.

* * * * *

(g) * * *

(5) *Disposition* means the transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency under this part. This part establishes disposition procedures for several different situations:

(i) Custody of human remains, funerary objects, sacred objects, and objects of cultural patrimony excavated intentionally from, or discovered inadvertently on, Federal or tribal lands after November 16, 1990, is established under § 10.6.

(ii) Repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony in museum and Federal agency collections to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization is established under § 10.10.

(iii) Disposition of culturally unidentifiable human remains, with or without associated funerary objects, in museum or Federal agency collections is established under § 10.11.

■ 4. Amend § 10.9 by revising paragraphs (e)(2), (5), and (6) to read as follows:

**§ 10.9 Inventories.**

* * * * *

(e) * * *

(2) The notice of inventory completion must:

(i) Summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in claiming the inventoried items;

(ii) Identify each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition;

(iii) Describe the human remains or associated funerary objects that are clearly culturally affiliated with an Indian tribe or Native Hawaiian organization and identify the Indian tribe or Native Hawaiian organization;

(iv) Describe the human remains or associated funerary objects that are not clearly identifiable as culturally affiliated with an Indian tribe or Native Hawaiian organization, but that are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization given the totality of circumstances surrounding acquisition of the human remains or associated objects; and

(v) Describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that are subject to disposition under § 10.11.

* * * * *

(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice and inventory under paragraphs (e)(1) and (e)(2) of this section, a museum or Federal agency must supply additional available documentation.

(i) For purposes of this paragraph, "documentation" means a summary of existing museum or Federal agency records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographic origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.

(ii) Documentation supplied under this paragraph by a Federal agency or to a Federal agency is considered a public record except as exempted under relevant laws, such as the Freedom of Information Act (5 U.S.C. 552), Privacy Act (5 U.S.C. 552a), Archaeological Resources Protection Act (16 U.S.C. 470hh), National Historic Preservation Act (16 U.S.C. 470w–3), and any other legal authority exempting the information from public disclosure.

(iii) Neither a request for documentation nor any other provisions of this part may be construed as authorizing either:

(A) The initiation of new scientific studies of the human remains and associated funerary objects; or

(B) Other means of acquiring or preserving additional scientific information from the remains and objects.

(6) This paragraph applies when a the museum or Federal agency official determines that it has possession of or control over human remains or associated funerary objects that cannot be identified as affiliated with a lineal descendent, Indian tribe, or Native Hawaiian organization The museum or Federal agency must provide the Manager, National NAGPRA Program notice of its determination and a list of the culturally unidentifiable human remains and any associated funerary objects. The Manager, National NAGPRA Program must make this information available to members of the Review Committee. Culturally unidentifiable human remains, with or without associated funerary objects, are subject to disposition under § 10.11.

* * * * *

■ 5. Add § 10.11 to read as follows:

**§ 10.11 Disposition of culturally unidentifiable human remains.**

(a) *General.* This section implements section 8(c)(5) of the Act and applies to human remains previously determined to be Native American under § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

(b) *Consultation.* (1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:

(i) Within 90 days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or

(ii) If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.

(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:

(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed; and

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:

(i) A list of all Indian tribes and Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains and associated funerary objects;

(ii) A list of any Indian groups that are not federally-recognized and are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and

(iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.

(4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:

(i) The name and address of the Indian tribal official to act as representative in consultations related to particular human remains and associated funerary objects;

(ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;

(iii) Temporal and geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;

(iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or Indian groups that are not federally-recognized who should be included in the consultations; and

(v) A schedule and process for consultation.

(5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.

(6) If consultation results in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains and associated funerary objects must be completed as required by § 10.9(e) and § 10.10(b).

(c) *Disposition of culturally unidentifiable human remains and associated funerary objects.* (1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at § 10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or

(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.

(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:

(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or

(ii) Upon receiving a recommendation from the Secretary or authorized representative:

(A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or

(B) Reinter culturally unidentifiable human remains according to State or other law.

(3) The Secretary may make a recommendation under paragraph (c)(2)(ii) of this section only with proof from the museum or Federal agency that it has consulted with all Indian tribes and Native Hawaiian organizations listed in paragraph (c)(1) of this section and that none of them has objected to the proposed transfer of control.

(4) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.

(5) The exceptions listed at § 10.10(c) apply to the requirements in paragraph (c)(1) of this section.

(6) Any disposition of human remains excavated or removed from Indian lands as defined by the Archaeological Resources Protection Act (16 U.S.C. 470bb (4)) must also comply with the provisions of that statute and its implementing regulations.

(d) *Notification.* (1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) of this section may not occur until at least 30 days after publication of a notice of inventory completion in the **Federal Register** as described in § 10.9.

(2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:

(i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice's publication; and

(ii) Make the revised Review Committee inventory accessible to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.

(e) *Disputes.* Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects should do so through informal negotiations to achieve a fair resolution. The Review Committee may facilitate informal resolution of any disputes that are not resolved by good faith negotiation under § 10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

■ 6. Amend § 10.12 by revising paragraphs (b)(1)(ii), (iii), and (iv) and adding paragraph (b)(1)(ix) to read as follows:

**§ 10.12 Civil penalties.**

* * * * *

(b) * * *

(1) * * *

(ii) After November 16, 1993, or a date specified under § 10.13, whichever deadline is applicable, has not completed summaries as required by the Act; or

(iii) After November 16, 1995, or a date specified under § 10.13, or the date specified in an extension issued by the Secretary, whichever deadline is applicable, has not completed inventories as required by the Act; or

(iv) After May 16, 1996, or 6 months after completion of an inventory under an extension issued by the Secretary, or 6 months after the date specified for completion of an inventory under § 10.13, whichever deadline is applicable, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or

* * * * *

(ix) Upon receipt of a claim consistent with § 10.11(c)(1), refuses to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession.

* * * * *

■ 7. Amend § 10.15 by revising paragraph (c) to read as follows:

**§ 10.15 Limitations and remedies.**

* * * * *

(c) *Exhaustion of remedies.* (1) A person's administrative remedies are exhausted only when the person has filed a written claim with the responsible museum or Federal agency and the claim has been duly denied under this part. This paragraph applies to both:

(i) Human remains, funerary objects, sacred objects, or objects of cultural patrimony subject to Subpart B of this part; and

(ii) Federal lands subject to subpart C this part.

(2) A Federal agency's final denial of a repatriation request constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704). As used in this paragraph, "repatriation request" means the request of a lineal descendant, Indian tribe, or Native Hawaiian organization for repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under the Act and this part.

* * * * *

Dated: March 4, 2010.

**Thomas L. Strickland,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 2010–5283 Filed 3–12–10; 8:45 am]

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March 15, 2010

# Part IV

# Department of the Treasury

## Community Development Financial Institutions Fund

**12 CFR Part 1807**

**Capital Magnet Fund; Proposed Rule; Notice of Funds Availability; Notice**

## DEPARTMENT OF THE TREASURY

## Community Development Financial Institutions Fund

## 12 CFR Part 1807

**RIN 1559–AA00**

## Capital Magnet Fund

**AGENCY:** Community Development Financial Institutions Fund, Department of the Treasury.

**ACTION:** Notice of proposed rulemaking with request for public comment.

**SUMMARY:** The Department of the Treasury is issuing this proposed rulemaking, and requesting comment on this proposed rule, for the implementation of the Capital Magnet Fund (CMF), administered by the Community Development Financial Institutions Fund (CDFI Fund), U.S. Department of the Treasury. The mission of the CDFI Fund is to increase the capacity of financial institutions to provide capital, credit and financial services in underserved markets. Its long-term vision is an America in which all people have access to affordable credit, capital and financial services. The CMF was established through the Housing and Economic Recovery Act of 2008, which added section 1339 to the Federal Housing Enterprises Financial Safety and Soundness Act of 1992.

**DATES:** *Comment due date:* Comments on this proposed rulemaking must be received in the offices of the CDFI Fund on or before May 14, 2010.

**ADDRESSES:** All comments concerning this proposed rule should be addressed to the Capital Magnet Fund Manager, Community Development Financial Institutions Fund, Department of the Treasury, 601 13th Street, NW., Suite 200 South, Washington, DC 20005; by e-mail to *cdfihelp@cdfi.treas.gov*; or by facsimile at (202) 622–7754. Comments will be made available for public review on the CDFI Fund's Web site at *http://www.cdfifund.gov*.

Comments may also be submitted and viewed through the Federal e-Rulemaking Portal, *http://www.regulations.gov*.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey C. Berg, Legal Counsel, Community Development Financial Institutions Fund, at (202) 622–8662 (This is not a toll free number). Information regarding the CDFI Fund and the CMF may be downloaded from the CDFI Fund's Web site at *http://www.cdfifund.gov*.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The Capital Magnet Fund (CMF) was established through the Housing and Economic Recovery Act of 2008 (the Act), Public Law 110–289, section 1131, as a trust fund whose appropriation will be used to carry out a competitive grant program administered by the CDFI Fund. Through the CMF, the CDFI Fund is authorized to make financial assistance grants to certified Community Development Financial Institutions (CDFIs) and Nonprofit Organizations (if one of their principal purposes is the Development or management of Affordable Housing). CMF grants must be used to attract financing for and increase investment in: (i) The Development, Preservation, Rehabilitation, and Purchase of Affordable Housing for primarily Extremely Low-, Very Low-, and Low-Income Families; and (ii) Economic Development Activities or Community Service Facilities (such as day care centers, workforce development centers, and health care clinics) which In Conjunction With Affordable Housing Activities will implement a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area. This proposed rulemaking creates the requirements and parameters for CMF implementation and administration including, among others, application eligibility, application review, award selection, Assistance Agreements, eligible uses of award dollars and related funds, Awardee reporting, and compliance monitoring.

On March 6, 2009, the CDFI Fund published in the **Federal Register** a Request for Public Comment, 74 FR 9869, seeking responses to specific questions regarding CMF design, implementation, and administration. The CDFI Fund seeks public comment on this entire proposed rule and the specific questions below. All capitalized terms are defined in the definition section of the proposed rule, as set forth in 12 CFR 1807.104.

1. This proposed rule currently defines Economic Development Activities as 'the Development, Preservation, Rehabilitation, or Purchase of Community Service Facilities and/or other physical structures in which neighborhood-based businesses operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area'. Is this an appropriate definition? Should it be expanded to include working capital loans to businesses? Should refinancing of existing loans be a permissible activity?

2. Should physical proximity be necessary to meet the requirement that Economic Development Activities or Community Service Facilities financed In Conjunction with Affordable Housing Activities implement a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area? If physical proximity is necessary, what is the best measure of being "physically proximate" with respect to projects undertaken in urban areas, and with respect to projects undertaken in rural areas?

3. The eligibility requirements for Applicants are set forth in 12 CFR 1807.200. Is an eligibility requirement that 33 percent of the Applicant's resources (measured by staff time and/or budget) be dedicated to Affordable Housing appropriate (12 CFR 1807.200(a)(2)(iii))? If not, what is the appropriate percentage of activities, and how should this be measured?

4. The proposed rule in 12 CFR 1807.302 sets forth a number of restrictions on use of CMF award funds. Are there suggested restrictions that will prevent the CMF from financing predatory lending practices that should be included in this section? Is the use restriction that no more than 30% of an Awardee's CMF award can be used for Economic Development Activities and Community Service Facilities appropriate (12 CFR 1807.302(d))? If not, what is the appropriate percentage?

5. Is the Affordable Housing qualification that requires a minimum of 20 percent of units in multi-family rental housing projects financed with a CMF award be occupied by Low-Income, Very Low-Income, or Extremely Low-Income Families appropriate (12 CFR 1807.401)? If not, what is the appropriate percentage?

6. As set forth in 12 CFR 1807.400 *et seq.,* Affordable Housing is subject to a 10-year affordability requirement that begins at Project Completion? Is this 10-year affordability requirement appropriate? How should this be measured with respect to funds that are deployed, returned to the Awardee, and reinvested during the life of the Assistant Agreement (e.g., in the case of CMF awards that are used to establish a revolving loan fund)?

7. The proposed rule sets forth record data collection and record retention requirements in 12 CFR 1807.902. What documentation should Awardees be required to retain to demonstrate compliance with (i) the affordability qualification requirements in 12 CFR 1807.400 *et seq.* and (ii) the leveraging, commitment and Project Completion

requirements in 12 CFR 1807.500 *et seq.?*

Simultaneously published with this proposed rule is the Notice of Funds Availability (NOFA) inviting applications for the FY 2010 funding round of the CMF.

**II. Responses to the Request for Public Comment (March 6, 2009)**

The CDFI Fund received comments from 22 organizations in response to the Request for Public Comment (RPC) that was published in the **Federal Register** on March 6, 2009 (74 FR 9869). The following discussion summarizes the comments and the CDFI Fund's responses, many of which have been incorporated in the proposed rule. Discussion is generally in the order in which the questions were posed in the RPC.

*A. Eligible Use of Funds*

(1) What definition should the CDFI Fund use to assess what constitutes "affordable housing?" What affordability thresholds or restrictions (if any) should the CDFI Fund require, and for how long a period should these be in place?

The majority of the commentators supported the imposition of affordability thresholds and restrictions compatible with the Low Income Housing Tax Credit (LIHTC) Program, authorized under the Tax Reform Act of 1986, I.R.C. section 42, and the HOME Investment Partnership Program (HOME Program), authorized under title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C. 12701 *et seq.,* administered by the U.S. Department of Housing and Urban Development (HUD). Some commentators suggested that the CDFI Fund allow a percentage of CMF funds to be used under a modified version of these affordability thresholds in order to support workforce housing for moderate-income families. Commentators suggested that the affordability requirements should be imposed for a duration ranging from 10 to 50 years.

*CDFI Fund response:* The income requirements for the CMF are set forth in the Definitions section of the proposed rule at 12 CFR 1807.104(v), (hh), and (ddd); the CMF affordability requirements (12 CFR 1807.400 *et seq.*) are based generally on the affordability qualifications for rental and homeownership properties under the HOME Program regulations set forth at 24 CFR 92.252–92.255. The affordability requirements for CMF-funded housing units apply without regard to the term of any loan or mortgage or the transfer of ownership; they must be imposed by deed restrictions, covenants running with the land, or other recordable mechanisms approved, in writing and in advance, by the CDFI Fund (12 CFR 1807.401(d) and 1807.402(a)(5)). CMF-funded housing units must meet the affordability requirements for a period of not less than 10 years, beginning after completion of project construction and at initial occupancy (12 CFR 1807.401(d) and 1807.402).

(2) Section 1131 of the Act, referencing section 1339(c) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, requires that CMF grants must be used to attract private capital for and increase investment in "the development, preservation, rehabilitation, or purchase of affordable housing for primarily extremely low-, very low-, and low-income families." How should "primarily" be defined? What are the appropriate minimum levels of targeting that each project should be required to achieve?

Several commentators proposed that "primarily" should mean: (i) At least 50 percent of units in a housing project that is funded, in whole or in part, with CMF funding, or (ii) 50 percent of costs directly traced to CMF funding in a given project. Several commentators suggested deeper income targeting.

*CDFI Fund Response:* The proposed rule adopts the comment that "primarily" means, with respect to Affordable Housing Activities financed with CMF funding, that greater than 50 percent of the Eligible Project Costs must be attributable to the support of housing units that meet the affordability standards (12 CFR 1807.400).

(3) How should "preservation" be defined, as such term is used in section 1131 of the Act, referencing section 1339(c)(1) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992? Should it include the re-financing of single- or multi-family mortgages as eligible activities?

Many commentators suggested broad and inclusive definitions of these terms. Commentators suggested definitions of preservation that included restoration of deteriorated properties, preventing troubled properties from default, refinancing of single-family and multi-family mortgages, and preservation of expiring-use properties with restrictions on tenant income and affordability under other federal programs that are coming to an end. Some commentators proposed using existing LIHTC or HUD definitions of preservation.

*CDFI Fund Response:* The CDFI Fund has adopted the definition of Preservation that is set forth in the proposed rule at 12 CFR 1807.104(rr).

(4) How should "rehabilitation" be defined, as such term is used in section 1131 of the Act, referencing section 1339(c)(1) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992?

Commentators suggested that "rehabilitation" be broadly defined to include promoting habitability, energy efficiency, and building code compliance of housing units. Commentators also suggested a minimum rehabilitation cost of approximately $6,000 per unit.

*CDFI Fund Response:* The CDFI Fund has adopted the definition of Rehabilitation that is set forth in the proposed rule at 12 CFR 1807.104(uu).

(5) CMF grants may be used to finance economic development activities or community service facilities, such as daycare centers, workforce development centers, and health care clinics which, in conjunction with affordable housing activities, implement a concerted strategy to stabilize or revitalize a low-income area or underserved rural area.

(a) What restrictions (if any) should the CDFI Fund place on the percentage of award dollars that an awardee may apply towards economic development activities and/or community service facilities?

Many commentators proposed that the CDFI Fund place no restrictions on the amount of CMF funding provided for economic development activities and/or community service facilities in conjunction with affordable housing activities. Others suggested that CMF grantees be allowed to apply 25 to 30 percent of their award to this use.

*CDFI Fund Response:* To ensure that the limited CMF funding is most efficiently targeted to Affordable Housing Activities, an Awardee may use no more than 30 percent of CMF funding for Economic Development Activities and/or Community Service Facilities, as set forth in the proposed rule, 12 CFR 1807.302(d).

(b) Should the CDFI Fund support economic development activities/community service facilities in conjunction with affordable housing activities financed by sources other than CMF grants or solely in conjunction with CMF grants?

Many commentators proposed that economic development activities and/or community service facilities should be allowed to be undertaken in conjunction with affordable housing activities that are financed with or without CMF funding.

*CDFI Fund Response:* The proposed rule adopts this suggestion at 12 CFR 1807.300.

(c) How should the CDFI Fund define "in conjunction with"?

Several commentators suggested that "in conjunction with" should be defined as including activities that are on the same site as or adjacent to the site of affordable housing. Others suggested a broader definition, to allow for proximate activities that are not physically adjacent to the affordable housing activities.

*CDFI Fund Response:* The proposed rule defines In Conjunction With to require that Economic Development Activities and/or Community Service Facilities must be physically proximate to Affordable Housing, and reasonably available to residents of Affordable Housing (12 CFR 1807.104(aa)).

(d) How should the CDFI Fund define "concerted strategy"?

Most commentators suggested that applicants identify some type of formal planning document to illustrate the connection between the affordable housing and proposed economic development activities or community service facilities, such as a local government's comprehensive housing development plan or a HUD-approved HOPE VI Program redevelopment plan, pursuant to section 803 of the National Affordable Housing Act, 42 U.S.C. 8012.

*CDFI Fund Response:* The proposed rule definition of Concerted Strategy (12 CFR 1807.104(p)) adopts this suggestion, requiring that, if the Economic Development Activity or Community Service Facility is not located on the same premises or immediately adjacent to the Affordable Housing, the Economic Development Activities/Community Service Facilities and the Affordable Housing must be included together in a planning document describing the community revitalization strategy for the area. Such documents may include, but are not limited to, a comprehensive, consolidated, or redevelopment plan, or some other local or regional planning document adopted or approved by the jurisdiction.

*B. Eligible Grantees*

Section 1131 of the Act, referencing section 1339(e) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 states that a CMF grant may only be made to: (i) A CDFI that has been certified by the CDFI Fund; or (ii) a nonprofit organization having as one of its principal purposes the development or management of affordable housing. How should the CDFI Fund define "principal purpose," with respect to determining whether one of an entity's principal purposes is the development or management of affordable housing?

For purposes of defining "nonprofit organization" in section 1339(e) of the Act, several commentators suggested automatic eligibility for certain types of organizations, such as community housing development organizations (CHDOs) as defined by HUD under the HOME Program, 24 CFR 92.2, and rural housing developers under the U.S. Department of Agriculture (USDA) section 523 Program, 7 CFR part 3551. For purposes of defining "principal purpose," a number of commentators proposed that 20 percent of the applicant's financial resources should be dedicated to affordable housing. Several commentators suggested a mission test, based on the applicant's bylaws or recognition by the Internal Revenue Service (IRS) that the applicant meets a tax-exempt purpose under I.R.C. section 501(c)(3); others recommended a track record test. Some suggested that a track record test could prevent desired activities in traditionally underserved areas.

*CDFI Fund Response:* For purposes of CMF applicant eligibility, the proposed rule at 12 CFR 1807.200(a) states that affordable housing development and/or management requirements will be set forth in the applicable NOFA that is published for each CMF funding round, and will comprise track record and resource dedication criteria.

*C. Applications*

(1) Are there other competitive award programs, federal or otherwise, upon which the CDFI Fund should model the CMF's application scoring and review protocols?

A few commentators suggested model programs such as the CDFI Program and HUD's Community Development Block Grant (CDBG) Program, authorized under the Housing and Community Development Act of 1974, 42 U.S.C. 5301 *et seq.*

*CDFI Fund Response:* The CMF application evaluation and selection protocols described in the proposed rule (12 CFR 1807.800 *et seq.*), are generally modeled on existing CDFI Fund award programs.

(2) Should the CDFI Fund divide applicants among different pools so that they compete only among organizations that have the same capacity level?

Most commentators recommended that CMF applications should not be divided into different pools based upon applicant capacity levels.

*CDFI Fund Response:* The proposed rule adopts this recommendation (12 CFR 1807.800 *et seq.*), thereby maintaining a single applicant pool in order to ensure that the highest qualified organizations receive funding and to ensure the efficiency of the application process.

(3) Should the CDFI Fund accept applications on an annual basis or more often *(e.g.,* twice a year)?

Commentators recommended an annual CMF application round.

*CDFI Fund Response:* Given the anticipated cycle of annual appropriation of CMF funding, the CDFI Fund will implement an annual funding round, subject to funding availability. Application requirements will be set forth in the NOFA that will be published for each funding round.

(4) Section 1131 of the Act, referencing section 1339(j)(2)(D)(ii) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires "a prioritization of funding based upon: (I) The ability to use such funds to generate additional investments; (II) affordable housing need (taking into account the distinct needs of different regions of the country); and (III) ability to obligate amounts and undertake activities so funded in a timely manner." How should the CDFI Fund quantify each of the three priority factors? For each of the three factors, what should applicants be required to present and/or address as part of their application materials? Should this prioritization be incorporated into the standard scoring of the application *(e.g.,* by weighting certain questions more heavily) or should there be separate "priority points" specific to each of the three criteria?

Many commentators provided specific suggestions on priority points, including deeper affordability targeting, targeting disaster areas, projects with guaranteed financing, workforce housing, rehabilitation or repair projects, projects in strong job areas or near good schools, manufactured housing, projects involving partnerships with state and local agencies, and rural projects, among others.

*CDFI Fund Response:* For the three priority factors specified in the Act, the CDFI Fund will not create separate priority points to be assigned for each. Rather, specific questions will be asked in the application to illustrate the applicant's strengths in each of the three areas, which will then be given weight in the application review process.

*D. Geographic Diversity*

Section 1131 of the Act, referencing section 1339(h)(2)(A) of the Federal Housing Enterprises Financial Safety

and Soundness Act of 1992 states: "The Secretary of the Treasury shall seek to fund activities in geographically diverse areas of economic distress, including metropolitan and undeserved rural areas in every State." Section 1339(h)(2)(B) provides a list of characteristics that objective criteria of economic distress may include:

(1) What objective criteria of economic distress should the CDFI Fund adopt based upon the language in section 1339(h)(2)(B)?

Many commentators proposed both place- and person-based indicators to allow for funding to projects that seek to de-concentrate poverty. Some commentators suggested utilizing existing CDFI Fund indicators.

*CDFI Fund Response:* In the CMF funding application, the CDFI Fund will set forth distress indicators that are the same or similar to those used in other CDFI Fund programs: Low-Income communities (less than 80 percent of area median income); high-poverty communities (poverty rate of 20 percent or greater); high unemployment rate (1.5 times the national average). In addition, the CMF application design will be sensitive to varying housing need in different communities, such as rural areas, high cost areas, and areas of revitalization or housing displacement by allowing for the use of readily available housing-specific measures such as housing vacancy rates, proportion of sub-standard or demolished housing, concentration of foreclosures, or changes in property values. As suggested by commentators, in measuring distressed communities, the CDFI Fund will allow consideration of the level of need in the population served.

(2) How should the CDFI Fund define "rural areas"? For example, is a rural area any census tract that is not located in a metropolitan statistical area (MSA)?

For purposes of defining rural, several commentators suggested using the USDA Rural Housing definition set forth in Section 520 of the Housing Act of 1949, 42 U.S.C. 1441.

*CDFI Fund Response:* The proposed rule adopts a definition of Non-Metropolitan Area, which includes rural areas, at 12 CFR 1807.104(mm) and a definition of Underserved Rural Area at 12 CFR 1807.104(ccc).

(3) Should the CDFI Fund ensure that, in any given award round, there is a CMF-funded project located in every state? Should the CDFI Fund "skip over" otherwise higher rated applicants to ensure that this geographic diversity goal is met? Section 1131 of the Act, referencing section 1339(j)(2)(D)(i) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 requires that "funds be fairly distributed to urban, suburban, and rural areas." How can the CDFI Fund best achieve this outcome?

Generally, commentators did not support skipping highly rated applicants to achieve geographic diversity. Some commentators suggested giving preferences to areas or even states with particularly high levels of economic distress.

*CDFI Fund Response:* As suggested by commentators, due in part to funding limitations and the unforeseeability of the applicant pool, the CDFI Fund will not likely be able to ensure that there is a CMF-funded project in every state. However, the CMF application will require applicants with national service areas to indicate the states in which they are most likely to provide Affordable Housing financing with CMF funding. The CDFI Fund reserves the right to adjust award decisions to ensure that the goal of geographic diversity is met.

Regarding urban, suburban, and rural distribution of awards, the CDFI Fund will incorporate an approach similar to the New Markets Tax Credit (NMTC) Program, requiring CMF applicants to indicate minimum and maximum commitments to invest in rural areas. Based on this information, the CDFI Fund will attempt to ensure that at least 20 percent of CMF funding is invested in rural communities.

*E. Leverage of Funds*

(1) Section 1131 of the Act, referencing section 1339(h)(3) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 states: "Each grant from the Capital Magnet Fund awarded under this section shall be reasonably expected to result in eligible housing, or economic and community development projects that support or sustain an affordable housing project funded by a grant under this section whose aggregate costs total at least 10 times the grant amount." What documentation should be required to demonstrate a leveraging ratio of 10:1 of "total aggregate costs"?

Most commentators suggested that the leveraging requirement is a reporting requirement, not an application or award requirement. As such, they proposed that the application should not require any documentation, but should instead utilize projections. One commentator proposed requiring conditional letters of commitment to help ensure that leveraging will be met.

*CDFI Fund Response:* In the CMF application, the CDFI Fund will require projections of leveraging, but will not require documentation. Once CMF funds have been committed to projects, information will be self-reported by the awardee through a standard system developed and managed by the CDFI Fund. Awardees will be required to retain appropriate documentation, such as audited financial statements, wire transfer documents, pro-formas, etc., and will be subject to periodic CDFI Fund audits to support their reports under the proposed rule, 12 CFR 1807.902.

(2) How should this 10:1 standard be measured (*e.g.,* on a project-by-project basis for each project funded, or on a collective basis for all projects financed)?

Many commentators proposed that leverage should be measured on a portfolio or collective basis; one commentator proposed that the requirement should be measured for each project.

*CDFI Fund Response:* The CDFI Fund notes that the statutory requirement is that CMF funds shall be reasonably expected to result in eligible housing or economic and community development projects that support or sustain an affordable housing project funded by a CMF grant whose aggregate costs total at least 10 times the CMF grant amount. The proposed rule adopts a 10 multiplier standard or some other standard set forth in an Awardee's Assistance Agreement that must be measured as Leveraged Costs on a collective basis for all projects financed (12 CFR part 1807.500).

(3) Is there a timing consideration as to when the CDFI Fund should release CMF award dollars (*e.g.,* not until all other sources of financing have been secured)?

Most commentators proposed that, since the CMF funding will constitute a small portion of overall project costs, the funding should be released upon closing of the assistance agreement.

*CDFI Fund Response:* The CDFI Fund has adopted this suggestion at 12 CFR 1807.901, with CMF funding released as a lump sum payment, or in another manner determined appropriate by the CDFI Fund, after the Assistance Agreement is executed.

*F. Commitment for Use Deadline*

Section 1131 of the Act, referencing section 1339(h)(4) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 states: "Amounts made available for grants under this section shall be committed for use within 2 years of the date of such allocation." How should the term "committed" be defined, and how it can

be verified, for the purposes of this requirement?

Several commentators suggested using HUD's HOME Program regulations, 24 CFR 92.2, to define the term "committed." Others suggested that a legally binding agreement should constitute commitment for use.

*CDFI Fund Response:* As described in the proposed rule at 12 CFR part 1807, subpart C (Use of Funds/Eligible Activities), the CDFI Fund will require all Awardees to allocate CMF funding for a specific eligible purpose, and to be able to demonstrate that these funds are so designated. Similar to HUD's HOME Program regulations at 24 CFR 92.2, CMF funds for Affordable Housing Activities, Economic Development Activities or Community Service Facilities must be Committed for use within two years of the effective date of an Awardee's Assistance Agreement. The proposed rule adopts a definition of Committed as set forth in 12 CFR 1807.104(m).

*G. Prohibited Uses*

Section 1131 of the Act, referencing section 1339(h)(5)–(6)) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 lists prohibited uses with respect to grants awarded under this program. Are there any additional prohibitions or limitations that should be applied?

Commentators did not propose additional specific prohibitions of CMF funding. Some commentators suggested that the CDFI Fund place a limitation of 10 to 15 percent on the amount of a CMF award that could be used for the awardee's operation costs.

*CDFI Fund Response:* The proposed rule states that the applicable NOFA will set forth the limitation on the amount of a CMF award that can be used for Operations (12 CFR 1807.302(b)) as well as other limitations, including a 30 percent limitation on use of an Awardee's CMF funding for Economic Development Activities and Community Service Facilities (12 CFR 1807.302(d)); and a requirement that 100 percent of Eligible Project Costs must be attributable to housing units that meet the affordability qualifications set forth in 12 CFR 1807.400 for families whose annual income does not exceed 120 percent of the median income for the area, as determined by HUD.

*H. Accountability of Recipients and Grantees*

(1) What requirements should be imposed to implement Section 1131 of the Act, referencing section 1339(h)(8)) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 which provides for accountability standards with respect to tracking the use of award dollars, as well as remedies in the event that an awardee misuses funds?

Commentators proposed various forms of documentation to illustrate completion of projects and satisfaction of affordability requirements and restrictions, including certificates of occupancy, closing documentation, and deeds and covenants.

*CDFI Fund Response:* The CDFI Fund has adopted a definition of Project Completion at 12 CFR 1807.104(ss) that applies when (i) All necessary title transfer requirements and construction work have been performed; (ii) the project complies with specified property standards; and (iii) the final drawdown has been disbursed for the project. Awardees will be required to report their compliance with CMF affordability requirements and to maintain adequate records to demonstrate compliance to the CDFI Fund during any audits that are undertaken by the CDFI Fund (12 CFR 1807.902).

(2) What specific industry standards for impact measures (units produced, percentage of units affordable to low-income persons; time to complete; *etc.*) should the CDFI Fund adopt for evaluating and monitoring projects funded under the CMF?

Commentators proposed various standards for impact measurements, including using the CDFI Fund's existing Community Investment Impact System (CIIS) and measures applied under USDA's Guaranteed Rural Rental Housing Program, 42 U.S.C. 1490p–2, as well as individual measurements such as affordable units produced, energy efficiency, cost per unit, length of time for development, project location, and others.

*CDFI Fund Response:* CMF awardees will be required to report on the impacts of their use of CMF funds and any Leverage Costs as set forth in 12 CFR 1807.902(e). The specific impact measures will be incorporated into the Assistance Agreement as described at 12 CFR 1807.900, and may include metrics such as the number of Affordable Housing units produced (including how many are affordable to Low-, Very Low- and Extremely Low-Income families), the ratio of leverage produced by the CMF award, and the deployment rate of CMF awards, among other measures.

## III. Rulemaking Analysis

*Executive Order (E.O.) 12866*

It has been determined that this proposed rule is not a significant regulatory action under Executive Order 12866. Accordingly, a regulatory impact assessment is not required.

*Regulatory Flexibility Act*

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612. The undersigned has determined and certified by signature of this document that this proposed rule will not have a significant economic impact on a substantial number of small entities. The CDFI Fund anticipates that a large number of applicants under this proposed rule will be certified CDFIs that have received funding under the CDFI Fund's programs or other similar federal government programs. Thus, awardees will be familiar with the types of reporting requirements that the CMF will require and most will have the necessary processes in place to participate in the CMF, regardless of their size. Many, if not all, applicants will be reporting on information and activities for which they report for other federal or state programs. Thus, this proposed rule will not impose a significant increase in reporting, recordkeeping, or other compliance burdens on a substantial number of small entities that would have a negative impact on either small or large entities in an economic way.

*Paperwork Reduction Act*

The collection of information contained in this proposed rule has been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 and assigned OMB Control Number 1559–0036. 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 control number assigned by OMB.

*National Environmental Policy Act*

This proposed rule has been reviewed in accordance with 12 CFR part 1815. The CDFI Fund's Environmental Regulations under the National Environmental Protection Act of 1969 (NEPA) require that the CDFI Fund adequately consider the cumulative impact proposed activities have upon the human environment. It is the determination of the CDFI Fund that the proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with the NEPA and the CDFI Fund Environmental Quality Regulations, 12 CFR part 1815, neither an Environmental Assessment nor an

Environmental Impact Statement is required.

*Administrative Procedure Act*

Because this proposed rule relates to loans and grants, notice and public procedure and a delayed effective date are not required pursuant to the Administrative Procedure Act, 5 U.S.C. 553(a)(2).

*Catalogue of Federal Domestic Assistance Number*

Capital Magnet Fund—21.011.

**List of Subjects in 12 CFR Part 1807**

Community development, Grant programs—housing and community development, Reporting and record keeping requirements.

For the reasons set forth in the preamble, 12 CFR chapter XVIII is proposed to be amended by adding part 1807 to read as follows:

## PART 1807—CAPITAL MAGNET FUND

**Subpart A—General Provisions**



**Subpart B—Eligibility**



**Subpart C—Use of Funds/Eligible Activities**



**Subpart D—Qualification as Affordable Housing**



**Subpart E—Leveraging and Commitment Requirement.**



**Subpart F—Tracking Requirements**



**Subpart G—Applications for Assistance**



**Subpart H—Evaluation and Selection of Applications**



**Subpart I—Terms and Conditions of Assistance**



**Authority:** Housing and Economic Recovery Act of 2008, Pub. L. 110–289, section 1131

### Subpart A—General Provisions

**§ 1807.100 Purpose.**

The purpose of the Capital Magnet Fund (CMF) is to attract private capital for and increase investment in Affordable Housing Activities and related Economic Development Activities and Community Service Facilities.

**§ 1807.101 Summary.**

(a) Through the CMF, the CDFI Fund will competitively award grants to CDFIs and qualified Nonprofit Organizations to leverage dollars for:

(1) The Development, Preservation, Rehabilitation or Purchase of Affordable Housing primarily for Low-Income Families; and

(2) Financing Economic Development Activities or Community Service Facilities.

(b) The CDFI Fund will select Awardees to receive financial assistance grants through a merit-based, competitive application process. Financial assistance grants that are awarded through the CMF may only be used for eligible uses set forth in Subpart C. Each Awardee will enter into an Assistance Agreement which will require it to leverage the CMF grant amount and abide by other terms and conditions pertinent to any assistance received under this part.

**§ 1807.102 Relationship to other CDFI Fund programs.**

A Certified CDFI will automatically be deemed to meet the eligible entity requirements, provided that it has been in business as an operating entity for a period of at least three years prior to the application deadline.

**§ 1807.103 Awardee not instrumentality.**

No Awardee shall be deemed to be an agency, department, or instrumentality of the United States.

**§ 1807.104 Definitions.**

For the purpose of this part:

(a) *Act* means the Housing and Economic Recovery Act of 2008, as amended, Pub. L. No. 110–289, section 1131;

(b) *Affiliate* means, any entity that Controls, is Controlled by, or is under common Control with, an entity;

(c) *Affordable Housing* means rental or for-sale single-family or multi-family housing that meets the requirements set forth in Subpart D of this part;

(d) *Affordable Housing Activities* means the Development, Preservation, Rehabilitation, or Purchase of Affordable Housing;

(e) *Affordable Housing Fund* means a loan fund, managed by the Awardee, whose capital is used to finance Affordable Housing Activities;

(f) *Appropriate Federal Banking Agency* has the same meaning as in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q), and includes, with respect to Insured Credit Unions, the National Credit Union Administration;

(g) *Applicant* means any entity submitting an application for assistance under this part;

(h) *Appropriate State Agency* means an agency or instrumentality of a State that regulates and/or insures the member accounts of a State-Insured Credit Union;

(i) *Assistance Agreement* means a formal, written agreement between the CDFI Fund and an Awardee which specifies the terms and conditions of assistance under this part;

(j) *Awardee* means an Applicant selected by the CDFI Fund to receive assistance pursuant to this part;

(k) *Capital Magnet Fund (or CMF)* means the program authorized by section 1131 of the Act, Public Law No. 110–289, and implemented under this part;

(l) *Certified Community Development Financial Institution (or Certified CDFI*) means an entity that has been determined by the CDFI Fund to meet the eligibility requirements set forth in 12 CFR Part 1805.201;

(m) *Committed* means that the Awardee is able to demonstrate, in written form and substance that is acceptable to the CDFI Fund, a Commitment for Use pursuant to § 1807.501;

(n) *Community Development Financial Institutions Fund (or CDFI Fund*) means the Community Development Financial Institutions Fund, an office of the U.S. Department of Treasury, established under the Community Development Banking and Financial Institutions Act of 1994, as amended, 12 U.S.C. 4701 *et seq.;*

(o) *Community Service Facility* means the physical structure in which community-based programs (including,

but not limited to, health care, childcare, educational, cultural, and/or social services) operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

(p) *Concerted Strategy* means a formal planning document that evidences the connection between Affordable Housing Activities and Economic Development Activities or Community Service Facilities. Such documents include, but are not limited to, a comprehensive, consolidated, or redevelopment plan, or some other local or regional planning document adopted or approved by the jurisdiction;

(q) *Control* means:

(1) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of Voting Securities of any company, directly or indirectly or acting through one or more other persons;

(2) Control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any company; or

(3) The power to exercise, directly or indirectly, a controlling influence over the management, credit or investment decisions, or policies of any company;

(r) *Depository Institution Holding Company* means a bank holding company or a savings and loan holding company as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(w)(1);

(s) *Development* means land acquisition, demolition of existing facilities, and construction of new facilities, which may include site improvement, utilities development and rehabilitation of utilities, necessary infrastructure, utility services, conversion, and other related activities;

(t) *Economic Development Activity* means the Development, Preservation, Rehabilitation, or Purchase of Community Service Facilities and/or other physical structures in which neighborhood-based businesses operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

(u) *Eligible Project Costs* means Leverage Costs plus those costs funded directly by a CMF award, exclusive of Operations;

(v) *Extremely Low-Income* means

(1) In the case of owner-occupied housing units, income not in excess of 30 percent of the area median income and

(2) In the case of rental housing units, income not in excess of 30 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD;

(w) *HOME Program* means the HOME Investment Partnership Program set forth in the HOME Investment Partnerships Act under title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C. 12701 *et seq.;*

(x) *Homeownership* means ownership in fee simple title or a 99-year leasehold interest in a one- to four-unit dwelling or in a condominium unit, or equivalent form of ownership (which shall include cooperative housing and mutual housing project). For purposes of housing located on trust or restricted Indian lands, homeownership includes leases of 50 years. The ownership interest may be subject only to the following:

(1) Restrictions on resale permitted under the Assistance Agreement;

(2) Mortgages, deeds of trust, or other liens or instruments securing debt on the property; or

(3) Any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest.

(y) *Housing* means single- and multi-family residential units, including, but not limited to, manufactured housing and manufactured housing lots, permanent housing for disabled and/or homeless persons, transitional housing, single-room occupancy housing, and group homes. Housing also includes elder cottage housing opportunity (ECHO), 24 CFR 92.258;

(z) *HUD* means the Department of Housing and Urban Development established under the Department of Housing and Urban Development Act of 1965, 42 U.S.C. 3532–3537;

(aa) *In Conjunction With* means physically proximate to Affordable Housing and reasonably available to residents of Affordable Housing. For a Metropolitan Area, In Conjunction With means located within the same census tract. For a Non-Metropolitan Area, In Conjunction With means located within the same county, township, or village;

(bb) *Insured CDFI* means a Certified CDFI that is an Insured Depository Institution or an Insured Credit Union;

(cc) *Insured Credit Union* means any credit union, the member accounts of which are insured by the National Credit Union Share Insurance Fund by the National Credit Union Administration pursuant to authority granted in 12 U.S.C. 1783 *et seq.;*

(dd) *Insured Depository Institution* means any bank or thrift, the deposits of which are insured by the Federal Deposit Insurance Corporation, 12 U.S.C. 1813(c)(2);

(ee) *Leveraged Costs* means those costs as described in 12 CFR 1807.500;

(ff) *Loan Guarantee* means an agreement to indemnify the holder of a loan all or a portion of the unpaid principal balance in case of default by the borrower;

(gg) *Loan Loss Reserves* means funds that the Applicant or Awardee will set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable, or for related purposes that the CDFI Fund deems appropriate;

(hh) *Low-Income* means

(1) In the case of owner-occupied housing units, income not in excess of 80 percent of area median income and

(2) In the case of rental housing units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families, as determined by HUD;

(ii) *Low-Income Area (LIA*) means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located. With respect to a census tract or block numbering area located within a Metropolitan Area, the median family income shall be at or below 80 percent of the Metropolitan Area median family income or the national Metropolitan Area median family income, whichever is greater. In the case of a census tract or block numbering area located outside of a Metropolitan Area, the median family income shall be at or below 80 percent of the statewide Non-Metropolitan Area median family income or the national Non-Metropolitan Area median family income, whichever is greater;

(jj) *Low-Income Families* means those households that reside within the boundaries of the United Sates (which shall encompass any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands) meeting the criteria as set forth in § 1807.104(hh);

(kk) *Low Income Housing Tax Credit Program or LIHTC Program* means the program as set forth under Title I of the U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.;*

(ll) *Metropolitan Area* means an area designated as such by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e) and 31 U.S.C. 1104(d)

and Executive Order 10253 (3 CFR, 1949–1953 Comp., p. 758), as amended;

(mm) *Non-Metropolitan Area* means a county or adjacent counties not contained within either a Consolidated Metropolitan Statistical Area (CMSA) or a Primary Metropolitan Statistical Area (PMSA), as such areas are defined in OMB Bulletin No. 99–04, with respect to the most recent decennial census. Non-Metropolitan Counties can be identified in the CDFI Fund's mapping system (CIMS), and are also listed on the CDFI Fund's Web site;

(nn) *Nonprofit Organization* means any corporation, trust, association, cooperative, or other organization that is

(1) Designated as a nonprofit or not-for-profit entity under the laws of the organization's State of formation and

(2) Exempt from Federal income taxation pursuant to the Internal Revenue Code of 1986;

(oo) *Non-Regulated CDFI* means any entity meeting the eligibility requirements described in 12 CFR 1805.200 which is not a Depository Institution Holding Company, Insured Depository Institution, or Insured Credit Union;

(pp) *Operations* means all allowable expenses as defined by Office of Management and Budget (OMB) Circular A–122, "Cost Principles For Non-Profit Organizations," and OMB Circular A–87, "Cost Principles for State, Local, and Indian Tribal Governments," incurred by the Awardee in the administration, operation, and implementation of a CMF award;

(qq) *Participating Jurisdiction* means a jurisdiction designated by HUD, as a participating jurisdiction under the HOME Program in accordance with the requirements of 24 CFR 92.105;

(rr) *Preservation* means:

(1) Activities to refinance, with or without Rehabilitation, single-family or multi-family rental property mortgages that, at the time of refinancing, are subject to affordability and use restrictions under State or federal affordable housing programs, including but not limited to, the HOME Program, the LIHTC Program, the Section 8 Tenant-Based Assistance and the Section 8 Rental Voucher programs (24 CFR part 982), or the Section 515 Rural Rental Housing program (7 CFR Part 3560), hereinafter referred to as "similar State or federal affordable housing programs," where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties;

(2) Activities to refinance and acquire single-family or multi-family properties that, at the time of refinancing or acquisition, were subject to affordability and use restrictions under similar State or Federal affordable housing programs, by the former tenants of such properties, where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties; or

(3) Activities to refinance the mortgages of single-family, owner-occupied housing that at the time of refinancing are subject to affordability and use restrictions under similar State or Federal affordable housing programs, where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties;

(ss) *Project Completion* means that all of the requirements set forth at 12 CFR 1807.503 for a project supported by a CMF award have been met;

(tt) *Purchase* means to acquire ownership in fee simple title or a 99-year leasehold interest in a one-to-four unit dwelling or in a condominium unit, through an exchange of money;

(uu) *Rehabilitation* means any repairs and/or capital improvements that contribute to the long-term preservation, current building code compliance, habitability, sustainability, energy efficiency of affordable housing;

(vv) *Revolving Loan Fund* means a pool of funds managed by the Applicant or Awardee wherein repayments on Affordable Housing Activities loans, Economic Development Activities loans and/or Community Services Facilities loans are used to finance additional loans;

(ww) *Risk-Sharing Loan* means loans for Affordable Housing Activities and/or Economic Development Activities in which the risk of borrower default is shared by the Applicant or Awardee with other lenders (e.g., participation loans);

(xx) *Service Area* means the geographic area in which the Applicant proposes to use CMF funding, and the geographic area approved by the CDFI Fund in which the Awardee shall use CMF funding as set forth in its Assistance Agreement;

(yy) *Single-family housing* means a one- to four-family residence, condominium unit, cooperative unit, combination of manufactured housing and lot, or manufactured housing lot;

(zz) *State* means the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Island, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory of the United States;

(aaa) *State-Insured Credit Union* means any credit union that is regulated by, and/or the member accounts of which are insured by, a State agency or instrumentality;

(bbb) *Subsidiary* means any company which is owned or Controlled directly or indirectly by another company;

(ccc) *Underserved Rural Area* means a Non-Metropolitan Area that:

(1) Qualifies as a Low-Income Area;

(2) Is experiencing housing stress evidenced by 30 percent or more of resident households with one or more of these housing conditions in the last decennial census:

(i) Lacked complete plumbing,

(ii) Lacked complete kitchen,

(iii) Paid 30 percent or more of income for owner costs or rent, or (D) had more than 1 person per room; or

(3) Is remote-rural county consisting of a Non-Metropolitan Area that is also not adjacent to a Metropolitan Area;

(ddd) *Very Low-Income* means

(1) In the case of owner-occupied housing units, income not greater than 50 percent of the area median income; and

(2) In the case of rental housing units, income not greater than 50 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD.

#### § 1807.105 Waiver authority.

The CDFI Fund may waive any requirement of this part that is not required by law upon a determination of good cause. Each such waiver shall be in writing and supported by a statement of the facts and the grounds forming the basis of the waiver. For a waiver in an individual case, the CDFI Fund must determine that application of the requirement to be waived would adversely affect the achievement of the purposes of the Act. For waivers of general applicability, the CDFI Fund will publish notification of granted waivers in the **Federal Register.**

#### § 1807.106 OMB control number.

The collection of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1559–0036.

### Subpart B—Eligibility

#### § 1807.200 Applicant eligibility.

(a) *General requirements.* An Applicant will be deemed eligible for a CMF award if it is:

(1) A Certified or certifiable CDFI. An entity may meet the requirements described in this paragraph (a)(1) if it is:

(i) A Certified CDFI, as set forth in 12 CFR Part 1805.201, that has been in existence as a legally formed entity as set forth in the Notice of Funds

Availability (NOFA) for the applicable funding round; or

(ii) A certifiable CDFI that has been in existence as a legally formed entity as set forth in the NOFA for the applicable round and, although not yet certified as a CDFI, has submitted a complete CDFI certification application as of the date set forth in the applicable NOFA; or

(2) A Nonprofit Organization having as one of its principal purposes the development or management of affordable housing. An entity may meet the requirements described in this paragraph (a)(2) if it:

(i) Has been in existence as a legally formed entity as set forth in the applicable NOFA;

(ii) Demonstrates, through articles of incorporation, by-laws, or other board-approved documents, that the development or management of affordable housing are among its principal purposes; and

(iii) Can demonstrate that at least one-third of the Applicant's resources (either as a portion of total staffing or as a portion of total assets) are dedicated to the development or management of affordable housing.

(b) *Eligibility verification.* An Applicant shall demonstrate that it meets the eligibility requirements described in § 1807.200(a)(2) above by providing information described in the application, NOFA, and/or supplemental information, as may be requested by the CDFI Fund. For an Applicant seeking eligibility under subsection 1 of this Subpart, the CDFI Fund will verify that the Applicant is a Certified CDFI during the application eligibility review. For an Applicant seeking eligibility under subsection 2 of this Subpart, the CDFI Fund, in its sole discretion, shall determine whether the Applicant has satisfied said requirements.

## Subpart C—Use of Funds/Eligible Activities

### § 1807.300 Purposes of grants.

The CDFI Fund may provide financial assistance grants to organizations described under Subpart B of this part for the purpose of attracting private capital for and increase investment in:

(a) The Development, Preservation, Rehabilitation, or Purchase of Affordable Housing for primarily Extremely Low-Income, Very Low-Income; and Low-Income families; and

(b) Economic Development Activities or Community Services Facilities. With respect to an Economic Development Activity or Community Service Facility funded with a CMF grant, the Affordable Housing that it is In Conjunction With may be financed by sources other than the CMF grant.

### § 1807.301 Eligible activities.

Grants awarded under this part shall be used by an Awardee to support Affordable Housing Activities, Economic Development Activities or Community Service Facilities, including the following eligible uses:

(a) To provide Loan Loss Reserves;

(b) To capitalize a Revolving Loan Fund;

(c) To capitalize an Affordable Housing Fund;

(d) To capitalize a fund to support Economic Development Activities or Community Service Facilities;

(e) For Risk-Sharing Loans;

(f) For Loan Guarantees; and

(g) For the Awardee's Operations.

### § 1807.302 Restrictions on use of assistance.

(a) An Awardee's activities under Part 1807.301 shall not include the use of CMF for the following:

(1) Political activities;

(2) Advocacy;

(3) Lobbying, whether directly or through other parties;

(4) Counseling services (including homebuyer or financial counseling);

(5) Travel expenses;

(6) Preparing or providing advice on tax returns;

(7) emergency shelters (including shelters for disaster victims);

(8) Nursing homes;

(9) Convalescent homes;

(10) Residential treatment facilities;

(11) Correctional facilities; or

(12) Student dormitories.

(b) An Awardee may use up to a percentage of CMF award for Operations as specified in the applicable NOFA.

(c) An Awardee shall not use CMF award to support projects that:

(1) Consist of the operation of any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises;

(2) Consist of farming (within the meaning of I.R.C. section 2032A(e)(5)(A) or (B)) if, as of the close of the taxable year of the taxpayer conducting such trade or business, the sum of the aggregate unadjusted bases (or, if greater, the fair market value) of the assets owned by the taxpayer that are used in such a trade or business, and the aggregate value of the assets leased by the taxpayer that are used in such a trade or business, exceeds $500,000.

(d) In any given funding round, no more than 30 percent of an Awardee's CMF award may be used for purposes described in § 1807.300(b).

## Subpart D—Qualification as Affordable Housing

### § 1807.400 Affordable Housing—general.

Each Awardee that uses CMF funding to support Affordable Housing Activities shall ensure that 100 percent of Eligible Project Costs are attributable to housing units that meet the affordability qualifications set forth below for families whose annual income does not exceed 120 percent of the median income for the area, as determined by HUD. In addition, greater than 50 percent of the Eligible Project Costs must be attributable to housing units that meet the affordability qualifications set forth below for either Low-Income, Very Low-Income, or Extremely Low-Income Families.

### § 1807.401 Affordable Housing—Rental Housing.

To qualify as Affordable Housing, a multi-family rental housing project financed with a CMF award must have at least 20 percent of the housing units occupied by Low-Income, Very Low-Income, or Extremely Low-Income Families and must comply with the rent limits set forth herein.

(a) *Rent limitation.* The maximum rent that is deemed to be affordable under the CMF is a rent that does not exceed 30 percent of the family's annual income.

(b) *Nondiscrimination against rental assistance subsidy holders.* The Awardee shall require that the owner of a rental unit cannot refuse to lease the unit to a Section 8 Program certificate or voucher holder (24 CFR Part 982, Section 8 Tenant-Based Assistance: Unified Rule for Tenant-Based Assistance under the Section 8 Rental Certificate Program and the Section 8 Rental Voucher Program) or to the holder of a comparable document evidencing participation in a HOME tenant-based rental assistance program because of the status of the prospective tenant as a holder of such certificate, voucher, or comparable HOME tenant-based assistance document.

(c) *Initial rent schedule and utility allowances.* The Awardee shall ensure that the housing adheres to the applicable Participating Jurisdiction's maximum monthly allowances for utilities and services (excluding telephone). If the Participating Jurisdiction's allowances have not been determined or are otherwise unavailable, the Awardee shall rely upon the utility and services allowances established by the applicable city,

county or State public housing authority.

(d) *Periods of Affordability.* Housing under § 1807.401 must meet the affordability requirements for not less than 10 years, beginning after Project Completion and at initial occupancy. The affordability requirements apply without regard to the term of any loan or mortgage or the transfer of ownership and must be imposed by deed restrictions, covenants running with the land, or other recordable mechanisms, except that the affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure. Other recordable mechanisms must be approved in writing and in advance by the CDFI Fund. The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the foreclosure, or deed in lieu of foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property.

(e) *Subsequent rents during the affordability period.* Any increase in rent for a CMF-funded unit requires that tenants of those units be given at least 30 days prior written notice before the implementation of the rent increase.

(f) *Tenant income determination.* (1) Each year during the period of affordability the tenant's income shall be re-examined; tenant income examination is the responsibility of the Awardee. Annual income shall include income from all household members.

(2) One of the following two definitions of "annual income" must be used to determine whether a family is income eligible:

(i) Annual income as reported under the Census long-form for the most recent available decennial Census. This definition includes:

(A) Wages, salaries, tips, commissions, etc.;

(B) Self-employment income from owned non-farm business, including proprietorships and partnerships;

(C) Farm self-employment income;

(D) interest, dividends, net rental income, or income from estates or trusts;

(E) Social Security or railroad retirement;

(F) Supplemental Security Income, Aid to Families with Dependent Children, or other public assistance or public welfare programs;

(G) Retirement, survivor, or disability pensions;

(H) Any other sources of income received regularly, including Veterans' (VA) payments, unemployment compensation, and alimony; and

(I) Any other sources of income the CDFI Fund may deem appropriate; or

(ii) Adjusted gross income as defined for purposes of reporting under Internal Revenue Service (IRS) Form 1040 series for individual Federal annual income tax purposes.

(3) The CDFI Fund reserves the right to deem certain government programs, under which a Low-Income family is a recipient, as income eligible for purposes of meeting the tenant income requirements under this subsection.

(g) *Over-income tenants.* (1) CMF-funded units continue to qualify as Affordable Housing despite a temporary noncompliance caused by increases in the incomes of existing tenants if actions satisfactory to the CDFI Fund are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected.

(2) Tenants whose incomes no longer qualify must pay rent equal to the lesser of the amount payable by the tenant under State or local law or 30 percent of the family's annual income, except that tenants of units that have been allocated low-income housing tax credits by a housing credit agency pursuant to section 42 of the Internal Revenue Code of 1986, I.R.C. section 42, must pay rent governed by section 42. Tenants who no longer qualify as Low-Income are not required to pay as rent an amount that exceeds the market rent for comparable, unassisted units in the neighborhood.

**§ 1807.402 Affordable Housing—Homeownership.**

(a) *Acquisition with or without rehabilitation.* Housing that is for Homeownership purchase must meet the affordability requirements of this subsection.

(1) The housing must be Single-family housing;

(2) The housing must meet the following standards:

(i) Housing costs should fall within a front-end ratio of 28 percent of household income and a back-end ratio of 36 percent of household income. The front-end ratio is a percentage comparing a Low-Income borrower's total monthly cost to buy a property (mortgage principal and interest, insurance, and real estate taxes) to the borrower's monthly income before deductions. The back-end ratio is a percentage comparing a Low-Income borrower's total monthly debt payments (mortgage, real estate taxes and insurance, car loans, and other consumer loans) to the borrower's gross monthly income; or

(ii) Housing price does not exceed 95 percent of the median purchase price for the area as used in the HOME Program and as determined by the applicable Participating Jurisdiction.

(3) The housing must be purchased by a qualifying family as set forth in § 1807.400. The housing must be the principal residence of the family throughout the period described in paragraph (a)(4) of this section.

(4) *Periods of Affordability.* Housing under this subsection must meet the affordability requirements for at least 10 years at the time of purchase by the homeowner.

(5) *Resale.* To ensure affordability, resale requirements must be imposed by the owner of the housing. Resale requirements must ensure that, if the housing does not continue to be the principal residence of the original qualifying family for the duration of the period of affordability, the housing is made available for subsequent purchase only to a buyer whose family meets the requirements in § 1807.400 and who will use the property as their principal residence. The resale requirement must also ensure that the price at resale provides the original CMF-funded owner a fair return on investment (including the homeowner's investment and any capital improvement) and ensure that the housing will remain affordable to a reasonable range of qualifying families. Deed restrictions, covenants running with the land, or other similar mechanisms must be used as the mechanism to impose the resale requirements. The affordability restrictions may terminate upon occurrence of any of the following termination events: foreclosure, transfer in lieu of foreclosure or assignment of an FHA-insured mortgage to HUD. The Awardee may use purchase options, rights of first refusal or other preemptive rights to purchase the housing before foreclosure to preserve affordability. The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the termination event, obtains an ownership interest in the housing.

(b) *Rehabilitation not involving acquisition.* Housing that is currently owned by a qualifying family, as set forth in § 1807.400, qualifies as Affordable Housing if it meets the requirements of this subsection.

(1) The housing is as follows:

(i) The estimated value of the housing, after Rehabilitation, does not exceed 95 percent of the median purchase price for the area, as used in the HOME Program and as determined by the applicable Participating Jurisdiction; or

(ii) Housing costs should fall within a front-end ratio of 28 percent of household income and a back-end ratio of 36 percent of household income. The front-end ratio is a percentage comparing a Low-Income borrower's total monthly cost to buy a property (mortgage principal and interest, insurance, and real estate taxes) to the borrower's monthly income before deductions. The back-end ratio is a percentage comparing the Low-Income borrower's total monthly debt payments (mortgage, real estate taxes and insurance, car loans, and other consumer loans) to the borrower's gross monthly income.

(2) The housing is the principal residence of a qualifying family as set forth in § 1807.400, at the time that CMF funding is Committed to the housing.

(3) Housing under this subsection must meet the affordability requirements for at least 10 years after Rehabilitation is completed.

(c) *Ownership interest.* The ownership in the housing assisted under this section must meet the definition of "Homeownership" as defined in § 1807.104(x).

(d) *New construction without acquisition.* Newly constructed housing that is built on property currently owned by a family which will occupy the housing upon completion, qualifies as Affordable Housing if it meets the requirements under paragraph (a) of this section.

(e) *Converting rental units to Homeownership units for existing tenants.* CMF-funded rental units may be converted to Homeownership units by selling, donating, or otherwise conveying the units to the existing tenants to enable the tenants to become homeowners in accordance with the requirements of § 1807.402. The Homeownership units are subject to a minimum period of affordability equal to the remaining affordability period.

## Subpart E—Leveraging and Commitment Requirement

### 1807.500 Leveraged costs—general.

(a) Each CMF grant is expected to result in Eligible Project Costs that total at least 10 times the grant amount. Such costs may be for activities that include Affordable Housing Activities, Economic Development Activities, or Community Service Facilities. Thus, an Awardee shall demonstrate that it leveraged its CMF award at least 10 times the CMF grant amount or some other standard established by the CDFI Fund in the Awardee's Assistance Agreement. Leveraged Costs are costs that exceed the dollar amount of the Awardee's CMF contribution to each CMF-funded activity. However, the applicable NOFA may set forth a required percentage of Leveraged Costs that must be attributable to non-governmental sources. An Awardee may report to the CDFI Fund all Leveraged Costs, with the following limitations:

(1) No costs attributable to Operations may be reported as Leveraged Costs.

(2) No costs attributable to prohibited uses as identified in § 1807.302(a) and (c) may be reported as Leveraged Costs.

(3) All costs attributable to Affordable Housing Activities reported as Leveraged Costs must be for housing units that qualify as Affordable Housing under § 1807.401 or § 1807.402 for families whose annual income does not exceed 120 percent of the median income for the area, as determined by HUD.

(b) Awardees shall self-report leveraging information through forms or electronic systems developed by the CDFI Fund, subject to audit requirements set forth herein. Consequently, Awardees shall maintain appropriate documentation, such as audited financial statements, wire transfers documents, pro-formas, and other relevant records, to support its reports.

### § 1807.501 Commitment for use.

(a) CMF awards shall be Committed for use within two years of the effective date of the Awardee's Assistance Agreement. An Awardee shall demonstrate that its CMF award is Committed by having executed a written, legally binding agreement under which CMF assistance will be provided to the developer or project sponsor for an identifiable project under which:

(1) Construction can reasonably be expected to start within 12 months of the agreement date; or

(2) Property title will be transferred within six months of the agreement date.

(b) An Awardee shall make an initial disbursement of its CMF award for Affordable Housing Activities, Economic Development Activities or Community Service Facilities within three years of the effective date of its Assistance Agreement.

### § 1807.502 Assistance limits.

An eligible Applicant and its Subsidiaries and Affiliates may not be awarded more than 15 percent of the aggregate funds available for CMF grants during any funding year.

### § 1807.503 Project completion.

Once a CMF-funded project has been *completed, it* must be placed into service within five years of the effective date of an Awardee's Assistance Agreement. Project Completion occurs, as determined by the CDFI Fund, when:

(a) All necessary title transfer requirements and construction work have been performed;

(b) The project complies with the requirements of this part, including the following property standards (these property standards must be complied with at the time of Project Completion and maintained for a period of at least 10 years thereafter):

(1) Housing that is constructed or rehabilitated with CMF funding must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances at the time of project completion. In the absence of a local code for new construction or rehabilitation, such housing must meet, as applicable: One of three model codes (Uniform Building Code (ICBO), National Building Code (BOCA), Standard (Southern) Building Code (SBCCI)); or the Council of American Building Officials (CABO) one or two family code; or the Minimum Property Standards (MPS) in 24 CFR 200.925 or 200.926. Newly constructed housing must meet the current edition of the Model Energy Code published by the Council of American Building Officials.

(2) The housing must meet the accessibility requirements at 24 CFR part 8, which implement Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and covered multifamily dwellings, as defined at 24 CFR 100.201, must also meet the design and construction requirements at 24 CFR 100.205, which implement the Fair Housing Act (42 U.S.C. 3601–3619).

(3) Construction of all manufactured housing must meet the Manufactured Home Construction and Safety Standards established in 24 CFR Part 3280. These standards pre-empt State and local codes covering the same aspects of performance for such housing. The installation of all manufactured housing units must comply with applicable State and local laws or codes. In the absence of such laws or codes, the installation must comply with the manufacturer's written instructions for installation of manufactured housing units. Manufactured housing that is rehabilitated using CMF funds must meet the requirements set out in paragraph (b)(1) of this section; and

(c) The final drawdown has been disbursed for the project.

## Subpart F—Tracking Requirements

### § 1807.600 Tracking funds—general.

An Awardee receiving a CMF award shall develop and maintain a system to ensure that its CMF award is used in accordance with this part, the Act, its Assistance Agreement, and any requirements or conditions under which such amounts were awarded. Thus, an Awardee may create a separate account or accounting code for CMF activities.

### § 1807.601 Nature of funds.

A CMF award shall be considered Federal financial assistance in regards to applying Federal civil rights laws.

## Subpart G—Applications for Assistance

### § 1807.700 Notice of Funds Availability.

Each Applicant shall submit an application for funding under this part in accordance with the regulations in this Subpart. The applicable NOFA will advise potential Applicants on how to obtain and complete an application and will establish deadlines and other requirements. The NOFA will specify any limitations, special rules, procedures, and restrictions for a particular funding round. After receipt of an application, the CDFI Fund may request clarifying or technical information on the materials submitted as part of such application.

## Subpart H—Evaluation and Selection of Applications

### § 1807.800 Evaluation and selection—general.

Applicants will be evaluated and selected, at the sole discretion of the CDFI Fund, to receive assistance based on a review process that may include an interview(s) and/or site visit(s) intended to:

(a) Ensure that Applicants are evaluated on a merit basis and in a fair and consistent manner;

(b) Ensure that each Awardee can successfully meet its leveraging goals and achieve Affordable Housing Activity, Community Service Facility and/or Economic Development Activity impacts;

(c) Ensure that Awardees represent a geographically diverse group of Applicants serving Metropolitan Areas and Underserved Rural Areas across the United States that meet criteria of economic distress, which may include:

(1) The percentage of Low-Income Families or the extent of poverty;

(2) The rate of unemployment or underemployment;

(3) The extent of blight and disinvestment;

(4) Economic Development Activities or Community Service Facilities that target Extremely Low-Income, Very Low-Income, and Low-Income families within the Awardee's Service Area; or

(5) Any other criteria the CDFI Fund shall set forth in the applicable NOFA; and

(d) Take into consideration other factors as described in the applicable NOFA.

### § 1807.801 Evaluation of applications.

(a) *Eligibility and completeness.* An Applicant will not be eligible to receive a CMF award if it fails to meet the eligibility requirements described in § 1807.200 and in the applicable NOFA, or if the Applicant has not submitted complete application materials. For the purposes of this paragraph (a), the CDFI Fund reserves the right to request additional information from the Applicant, if the CDFI Fund deems it appropriate.

(b) *Substantive review.* In evaluating and selecting applications to receive assistance, the CDFI Fund will evaluate the Applicant's likelihood of success in meeting the factors set forth in the applicable NOFA, including but not limited to:

(1) The Applicant's ability to use CMF funding to generate additional investments;

(2) The need for affordable housing in the Applicant's market; and

(3) The ability of the Applicant to obligate amounts and undertake activities in a timely manner. In the case of an Applicant that has previously received assistance under any CDFI Fund program, the CDFI Fund will also consider the Applicant's level of success in meeting its performance goals, reporting requirements, and other requirements contained in the previously negotiated and executed assistance, allocation or award agreement(s) with the CDFI Fund, any undisbursed balance of assistance, and compliance with applicable federal laws. The CDFI Fund may consider any other factors, as it deems appropriate, in reviewing an application, as set forth in the applicable NOFA.

(c) *Consultation with appropriate regulatory agencies.* In the case of an Applicant that is a federally regulated financial institution, the CDFI Fund may consult with the Appropriate Federal Banking Agency or Appropriate State Agency prior to making a final award decision and prior to entering into an Assistance Agreement.

(d) *Awardee selection.* The CDFI Fund will select CMF Awardees based on the criteria described in paragraph (b) of this section and any other criteria set forth in this part or the applicable NOFA.

## Subpart I—Terms and Conditions of Assistance

### § 1807.900 Assistance Agreement.

(a) Each Applicant that is selected to receive a CMF award must enter into an Assistance Agreement with the CDFI Fund. The Assistance Agreement will set forth certain required terms and conditions of the Assistance Agreement which may include, but are not limited to, the following:

(1) The amount of the award;

(2) The approved uses of the award;

(3) The approved Service Area in which the award may be used; (4) the time period by which the award proceeds must be Committed;

(5) The required documentation to evidence Project Completion; and

(6) Performance goals that have been established by the CDFI Fund based upon the Awardee's application.

(b) The Assistance Agreement shall provide that in the event of fraud, mismanagement, noncompliance with the Act or the CDFI Fund's regulations; or noncompliance with the terms and conditions of the Assistance Agreement on the part of the Awardee; the CDFI Fund, in its discretion, may:

(1) Require changes in the performance goals set forth in the Assistance Agreement;

(2) Revoke approval of the Awardee's Application;

(3) Reduce or terminate the Awardee's assistance;

(4) Require repayment of any assistance that has been distributed to the Awardee;

(5) Bar the Awardee from reapplying for any assistance from the CDFI Fund; or

(6) Take such other actions as the CDFI Fund deems appropriate or as set forth in the Assistance Agreement.

(c) Prior to imposing any sanctions pursuant to this section or an Assistance Agreement, the CDFI Fund shall, to the maximum extent practicable, provide the Awardee with written notice of the proposed sanction and an opportunity to comment. Nothing in this section, however, shall provide an Awardee the right to any formal or informal hearing or comparable proceeding not otherwise required by law.

### § 1807.901 Disbursement of funds.

Assistance provided pursuant to this part may be provided in a lump sum or in some other manner, as determined appropriate by the CDFI Fund. The CDFI Fund shall not provide any assistance under this part until an

Awardee has satisfied all conditions set forth in the applicable NOFA and Assistance Agreement.

**§ 1807.902 Data collection and reporting.**

(a) *Data—General.* An Awardee shall maintain such records as may be prescribed by the CDFI Fund that are necessary to:

(1) Disclose the manner in which CMF funding is used, including providing documentation to demonstrate Project Completion;

(2) Demonstrate compliance with the requirements of this part and the Assistance Agreement; and

(3) Evaluate the impact of CMF funding.

(b) *Customer profiles.* An Awardee shall compile such data on the gender, race, ethnicity, national origin, or other information on individuals that utilize its products and services as the CDFI Fund shall prescribe in an Assistance Agreement. Such data will be used to determine whether residents of the Awardee's Service Area are adequately served and to evaluate the impact of CMF funding.

(c) *Access to records.* An Awardee must submit such financial and activity reports, records, statements, and documents at such times, in such forms, and accompanied by such reporting data, as required by the CDFI Fund or the U.S. Department of Treasury to ensure compliance with the requirements of this part and to evaluate the impact of CMF funding. The United States Government, including the U.S. Department of Treasury, the Comptroller General, and their duly authorized representatives, shall have full and free access to the Awardee's offices and facilities and all books, documents, records, and financial statements relating to use of Federal funds and may copy such documents as they deem appropriate and audit or provide for an audit at least annually. The CDFI Fund, if it deems appropriate, may prescribe access to record requirements for entities that are borrowers of, or that receive investments from, an Awardee.

(d) *Retention of records.* An Awardee shall comply with all record retention requirements as set forth in OMB Circular A–110 (as applicable).

(e) *Data collection and reporting.* (1) Financial Reporting: (i) All Non-Profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) must submit to the CDFI Fund financial statements that have been reviewed by an independent certified public accountant in accordance with *Statements on Standards for Accounting and Review Services,* issued by the American Institute of Certified Public Accountants by a time set forth in the applicable Notice of Funding Availability or Assistance Agreement (audited financial statements can be provided by the due date in lieu of reviewed statements, if available). Non-Profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) that are required to have their financial statements audited pursuant to OMB Circular A–133 *Audits of States, Local Governments and Non-Profit Organizations,* must also submit their A–133 audited financial statements by a time set forth in the applicable NOFA or Assistance Agreement. Non-Profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) that are not required to have financial statements audited pursuant to OMB Circular A–133, *Audits of States, Local Governments and Non-Profit Organizations,* must submit to the CDFI Fund a statement signed by the Awardee's authorized representative or certified public accountant, asserting that the Awardee is not required to have a single audit pursuant OMB Circular A–133.

(ii) For-profit Awardees (excluding Insured CDFIs and State-Insured Credit Unions) must submit to the CDFI Fund financial statements audited in conformity with generally accepted auditing standards as promulgated by the American Institute of Certified Public by a time set forth in the applicable NOFA or Assistance Agreement.

(iii) Insured CDFIs are not required to submit financial statements to the CDFI Fund. The CDFI Fund will obtain the necessary information from publicly available sources. State-Insured Credit Unions must submit to the CDFI Fund copies of the financial statements that they submit to the Appropriate State Agency.

(2) Performance Goal Reporting: Performance goals and measures that are specific to the Awardee's application for funding shall be met as set forth in its Assistance Agreement. Awardees shall submit data and information to the CDFI Fund regarding achievement of these Performance Goals as described in the Assistance Agreement.

(f) *Availability of referenced publications.* The publications referenced in this section are available as follows:

(1) OMB Circulars may be obtained from the Office of Administration, Publications Office, 725 17th Street, NW., Room 2200, New Executive Office Building, Washington, DC 20503 or on the Internet (*http://www.whitehouse.gov/omb/grants_circulars/*); and

(2) General Accounting Office materials may be obtained from GAO Distribution, 700 4th Street, NW., Suite 1100, Washington, DC 20548.

**§ 1807.903 Compliance with government requirements.**

In carrying out its responsibilities pursuant to an Assistance Agreement, the Awardee shall comply with all applicable Federal, State, and local laws, regulations, and ordinances, OMB Circulars, and Executive Orders.

**1807.904 Lobbying restrictions.**

No assistance made available under this part may be expended by an Awardee to pay any person to influence or attempt to influence any agency, elected official, officer or employee of a State or local government in connection with the making, award, extension, continuation, renewal, amendment, or modification of any State or local government contract, grant, loan or cooperative agreement as such terms are defined in 31 U.S.C. 1352.

**1807.905 Criminal provisions.**

The criminal provisions of 18 U.S.C. 657 regarding embezzlement or misappropriation of funds is applicable to all Awardees and Insiders.

**§ 1807.906 CDFI Fund deemed not to control.**

The CDFI Fund shall not be deemed to control an Awardee by reason of any assistance provided under the Act for the purpose of any applicable law.

**1807.907 Limitation on liability.**

The liability of the CDFI Fund and the United States Government arising out of any assistance to an Awardee in accordance with this part shall be limited to the amount of the investment in the Awardee. The CDFI Fund shall be exempt from any assessments and other liabilities that may be imposed on controlling or principal shareholders by any Federal law or the law of any State. Nothing in this section shall affect the application of any Federal tax law.

**§ 1807.908 Fraud, waste, and abuse.**

Any person who becomes aware of the existence or apparent existence of fraud, waste or abuse of assistance provided under this part should report such incidences to the Office of Inspector General of the U.S. Department of the Treasury.

Dated: March 4, 2010.

**Donna J. Gambrell,**

*Director, Community Development Financial Institutions Fund.*

[FR Doc. 2010–5026 Filed 3–12–10; 8:45 am]

**BILLING CODE 4810–70–P**

## DEPARTMENT OF THE TREASURY

### Community Development Financial Institutions Fund

### Notice of Funds Availability

*Funding Opportunity Title:* Notice of Funds Availability (NOFA) inviting Applications for the FY 2010 Funding Round of the Capital Magnet Fund (CMF).

*Announcement Type:* Announcement of funding opportunity.

*Catalog of Federal Domestic Assistance (CFDA) Number:* 21.011

**DATES:** Applications for awards through the FY 2010 Funding Round of the CMF must be received by 5 p.m. Eastern Time (ET), April 15, 2010.

*Executive Summary:* Subject to funding availability, this NOFA is issued in connection with the FY 2010 Funding Round of the CMF (the FY 2010 Funding Round). The CMF is administered by the Community Development Financial Institutions Fund (the CDFI Fund).

**I. Funding Opportunity Description**

A. Through the CMF, the CDFI Fund provides financial assistance awards to Community Development Financial Institutions (CDFIs), and to Nonprofit Organizations that have as at least one of their principal purposes the development or management of affordable housing.

B. The proposed regulations that will eventually govern the CMF have been simultaneously published for comment with this NOFA and will provide guidance on the requirements of the CMF. The CDFI Fund encourages Applicants to review the proposed CMF regulations. Detailed application content requirements are found in the applicable funding application and related guidance materials. Each capitalized term in this NOFA is defined herein, in the application, or in the guidance materials.

C. *Definitions:* For the purposes of this NOFA, the following terms shall have the following definitions:

1. *Act* means the Housing and Economic Recovery Act of 2008, as amended, Public Law 110–289, section 1131;

2. *Affiliate* means any company or entity that Controls, is Controlled by, or is under common Control with another company;

3. *Affordable Housing* means rental or for-sale single-family or multi-family housing that meets the requirements set forth in the Assistance Agreement or CMF regulations;

4. *Affordable Housing Activities* means the Development, Preservation, Rehabilitation, or Purchase of Affordable Housing;

5. *Affordable Housing Fund* means a loan, grant, or investment fund, managed by the Awardee, whose capital is used to finance Affordable Housing Activities;

6. *Appropriate Federal Banking Agency* has the same meaning as in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(q), and includes, with respect to Insured Credit Unions, the National Credit Union Administration;

7. *Applicant* means any entity submitting an application for assistance under this Notice of Funds Availability;

8. *Appropriate State Agency* means an agency or instrumentality of a State that regulates and/or insures the member accounts of a State-Insured Credit Union;

9. *Assistance Agreement* means a formal, written agreement between the CDFI Fund and an Awardee which specifies the terms and conditions of an award under this NOFA;

10. *Awardee* means an Applicant selected by the CDFI Fund to receive an award pursuant to this NOFA;

11. *Capital Magnet Fund (or CMF)* means the program authorized by section 1131 of the Act, Public Law 110–289;

12. *Certified Community Development Financial Institution (or Certified CDFI)* means an entity that has been determined by the CDFI Fund to meet the eligibility requirements set forth in 12 CFR 1805.201;

13. *Community Development Financial Institutions Fund (or CDFI Fund*) means the Community Development Financial Institutions Fund, an office of the U.S. Department of Treasury, established under the Community Development Banking and Financial Institutions Act of 1994, as amended, 12 U.S.C. 4701 *et seq.;*

14. *Community Service Facility* means the physical structure in which community-based programs (including, but not limited to, health care, childcare, educational, cultural, and/or social services) operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

15. *Concerted Strategy* means a formal planning document that evidences the connection between Affordable Housing Activities and Economic Development Activities or Community Service Facilities. Such documents include, but are not limited to, a comprehensive, consolidated, or redevelopment plan, or some other local or regional planning document adopted or approved by the jurisdiction;

16. *Control* means: (i) Ownership, control, or power to vote 25 percent or more of the outstanding shares of any class of Voting Securities of any company, directly or indirectly or acting through one or more other persons; (ii) control in any manner over the election of a majority of the directors, trustees, or general partners (or individuals exercising similar functions) of any company; or (iii) the power to exercise, directly or indirectly, a controlling influence over the management, credit or investment decisions, or policies of any company;

17. *Depository Institution Holding Company* means a bank holding company or a savings and loan holding company as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813(w)(1);

18. *Development* means land acquisition, demolition of existing facilities, and construction of new facilities, which may include site improvement, utilities development and rehabilitation of utilities, necessary infrastructure, utility services, conversion, and other related activities;

19. *Economic Development Activity* means the Development, Preservation, Rehabilitation, or Purchase of Community Service Facilities and/or other physical structures in which neighborhood-based businesses operate which, In Conjunction With Affordable Housing Activities, implements a Concerted Strategy to stabilize or revitalize a Low-Income Area or Underserved Rural Area;

20. *Eligible Project Costs* means Leverage Costs plus those costs funded directly by a CMF award, exclusive of Operations;

21. *Extremely Low-Income* means (i) in the case of owner-occupied housing units, income not in excess of 30 percent of the area median income and (ii) in the case of rental housing units, income not in excess of 30 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD;

22. *HOME Program* means the HOME Investment Partnership Program set forth in the HOME Investment Partnerships Act under title II of the Cranston-Gonzalez National Affordable Housing Act, as amended, 42 U.S.C. 12701 *et seq.;*

23. *Homeownership* means ownership in fee simple title or a 99-year leasehold interest in a one- to four-unit dwelling or in a condominium unit, or equivalent form of ownership (which shall include cooperative housing and mutual housing project). The ownership interest

may be subject only to the following: (i) Restrictions on resale permitted in the Assistance Agreement; (ii) mortgages, deeds of trust, or other liens or instruments securing debt on the property; or (iii) any other restrictions or encumbrances that do not impair the good and marketable nature of title to the ownership interest. For purposes of housing located on trust or restricted Indian lands, homeownership includes leases of 50 years;

24. *Housing* means single- and multi-family residential units, including, but not limited to, manufactured housing and manufactured housing lots, permanent housing for disabled and/or homeless persons, transitional housing, single-room occupancy housing, and group homes. Housing also includes elder cottage housing opportunity (ECHO), 24 CFR 92.258;

25. *HUD* means the Department of Housing and Urban Development established under the Department of Housing and Urban Development Act of 1965, 42 U.S.C. 3532–3537;

26. *In Conjunction With* means physically proximate to Affordable Housing and reasonably available to residents of Affordable Housing

27. *Insured CDFI* means a Certified CDFI that is an Insured Depository Institution or an Insured Credit Union;

28. *Insured Credit Union* means any credit union, the member accounts of which are insured by the National Credit Union Share Insurance Fund by the National Credit Union Administration pursuant to authority granted in 12 U.S.C. 1783 *et seq.;*

29. *Insured Depository Institution* means any bank or thrift, the deposits of which are insured by the Federal Deposit Insurance Corporation, 12 U.S.C. 1813(c)(2);

30. *Leveraged Costs* means those costs as described Section II.B.4. of this NOFA and in the CMF regulations;

31. *Loan Guarantee* means an agreement to indemnify the holder of a loan all or a portion of the unpaid principal balance in case of default by the borrower;

32. *Loan Loss Reserves* means funds that the Applicant or Awardee will set aside in the form of cash reserves, or through accounting-based accrual reserves, to cover losses on loans, accounts, and notes receivable, or for related purposes that the CDFI Fund deems appropriate;

33. *Low-Income* means (i) in the case of owner-occupied housing units, income not in excess of 80 percent of area median income and (ii) in the case of rental housing units, income not in excess of 80 percent of area median income, with adjustments for smaller and larger families, as determined by HUD;

34. *Low-Income Area or LIA* means a census tract or block numbering area in which the median income does not exceed 80 percent of the median income for the area in which such census tract or block numbering area is located. With respect to a census tract or block numbering area located within a Metropolitan Area, the median family income shall be at or below 80 percent of the Metropolitan Area median family income or the national Metropolitan Area median family income, whichever is greater. In the case of a census tract or block numbering area located outside of a Metropolitan Area, the median family income shall be at or below 80 percent of the statewide Non-Metropolitan Area median family income or the national Non-Metropolitan Area median family income, whichever is greater;

35. *Low-Income Families* means those households that reside within the boundaries of the United Sates (which shall encompass any State of the United States, the District of Columbia or any territory of the United States, Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Northern Mariana Islands) meeting the criteria as set forth in Section I.C.(34) of this NOFA;

36. *Low Income Housing Tax Credit Program or LIHTC Program* means the program as set forth under Title I of the U.S. Housing Act of 1937, as amended, 42 U.S.C. 1437 *et seq.;*

37. *Metropolitan Area* means an area designated as such by the Office of Management and Budget pursuant to 44 U.S.C. 3504(e) and 31 U.S.C. 1104(d) and Executive Order 10253, as amended, 16 FR 5605;

38. *Non-Metropolitan Area* means a county or adjacent counties not contained within either a Consolidated Metropolitan Statistical Area (CMSA) or a Primary Metropolitan Statistical Area (PMSA), as such areas are defined in OMB Bulletin No. 99–04, with respect to the most recent decennial census. Non-Metropolitan Counties can be identified in the CDFI Fund's mapping system (CIMS), and are also listed on the CDFI Fund's Web site;

39. *Nonprofit Organization* means any corporation, trust, association, cooperative, or other organization that is (i) designated as a nonprofit or not-for-profit entity under the laws of the organization's State of formation and (ii) exempt from Federal income taxation pursuant to the Internal Revenue Code of 1986;

40. *Non-Regulated CDFI* means any entity meeting the eligibility requirements described in 12 CFR 1805.200 which is not a Depository Institution Holding Company, Insured Depository Institution, or Insured Credit Union;

41. *Operations* means all allowable expenses as defined by Office of Management and Budget (OMB) Circular A–122, "Cost Principles for Non-Profit Organizations," and OMB Circular A–87, "Cost Principles for State, Local, and Indian Tribal Governments," incurred by the Awardee related to the administration, operation, and implementation of a CMF award.

42. *Participating Jurisdiction* means a jurisdiction designated by HUD, as a participating jurisdiction under the HOME Program in accordance with the requirements of 24 CFR 92.105;

43. *Preservation* means: (i) Activities to refinance, with or without Rehabilitation, single-family or multi-family rental property mortgages that, at the time of refinancing, are subject to affordability and use restrictions under State or federal affordable housing programs, including but not limited to, the HOME Program, the LIHTC Program, the Section 8 Tenant-Based Assistance and the Section 8 Rental Voucher programs (24 CFR part 982), or the Section 515 Rural Rental Housing program (7 CFR Part 3560), hereinafter referred to as "similar State or federal affordable housing programs", where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties; (ii) activities to refinance and acquire single-family or multi-family properties that, at the time of refinancing or acquisition, were subject to affordability and use restrictions under similar State or federal affordable housing programs, by the former tenants of such properties, where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties; or (iii) activities to refinance the mortgages of single-family, owner-occupied housing that at the time of refinancing are subject to affordability and use restrictions under similar State or federal affordable housing programs, where such refinancing has the effect of extending the term of any affordability and use restrictions on the properties;

44. *Purchase* means to acquire ownership in fee simple title or a 99-year leasehold interest in a one-to-four unit dwelling or in a condominium unit, through an exchange of money;

45. *Rehabilitation* means any repairs and or capital improvements that contribute to the long-term preservation, current building code compliance, habitability, sustainability, or energy efficiency of affordable housing;

46. *Revolving Loan Fund* means a pool of funds managed by the Applicant or Awardee wherein repayments on Affordable Housing Activities loans, Economic Development Activities loans and/or Community Services Facilities loans are used to finance additional loans;

47. *Risk-Sharing Loan* means loans for Affordable Housing Activities and/or Economic Development Activities in which the risk of borrower default is shared by the Applicant or Awardee with other lenders (*e.g.,* participation loans);

48. *Service Area* means the geographic area in which the Applicant proposes to use CMF funding, and the geographic area approved by the CDFI Fund in which the Awardee shall use CMF funding as set forth in its Assistance Agreement;

49. *Single-family housing* means a one- to four-family residence, condominium unit, cooperative unit, combination of manufactured housing and lot, or manufactured housing lot;

50. *State* means the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Island, Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands, and any other territory of the United States;

51. *State-Insured Credit Union* means any credit union that is regulated by, and/or the member accounts of which are insured by, a State agency or instrumentality;

52. *Subsidiary* means any company which is owned or Controlled directly or indirectly by another company;

53. *Underserved Rural Area* means a Non-Metropolitan Area that (i) Qualifies as a Low-Income Area; (ii) is experiencing housing stress evidenced by 30 percent or more of resident households with one or more of these housing conditions in the last decennial census: (A) Lacked complete plumbing, (B) lacked complete kitchen, (C) paid 30 percent or more of income for owner costs or rent, or (D) had more than 1 person per room; or (iii) is remote-rural county (*i.e.,* is neither located in, nor adjacent to, a Non-Metropolitan Area);

54. *Very Low-Income* means (i) in the case of owner-occupied housing units, income not greater than 50 percent of the area median income; and (ii) in the case of rental housing units, income not greater than 50 percent of the area median income, with adjustments for smaller and larger families, as determined by HUD.

D. The CDFI Fund reserves the right to fund, in whole or in part, any, all, or none of the applications submitted in response to this NOFA.

## II. Award Information

A. *Funding Availability:* Through this NOFA, the CDFI Fund expects that it will award approximately $80 million in appropriated funds for the FY 2010 Funding Round.

B. *Funding Cap:* The CDFI Fund is prohibited from obligating more than 15 percent of the available funding in the aggregate to any Applicant, its Subsidiaries and Affiliates in the same funding year. The CDFI Fund anticipates that the maximum award for the FY 2010 Funding Round will therefore be $12 million in the aggregate to any Applicant, its Subsidiaries and Affiliates.

C. *Types of Awards:* The CDFI Fund will provide CMF awards in the form of grants. Applicants may request a grant of up to $12 million under this award announcement. The CDFI Fund reserves the right, in its sole discretion, to provide a CMF award in an amount other than that which the Applicant requests; however, the award amount will not exceed the Applicant's award request as stated in its application. CMF awards must be used to support the Applicant's activities; CMF awards cannot be used to support the activities of, or otherwise be "passed through" to, third-party entities, whether Affiliates, Subsidiaries, or others, without the prior written permission of the CDFI Fund.

1. *Eligible Uses:* An Applicant may submit an application for a CMF award intended to support financing activities related to (i) the Development, Preservation, Rehabilitation, or Purchase of Affordable Housing for primarily Low-, Very Low- and Extremely Low-Income families, and (ii) Economic Development Activities or Community Service Facilities, such as day care centers, workforce development centers, and health care clinics. CMF awards can be used as follows: (i) To provide Loan Loss Reserves, (ii) to capitalize a Revolving Loan Fund, (iii) to capitalize an Affordable Housing Fund, (iv) to capitalize a fund to support Economic Development Activities and Community Service Facilities, (v) for Risk-Sharing Loans, (vii) to provide Loan Guarantees, and (viii) to support Operations pertaining to the administration of the CMF award.

2. *Limitations on Use:* Each Awardee that uses CMF funding to support Affordable Housing Activities shall ensure that 100 percent of Eligible Project Costs pertaining to such activities are attributable to housing units that meet the CMF affordability qualifications for Homeownership and rental properties for families whose annual income does not exceed 120 percent of the median income for the area. In addition, greater than 50 percent of the Eligible Project Costs must be attributable to housing units that meet the CMF affordability qualifications for Homeownership and rental units for either Low-Income, Very Low-Income, or Extremely Low-Income Families. These affordability restrictions must remain in place for a period of 10 years from the date of project completion, which includes the transfer of title, completion of construction, and other criteria as described in the Awardee's Assistance Agreement.

Awardees may use no more than 30 percent of their CMF award pursuant to this NOFA to support Economic Development Activities and Community Service Facilities. In addition, no more than five percent of an Awardee's CMF grant pursuant to this NOFA may be used for Operations.

3. *Designation of a Service Area:* Each Applicant shall indicate its proposed Service Area in its application and shall use its CMF award in the Service Area approved by the CDFI Fund and designated in its Assistance Agreement.

4. *Leverage:* Each CMF award is expected to result in total Eligible Project Costs equal to at least ten (10) times the CMF award amount. Such costs may be for activities including Affordable Housing Activities, Economic Development Activities or Community Service Facilities. Thus, an Awardee shall demonstrate that it leveraged its CMF award at least 10 times the CMF grant amount or some other standard established by the CDFI Fund in the Awardee's Assistance Agreement. For the purposes of this NOFA, Eligible Project Costs include Leveraged Costs plus those costs funded directly by a CMF award, excluding costs associated with Operations. Leveraged Costs are costs that exceed the dollar amount of the Awardee's CMF contribution to each CMF-funded activity. An Awardee may report to the CDFI Fund all Leveraged Costs with the following limitations:

(a) No costs attributable to Operations may be reported as Leveraged Costs.

(b) No costs attributable to prohibited uses as defined in the Assistance Agreement may be reported as Leveraged Costs.

An Awardee shall self-report its leveraging information through a standardized data collection system developed by the CDFI Fund. Consequently, an Awardee should maintain appropriate documentation,

such as audited financial statements, wire transfers documents, pro-formas, and other relevant records, to support its reports.

5. *Commitment for Use:* CMF awards shall be committed for use within two years of the effective date of the Awardee's Assistance Agreement. An Awardee shall demonstrate that its CMF award is committed by having executed a written, legally binding agreement under which CMF assistance will be provided to the developer or project sponsor for an identifiable project under which:

(a) Construction can reasonably be expected to start within 12 months of the agreement date; or

(b) Property title will be transferred within six months of the agreement date.

An Awardee shall make an initial disbursement of its CMF award for Affordable Housing Activities, Economic Development Activities, or Community Service Facilities within three years of the effective date of its Assistance Agreement.

6. *Project Completion:* All projects funded through CMF grants must be placed into service within 5 years of the effective date of the Assistance Agreement.

7. *Limitation on Awards:* An Applicant may receive only one award through the FY 2010 Funding Round of the CMF. A CMF Applicant, its Subsidiaries, or Affiliates also may apply for and receive an award through the CDFI Program, Native American CDFI Assistance (NACA) Program, Bank Enterprise Award (BEA) Program, Financial Education and Counseling (FEC) Pilot Program, or New Markets Tax Credit (NMTC) Program, but only to the extent that the activities approved for CMF awards are different from those activities for which the Applicant receives an award under another CDFI Fund program.

D. *Assistance Agreement:* Each Awardee under this NOFA must sign an Assistance Agreement in order to receive a disbursement of award proceeds by the CDFI Fund. The Assistance Agreement will include a Notice of Award and these documents will contain the terms and conditions of the award. For further information, see Sections VI.A and VI.B of this NOFA.

**III. Eligibility Information**

A. *Eligible Applicants:* The following sets forth the eligibility requirements that each Applicant must meet in order to be eligible to apply for assistance under this NOFA.

1. *CMF Applicant Categories:* All Applicants for CMF awards through this NOFA must be Certified CDFIs or eligible Nonprofit Organizations. An Applicant will be deemed eligible to apply for a CMF award if it is:

(a) A Certified CDFI that has been in existence as a legally formed entity for at least three years prior to the application deadline under this NOFA;

(b) An entity that has been in existence as a legally formed entity for at least three years prior to the application deadline under this NOFA, and the CDFI Fund has received that entity's CDFI certification application materials by April 1, 2010; or

(c) A Nonprofit Organization that: (i) Has been in existence as a legally formed entity for at least three years prior to the application deadline under this NOFA; (ii) demonstrates, through articles of incorporation, by-laws, or other board-approved documents, that the development or management of affordable housing are among its principal purposes; and (iii) can demonstrate that at least one-third of the Applicant's resources (either as a portion of total staffing or as a portion of total assets) are dedicated to the development or management of affordable housing.

2. *CDFI Certification Status:* Eligible CMF Applicants include Certified CDFIs and certain entities that have applied for CDFI certification, defined as follows:

(a) *Certified CDFIs:* For purposes of this NOFA, a Certified CDFI is an entity that has received official notification from the CDFI Fund that it meets all CDFI certification requirements as of the date of publication of this NOFA, the certification of which has not expired, and that has not been notified by the CDFI Fund that its certification has been terminated. In cases where the CDFI Fund provided certified CDFIs with written notification that their certifications had been extended, the CDFI Fund will consider the extended certification date (the later date) to determine whether those certified CDFIs meet this eligibility requirement. When applicable, each such Applicant must submit a Certification of Material Events form to the CDFI Fund not later than April 1, 2010 (see Table 1—FY 2010 CMF Deadlines). The Certification of Material Events form can be found on the CDFI Fund's Web site at *http://www.CDFIfund.gov.*

(b) *Entities that have applied for CDFI Certification:* For purposes of this NOFA, these are entities from which the CDFI Fund has received a complete CDFI Certification application not later than April 1, 2010. **Please note:** While an entity that has applied for CDFI certification may be deemed eligible to apply for a CMF award, the CDFI Fund will not provide an award to such an entity unless and until the CDFI Fund has officially certified the organization as a CDFI.

B. *Prior Awardees:* Applicants must be aware that success in a prior round of any of the CDFI Fund's programs is not indicative of success under this NOFA. For purposes of this section, the CDFI Fund will consider an Affiliate to be any entity that meets the definition of Affiliate in this NOFA or any entity otherwise identified as an Affiliate by the Applicant in its funding application under this NOFA. Prior awardees should note the following:

1. *Failure to Meet Reporting Requirements:* The CDFI Fund will not consider an application submitted by an Applicant if the Applicant, or an Affiliate of the Applicant, is a prior awardee or allocatee under any CDFI Fund program and is not current on the reporting requirements set forth in a previously executed assistance, allocation, or award agreement(s), as of the applicable application deadline of this NOFA. Please note that the CDFI Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received.

2. *Pending Resolution of Noncompliance:* If an Applicant is a prior awardee or allocatee under any CDFI Fund program and if (i) it has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, allocation or award agreement, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, allocation, or award agreement, the CDFI Fund will consider the Applicant's application under this NOFA pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance. Further, if an Affiliate of the Applicant is a prior CDFI Fund awardee or allocatee and if such entity (i) has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, allocation, or award agreement, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, allocation, or award agreement, the CDFI Fund will consider the Applicant's application under this NOFA pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance.

3. *Default Status:* The CDFI Fund will not consider an application submitted by an Applicant that is a prior awardee or allocatee under any CDFI Fund

program if, as of the applicable application deadline of this NOFA, the CDFI Fund has made a final determination that such Applicant is in default of a previously executed assistance, allocation, or award agreement(s). Further, an entity is not eligible to apply for an award pursuant to this NOFA if, as of the applicable application deadline of this NOFA, the CDFI Fund has made a final determination that an Affiliate of the Applicant is a prior awardee or allocatee under any CDFI Fund program and has been determined by the CDFI Fund to be in default of a previously executed assistance, allocation, or award agreement(s). Such entities will be ineligible to apply for an award pursuant to this NOFA so long as the Applicant's, or its Affiliate's, prior award or allocation remains in default status or such other time period as specified by the CDFI Fund in writing.

4. *Termination in Default:* The CDFI Fund will not consider an application submitted by an Applicant that is a prior awardee or allocatee under any CDFI Fund program if (i) within the 12-month period prior to the applicable application deadline of this NOFA, the CDFI Fund has made a final determination that such Applicant's prior award or allocation terminated in default of a previously executed assistance, allocation, or award agreement(s), and (ii) the final reporting period end date for the applicable terminated assistance, allocation, or award agreement(s) falls within the 12-month period prior to the application deadline of this NOFA. Further, an entity is not eligible to apply for an award pursuant to this NOFA if (i) within the 12-month period prior to the applicable application deadline, the CDFI Fund has made a final determination that an Affiliate of the Applicant is a prior awardee or allocatee under any CDFI Fund program whose award or allocation terminated in default of a previously executed assistance, allocation, or award agreement(s), and (ii) the final reporting period end date for the applicable terminated assistance, allocation or award agreement(s) falls within the 12-month period prior to the application deadline of this NOFA.

5. *Undisbursed Award Funds:* The CDFI Fund will not consider an application submitted by an Applicant that is a prior awardee under any CDFI Fund program if the Applicant has a balance of undisbursed award funds (as defined below) under said prior award(s), as of the applicable application deadline of this NOFA. Further, an entity is not eligible to apply for an award pursuant to this NOFA if an Affiliate of the Applicant is a prior awardee under any CDFI Fund program, and has a balance of undisbursed award funds under said prior award(s), as of the applicable application deadline of this NOFA. In a case where another entity that Controls the Applicant, is Controlled by the Applicant, or shares common management officials with the Applicant (as determined by the CDFI Fund) is a prior awardee under any CDFI Fund program, and has a balance of undisbursed award funds under said prior award(s), as of the applicable application deadline of this NOFA, the CDFI Fund will include the combined awards of the Applicant and such Affiliated entities when calculating the amount of undisbursed award funds.

For purposes of the calculation of undisbursed award funds for the BEA Program, only awards made to the Applicant (and any Affiliates) three to five calendar years prior to the end of the calendar year of the application deadline of this NOFA are included ("includable BEA awards"). Thus, for purposes of this NOFA, undisbursed BEA Program award funds are the amount of FYs 2005, 2006, and 2007 awards that remain undisbursed as of the application deadline of this NOFA.

For purposes of the calculation of undisbursed award funds for the CDFI Program and the Native Initiatives Funding Programs, only awards made to the Applicant (and any Affiliates) two to five calendar years prior to the end of the calendar year of the application deadline of this NOFA are included ("includable CDFI/NI awards"). Thus, for purposes of this NOFA, undisbursed CDFI Program and NI awards are the amount of FYs 2005, 2006, 2007 and 2008 awards that remain undisbursed as of the application deadline of this NOFA. The term "Native Initiatives Funding Programs" refers to the NACA Program and all prior funding programs, through which funds are no longer available, including the Native American CDFI Technical Assistance (NACTA) Component of the CDFI Program, the Native American CDFI Development (NACD) Program, and the Native American Technical Assistance (NATA) Component of the CDFI Program.

To calculate total includable BEA/CDFI/NI awards: amounts that are undisbursed as of the application deadline of this NOFA cannot exceed five percent of the total includable awards.

The "undisbursed award funds" calculation does not include: (i) Tax credit allocation authority made available through the NMTC Program; (ii) any award funds for which the CDFI Fund received a full and complete disbursement request from the awardee by the applicable application deadline of this NOFA; (iii) any award funds for an award that has been terminated in writing by the CDFI Fund or deobligated by the CDFI Fund; or (iv) any award funds for an award that does not have a fully executed assistance or award agreement. The CDFI Fund strongly encourages Applicants requesting disbursements of "undisbursed funds" from prior awards to provide the CDFI Fund with a complete disbursement request at least 10 business days prior to the application deadline of this NOFA.

6. *Contact the CDFI Fund:* Applicants that are prior CDFI Fund awardees are advised to: (i) Comply with requirements specified in assistance, allocation, and/or award agreement(s), and (ii) contact the CDFI Fund to ensure that all necessary actions are underway for the disbursement or deobligation of any outstanding balance of said prior award(s). An Applicant that is unsure about the disbursement status of any prior award should contact the CDFI Fund's Senior Resource Manager via e-mail at *CDFI.disburseinquiries@cdfi.treas.gov.*

7. *Entities that Submit Applications Together with Affiliates; Applications from Common Enterprises:*

(a) As part of the CMF application review process, the CDFI Fund considers whether Applicants are Affiliates, as such term is defined in the CMF application. If an Applicant and its Affiliates wish to submit CMF applications, they must do so collectively, in one application; an Applicant and its Affiliates may not submit separate CMF applications. If Affiliated entities submit multiple applications, the CDFI Fund reserves the right either to reject all such applications received or to select a single application as the only application considered for an award.

For purposes of this NOFA, in addition to assessing whether applicants meet the definition of the term "Affiliate," the CDFI Fund will consider: (i) Whether the activities described in applications submitted by separate entities are, or will be, operated and/or managed as a common enterprise that, in fact or effect, may be viewed as a single entity; (ii) whether the applications submitted by separate entities contain significant narrative, textual or other similarities, and (iii) whether the business strategies and/or activities described in applications submitted by separate entities are so closely related, in fact or effect, they

may be viewed as substantially identical applications. In such cases, the CDFI Fund reserves the right either to reject all applications received from all such entities; to select a single application as the only one that will be considered for an award; and, in the event that an application is selected to receive an award, to deem certain activities ineligible.

(b) Furthermore, an Applicant that receives an award in this CMF round may not become an Affiliate of or member of a common enterprise (as defined above) with another Applicant that receives an award in this CMF round at any time after the submission of a CMF application under this NOFA. This requirement will also be a term and condition of the Assistance Agreement (see Section VI.B. of this NOFA and additional application guidance materials on the CDFI Fund's Web site at *http://www.cdfifund.gov* for more details).

## IV. Application and Submission Information

A. *MyCDFIFund Accounts:* All Applicants must register User and Organization accounts in myCDFIFund, the CDFI Fund's Internet-based interface. An Applicant must be registered as both a User and an Organization in myCDFIFund as of the applicable application deadline in order to be considered to have submitted a complete application. As myCDFIFund is the CDFI Fund's primary means of communication with Applicants and Awardees, organizations must make sure that they update the contact information in their myCDFIFund accounts before the applicable application deadline. For more information on myCDFIFund, please see the "Frequently Asked Questions" link posted at *https://www.cdfifund.gov/myCDFI/Help/Help.asp.*

B. *Form of Application Submission:* Applicants must submit applications under this NOFA electronically. Applications sent by mail, facsimile, or other form will not be permitted, except in circumstances that the CDFI Fund, in its sole discretion, deems acceptable.

C. *Applications Submitted via myCDFIFund:* Applicants must submit applications under this NOFA electronically, through myCDFIFund, the CDFI Fund's Internet-based interface. Please note that the CDFI Fund will not accept applications through Grants.gov. Applications sent by mail, facsimile, or other form will generally not be accepted, except in circumstances approved by the CDFI Fund, in its sole discretion. The CDFI Fund will post to its Web site at *http://www.cdfifund.gov* instructions for accessing and submitting an application as soon as they become available.

D. *Application Content Requirements:* Detailed application content requirements are found in the application and guidance. Please note that, pursuant to OMB guidance (68 *FR* 38402), each Applicant must provide, as part of its application submission, a Dun and Bradstreet Data Universal Numbering System (DUNS) number. In addition, each application must include a valid and current Employer Identification Number (EIN), with a letter or other documentation from the Internal Revenue Service (IRS) confirming the Applicant's EIN. An application that does not include an EIN is incomplete and cannot be transmitted to the CDFI Fund. Applicants should allow sufficient time for the IRS and/or Dun and Bradstreet to respond to inquiries and/or requests for identification numbers. Once an application is submitted, the Applicant will not be allowed to change any element of the application. The preceding sentences do not limit the CDFI Fund's ability to contact an Applicant for the purpose of obtaining clarifying or confirming application information (such as a DUNS number or EIN information).

E. Under the Paperwork Reduction Act (44 U.S.C. chapter 35), an agency may not conduct or sponsor a collection of information, and an individual is not required to respond to a collection of information, unless it displays a valid OMB control number. Pursuant to the Paperwork Reduction Act, the application has been assigned the following control number: 1559–0036.

F. *Application Deadlines:*

1. The following are the deadlines for submission of the documents related to the FY 2010 Funding Round:

TABLE 1—FY 2010 CMF DEADLINES

[All 5 p.m. ET deadlines]

| Applicant Type | Document | Deadline | Last date to contact CDFI Fund |
|---|---|---|---|
| Certified CDFIs | Certification of Material Events | Thursday, April 1, 2010 | Tuesday, March 30, 2010. |
| Entities Applying for CDFI Certification. | CDFI Certification Application | Thursday, April 1, 2010 | Tuesday, March 30, 2010. |
| All Applicants | CMF Funding Application | Thursday, April 15, 2010 | Tuesday, April 13, 2010. |

All CMF funding applications must be electronic and submitted through myCDFIFund. No paper submittals or attachments will be accepted.

2. *Late Delivery:* The CDFI Fund will neither accept a late application nor any portion of an application that is late; an application that is late, or for which any portion is late, will be rejected. The CDFI Fund will not grant exceptions or waivers. Any application that is deemed ineligible will not be returned to the Applicant.

G. *Intergovernmental Review:* Not applicable.

H. *Funding Restrictions:* CMF awards may not be used for the following: (i) Political activities; (ii) advocacy; (iii) lobbying, whether directly or through other parties; (iv) counseling services (including homebuyer or financial counseling); (v) travel expenses; (vi) preparing or providing advice on tax returns; (vii) emergency shelters (including shelters for disaster victims); (viii) nursing homes; (ix) convalescent homes; (x) residential treatment facilities; (xi) correctional facilities; (xii) student dormitories; or (xiii) other uses identified in the Awardee's Assistance Agreement.

## V. Application Review Information

A. *Format:* Each narrative response required in the application has limitations with respect to the amount of words or characters that the Applicant may provide. Applicants are encouraged to read each question carefully and to remain within limitations set forth in the question, to avoid the electronic application submission form from truncating the Applicant's response. Also, the CDFI Fund will read only information requested in the application and will not read attachments that have not been specifically requested in this NOFA or the application.

B. *Criteria:* Applicants will be evaluated across several key areas:

1. *Business Strategy:* The Applicant must provide a detailed strategy for implementing its CMF award. The Applicant is required to identify and describe, among other things: (i) Its track record of financing Affordable Housing and related activities; (ii) its proposed activities including a description of the financing tools and specific debt or equity products that will be offered; and (iii) its pipeline of proposed projects and activities.

2. *Leveraging Strategy:* The Applicant must be able to demonstrate its ability to leverage CMF award funding. To this end, the Applicant must identify and describe, among other things, its anticipated strategy for leveraging dollars, including private capital: (i) At the pre-investment stage (*e.g.,* use of the CMF award to secure additional third-party capital prior to investing into projects); (ii) through reinvestment of CMF award dollars into additional projects (*e.g.,* use of the CMF award to fund a revolving loan pool to invest in projects); and (iii) at the project level (*e.g.,* use of the CMF award to invest in projects with total costs in excess of the CMF award investment).

3. *Community Impact:* The Applicant must describe the extent to which the Applicant will target its activities towards underserved populations and areas of high housing need; and describe the extent to which the Applicant's strategy will have positive community development and economic impacts.

4. *Organizational Capacity:* The Applicant must demonstrate its ability and capacity to undertake its proposed activities, use its award successfully, and maintain compliance with its Assistance Agreement. To this end, the Applicant will be required to identify and describe, among other things: (i) Its management team and key staff; (ii) the role of its governing board or advisory board; (iii) its timelines for committing its CMF award funds to activities and projects; (iv) its procedures and systems to track and ensure compliance with the affordability and community impact commitments; (v) its current financial condition, including results of recent audits; and (vi) its experience administering other public funds including federal government awards, if applicable.

*C. Review and Selection Process*

1. *Eligibility and Completeness Review:* The CDFI Fund will review each application to determine whether it is complete and the Applicant meets the eligibility requirements set forth above. An incomplete application that does not meet eligibility requirements will be rejected. Any application that does not meet eligibility requirements will not be returned to the Applicant.

2. *Substantive Review:* If an application is deemed to be complete and the Applicant is determined to be eligible, the CDFI Fund will conduct the substantive review of the application in accordance with the criteria and procedures described in this NOFA, the application, and any application guidance. As part of the review process, the CDFI Fund may contact the Applicant by telephone, e-mail, mail, or through an on-site visit for the sole purpose of obtaining clarifying or confirming application information. The CDFI Fund reserves the right to collect such additional information from Applicants as it deems appropriate. After submitting its application, the Applicant will not be permitted to revise or modify its application in any way nor attempt to negotiate the terms of an award. If contacted for clarifying or confirming information, the Applicant must respond within the time parameters set by the CDFI Fund.

3. *Application Review; Selection:* Awards will be made based on Applicants' experience and ability to use CMF award dollars to support Affordable Housing Activities, Economic Development Activities, and Community Service Facilities, in accordance with the criteria set forth above in Section V.B.

(a) *Quantitative Peer Review:* The CDFI Fund may undertake an initial review of all applications prior to assigning the application to a reviewer. This review will be based upon quantitative information provided by the Applicant in its application materials, with specific focus on: (i) The Applicant's commitments to using CMF award dollars to generate additional funds through leveraging; (ii) the Applicant's commitments to targeting projects that serve underserved populations or areas of high housing need; and (iii) the Applicant's demonstrated ability to obligate funds and undertake activities in a timely matter. Applicants that, when compared with the rest of the Applicant pool, score lowest in one or more of these key areas may not be forwarded to the next level of review.

(b) *Application Review:* Reviewers will be assigned a set number of applications to review. Once the reviewer has completed all of his/her review assignments, he/she will provide a score for each of the applications that was reviewed, in accordance with the scoring criterion outlined in the application materials.

(c) *Evaluating Prior Award Performance:* In the case of an Applicant that has received awards from other federal programs, the CDFI Fund reserves the right to contact officials from the appropriate federal agency or agencies to determine whether the Awardee is in compliance with current or prior award agreements, and to take such information into consideration before making a CMF award. In the case of an Applicant that has previously received funding through any CDFI Fund program, the CDFI Fund will consider and may, in its discretion, deduct points for those Applicants (or their Affiliates) that have a history of providing late reports. The CDFI Fund may also bar from consideration an Applicant that has, in any proceeding instituted against the Applicant in, by, or before any court, governmental, or administrative body or agency, received a final determination within the last three years indicating that the Applicant has discriminated on the basis of race, color, national origin, disability, age, marital status, receipt of income from public assistance, religion, or sex.

(d) *Selection:* After all applications have been reviewed and scored, the CDFI Fund will make award determinations in descending order of scores, subject to Applicants' meeting all eligibility requirements; provided, however, that the CDFI Fund, in its sole discretion, reserves the right to reject an application and/or adjust award amounts as appropriate based on information obtained during the review process. After preliminary award determinations are made, the CDFI Fund will review the list of potential awardees to determine whether: (i) the potential awardees' service areas collectively represent broad geographic coverage throughout the United States; and (ii) the potential awardees will collectively, based upon projections made by each Applicant, direct at least 20 percent of total activities to Non-Metropolitan Areas. To the extent practicable, the CDFI Fund reserves the right to make alterations to award amounts and/or make awards to additional organizations if deemed necessary to ensure these desired outcomes.

4. *Regulated Applicants:* In the case of Insured Depository Institutions and Insured Credit Unions, the CDFI Fund will take into consideration the views of the Appropriate Federal Banking Agencies; in the case of State-Insured Credit Unions, the CDFI Fund may consult with the appropriate State banking agencies (or comparable entity).

5. *Award Notification:* Each Applicant will be informed of the CDFI Fund's

award decision through an Assistance Agreement if selected for an award (see Assistance Agreement section, below) or written declination if not selected for an award. The CDFI Fund will notify Awardees by e-mail using the addresses maintained in the Awardee's myCDFIFund account.

6. The CDFI Fund reserves the right to reject an application if information (including administrative errors) comes to the attention of the CDFI Fund that adversely affects an Applicant's eligibility for an award, adversely affects the CDFI Fund's evaluation or scoring of an application, or indicates fraud or mismanagement on the part of an Applicant. If the CDFI Fund determines that any portion of the application is incorrect in any material respect, the CDFI Fund reserves the right, in its sole discretion, to reject the application. The CDFI Fund reserves the right to change its eligibility and evaluation criteria and procedures, if the CDFI Fund deems it appropriate; if said changes materially affect the CDFI Fund's award decisions, the CDFI Fund will provide information regarding the changes through the CDFI Fund's Web site. There is no right to appeal the CDFI Fund's award decisions. The CDFI Fund's award decisions are final.

**VI. Award Administration Information**

A. *Notice of Award:* The CDFI Fund will signify its conditional selection of an Applicant as an Awardee by delivering an Assistance Agreement to the Applicant via e-mail using the addresses maintained in the Awardee's myCDFIFund account. The Assistance Agreement will contain the Notice of Award and general terms and conditions underlying the CDFI Fund's provision of assistance. The Awardee must confirm receipt of the Assistance Agreement once received. By confirming receipt of the Assistance Agreement, the Awardee agrees, among other things, that, if prior to executing and entering into an Assistance Agreement with the CDFI Fund, information (including administrative errors) comes to the attention of the CDFI Fund that either adversely affects the Awardee's eligibility for an award, or adversely affects the CDFI Fund's evaluation of the Awardee's application, or indicates fraud or mismanagement on the part of the Awardee, the CDFI Fund may, in its discretion and without advance notice to the Awardee, terminate the award or take such other actions as it deems appropriate. Moreover, by confirming receipt of the Assistance Agreement, the Awardee agrees that, if prior to executing and entering into an Assistance Agreement with the CDFI Fund, the CDFI Fund determines that the Awardee or an Affiliate of the Awardee is in default of any Assistance Agreement previously entered into with the CDFI Fund, the CDFI Fund may, in its discretion and without advance notice to the Awardee, either terminate the award or take such other actions as it deems appropriate. The CDFI Fund reserves the right, in its sole discretion, to rescind its award if the Awardee fails to return the Assistance Agreement, signed by the authorized representative of the Awardee, along with any other requested documentation, within the deadline set by the CDFI Fund. For purposes of this section, the CDFI Fund will consider an Affiliate to mean any entity that meets the definition of Affiliate in this NOFA.

1. *Failure to Meet Reporting Requirements:* If an Awardee or an Affiliate of the Awardee is a prior awardee or allocatee under any CDFI Fund program and is not current on the reporting requirements set forth in the previously executed assistance, allocation or award agreement(s), as of the date of the NOA, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement until said prior awardee or allocatee is current on the reporting requirements in any previously executed assistance, allocation, or award agreement(s). Please note that the CDFI Fund only acknowledges the receipt of reports that are complete. As such, incomplete reports or reports that are deficient of required elements will not be recognized as having been received. If said prior awardee or allocatee is unable to meet this requirement within the timeframe set by the CDFI Fund, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the award made under this NOFA.

2. *Pending Resolution of Noncompliance:* If an Applicant is a prior awardee or allocatee under any CDFI Fund program and if: (i) it has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, award, or allocation agreement; and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award, or allocation agreement, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement, pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance. Further, if an Affiliate of the Awardee is a prior CDFI Fund awardee or allocatee and if such entity (i) has submitted complete and timely reports to the CDFI Fund that demonstrate noncompliance with a previous assistance, award, or allocation agreement, and (ii) the CDFI Fund has yet to make a final determination as to whether the entity is in default of its previous assistance, award, or allocation agreement, the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement, pending full resolution, in the sole determination of the CDFI Fund, of the noncompliance. If the prior awardee or allocatee in question is unable to satisfactorily resolve the issues of noncompliance, in the sole determination of the CDFI Fund, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the award made under this NOFA.

3. *Default Status:* If, at any time prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund has made a final determination that an Awardee that is a prior awardee or allocatee under any CDFI Fund program is in default of a previously executed assistance, allocation, or award agreement(s), the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement, until said prior awardee or allocatee has submitted a complete and timely report demonstrating full compliance with said agreement within a timeframe set by the CDFI Fund. Further, if at any time prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund has made a final determination that an Affiliate of the Awardee is a prior awardee or allocatee under any CDFI Fund program and is in default of a previously executed assistance, allocation, or award agreement(s), the CDFI Fund reserves the right, in its sole discretion, to delay entering into an Assistance Agreement, until said prior awardee or allocatee has submitted a complete and timely report demonstrating full compliance with said agreement within a timeframe set by the CDFI Fund. If said prior awardee or allocatee is unable to meet this requirement and the CDFI Fund has not specified in writing that the prior awardee or allocatee is otherwise eligible to receive an Award under this NOFA, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the award made under this NOFA.

4. *Termination in Default:* If (i) within the 12-month period prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund has made a final determination that an Awardee that is a prior awardee or allocatee

under any CDFI Fund program whose award or allocation was terminated in default of such prior agreement, and (ii) the final reporting period end date for the applicable terminated agreement falls within the 12-month period prior to the application deadline of this NOFA, the CDFI Fund reserves the right, in its sole discretion, to delay entering into or determine not to enter into an Assistance Agreement. Further, if (i) within the 12-month period prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund has made a final determination that an Affiliate of the Awardee is a prior awardee or allocatee under any CDFI Fund program whose award or allocation was terminated in default of such prior agreement, and (ii) the final reporting period end date for the applicable terminated agreement falls within the 12-month period prior to the application deadline of this NOFA, the CDFI Fund reserves the right, in its sole discretion, to delay entering into or determine not to enter into an Assistance Agreement.

5. *Compliance with Federal Anti-Discrimination Laws:* If at any time prior to entering into an Assistance Agreement through this NOFA, the CDFI Fund is made aware of a final determination, made within the last three years, in any proceeding instituted against the Awardee in, by, or before any court, governmental, or administrative body or agency, declaring that the Awardee has discriminated on the basis of race, color, national origin, disability, age, marital status, receipt of income from public assistance, religion, or sex, the CDFI Fund reserves the right, in its sole discretion, to terminate and rescind the award made under this NOFA.

B. *Assistance Agreement:* Each Applicant that is selected to receive an award under this NOFA must enter into an Assistance Agreement with the CDFI Fund in order to receive disbursement of award proceeds. The Assistance Agreement will set forth certain required terms and conditions of the award, which will include, but not be limited to: (i) The amount of the award; (ii) the approved uses of the award; (iii) the approved Service Area in which the award may be used; (iv) performance goals and measures; and (v) reporting requirements for all Awardees. It is anticipated that CMF awards under this NOFA generally will have ten-year performance periods.

The Assistance Agreement shall provide that in the event of fraud, mismanagement, noncompliance with the Act or the CDFI Fund's regulations, or noncompliance with the terms and conditions of the Assistance Agreement on the part of the Awardee, the CDFI Fund, in its discretion, may: (1) Require changes in the performance goals set forth in the Assistance Agreement; (2) revoke approval of the Awardee's application; (3) reduce or terminate the Awardee's assistance; (4) require repayment of any assistance that has been distributed to the Awardee; (5) bar the Awardee from reapplying for any assistance from the CDFI Fund; or (6) take such other actions as the CDFI Fund deems appropriate or as set forth in the Assistance Agreement.

Prior to imposing any sanctions pursuant to this section or an Assistance Agreement, the CDFI Fund shall, to the maximum extent practicable, provide the Awardee with written notice of the proposed sanction and an opportunity to comment. Nothing in this section, however, shall provide an Awardee the right to any formal or informal hearing or comparable proceeding not otherwise required by law.

The CDFI Fund reserves the right, in its sole discretion, to terminate and rescind an award if the Awardee fails to return the Assistance Agreement, signed by the authorized representative of the Awardee, and/or provide the CDFI Fund with any other requested documentation, within the deadlines set by the CDFI Fund.

In addition to entering into an Assistance Agreement, each Applicant selected to receive a CMF award must furnish to the CDFI Fund an opinion from its legal counsel, the content of which will be further specified in the Assistance Agreement, which may include, among other matters, an opinion that: (i) The Applicant (and its Subsidiary transferees, if any) is duly formed and in good standing in the jurisdiction in which it was formed and the jurisdiction(s) in which it operates; (ii) the Applicant (and its Subsidiary transferees, if any) has the authority to enter into the Assistance Agreement and undertake the activities that are specified therein; (iii) the Applicant (and its Subsidiary transferees, if any) has no pending or threatened litigation that would materially affect its ability to enter into and carry out the activities specified in the Assistance Agreement; (iv) the Applicant (and its Subsidiary transferees, if any) is not in default of its articles of incorporation, bylaws or other organizational documents, or any agreements with the Federal government; and (v) the CMF affordability restrictions that are to be imposed by deed restrictions, covenants running with the land, or other CDFI Fund approved mechanisms are recordable and enforceable under the laws of the State and locality where the Awardee will undertake its CMF activities.

*C. Reporting*

1. *Reporting requirements:* The CDFI Fund will collect information, on at least an annual basis, from each Awardee which may include, but are not limited to: (i) Financial reports (including an OMB A–133 audit, as applicable); (ii) reports on Awardee information and transactional information; (iii) reports on uses of CMF award; (iv) verification of affordability standard maintenance; (v) explanation of noncompliance (as applicable); and (vi) such other information that the CDFI Fund may require. Each Awardee is responsible for the timely and complete submission of the annual reporting documents, even if all or a portion of the documents are completed by another entity or signatory to the Assistance Agreement. If such other entities or signatories are required to provide annual report documentation, or other documentation that the CDFI Fund may require, the Awardee is responsible for ensuring that the information is submitted timely and complete. The CDFI Fund reserves the right to contact such additional entities or signatories to the Assistance Agreement and require that additional information and documentation be provided. The CDFI Fund will use such information to monitor each Awardee's compliance with the requirements set forth in the Assistance Agreement and to assess the impact of the CMF. The CDFI Fund reserves the right, in its sole discretion, to modify these reporting requirements if it determines it to be appropriate and necessary; however, such reporting requirements will be modified only after notice to Awardees.

2. *Accounting:* The CDFI Fund will require each Awardee that receives CMF awards through this NOFA to account for and track the use of said CMF awards. This means that for every dollar of CMF awards received from the CDFI Fund, the Awardee will be required to inform the CDFI Fund of its uses. This will require Awardees to establish separate administrative and accounting controls, subject to the applicable OMB Circulars. The CDFI Fund will provide guidance to Awardees outlining the format and content of the information to be provided on an annual basis, outlining and describing how the funds were used. Each Awardee that receives an award must provide the CDFI Fund with the required complete and accurate Automated Clearinghouse (ACH) form for its bank account prior to award closing and disbursement.

## VII. Agency Contacts

A. The CDFI Fund will respond to questions and provide support concerning this NOFA and the funding application between the hours of 9 a.m. and 5 p.m. ET, starting the date of the publication of this NOFA through two days prior to the application deadline. The CDFI Fund will not respond to questions or provide support concerning the applications that are received after 5 p.m. ET on said dates, until after the funding application deadline. Applications and other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's Web site at *http://www.cdfifund.gov*. The CDFI Fund will post on its Web site responses to questions of general applicability regarding the CMF.

B. The CDFI Fund's contact information is as follows:

TABLE 2—CONTACT INFORMATION

| Type of question | Telephone number (not toll free) | E-mail addresses |
|---|---|---|
| **Fax number for all offices: 202–622–7754** | | |
| CMF | 202–622–6355 | *cdfihelp@cdfi.treas.gov.* |
| CDFI Certification | 202–622–6355 | *cdfihelp@cdfi.treas.gov.* |
| Compliance Monitoring and Evaluation | 202–622–6330 | *cme@cdfi.treas.gov.* |
| Information Technology Support | 202–622–2455 | *ITHelp@cdfi.treas.gov.* |

C. *Communication with the CDFI Fund:* The CDFI Fund will use the myCDFIFund Internet interface to communicate with Applicants and Awardees, using the contact information maintained in their respective myCDFIFund accounts. Therefore, the Applicant and any Subsidiaries, Signatories, and Affiliates must maintain accurate contact information (including contact person and authorized representative, e-mail addresses, fax numbers, phone numbers, and office addresses) in its myCDFIFund account(s). For more information about myCDFIFund (which includes information about the CDFI Fund's Community Investment Impact System), please see the Help documents posted at *http://www.cdfifund.gov/ciis/accessingciis.pdf*.

## VIII. Information Sessions and Outreach

The CDFI Fund may conduct webcasts, webinars, or information sessions for organizations that are considering applying to, or are interested in learning about, the CDFI Fund's programs. For further information, please visit the CDFI Fund's Web site at *http://www.cdfifund.gov*.

**Authority:** Pub.L. 110–289, 12 U.S.C. 4701, 12 CFR part 1805, 12 CFR part 1807, 12 CFR part 1815, 12 U.S.C. 4502.

Dated: March 4, 2010.

**Donna J. Gambrell,**

*Director, Community Development Financial Institutions Fund.*

[FR Doc. 2010–5025 Filed 3–12–10; 8:45 am]

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