5–6–09 Wednesday
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Federal Register

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WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, May 12, 2009
9:00 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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

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Presidential Documents

Title 3—

The President

Memorandum of May 1, 2009

Establishment of the Interagency Committee on Trade in Timber Products from Peru and Assignment of Function under Section 501 of the United States-Peru Trade Promotion Agreement Implementation Act

Memorandum for the Secretary of State, the Secretary of the Treasury, the Attorney General, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Homeland Security, United States Trade Representative, [and] Administrator of the United States Agency for International Development

Section 501 of the United States-Peru Trade Promotion Agreement Implementation Act (the ''Act''), Public Law 110–138, calls for the establishment of an interagency committee with responsibility for overseeing the implementation of Annex 18.3.4 of the United States-Peru Trade Promotion Agreement (the ''Agreement'') within 90 days after the date on which the Agreement enters into force. The Agreement entered into force on February 1, 2009. Therefore, by the authority vested in me as President under the Constitution and the laws of the United States, including section 301 of title 3, United States Code, and section 501 of the Act, I order as follows:

Section 1. *Establishment of Interagency Committee.* The Interagency Committee on Trade in Timber Products from Peru (Committee) is hereby established to oversee the implementation of Annex 18.3.4 of the Agreement, including by undertaking such actions and making such determinations provided for in section 501 of the Act that are not otherwise authorized under law.

Sec. 2. *Membership.* The Committee shall be composed of representatives of the Departments of State, Justice, the Interior, and Agriculture, and the Office of the United States Trade Representative (USTR), and all representatives shall be officers of the United States. The USTR's representative shall serve as chair. Representatives of the Department of Homeland Security and the United States Agency for International Development shall participate on the Committee as observers. The chair may invite representatives from other departments or agencies, as appropriate, to participate as observers.

Sec. 3. *Assignment of Function.* The function vested in the President by section 501(h) of the Act is assigned to the USTR.

Sec. 4. *Committee Decision-making.* The Committee shall endeavor to make any decision on an action or determination under section 501 of the Act by consensus, which shall be deemed to exist where no Committee member objects to the proposed action or determination. If the Committee is unable to reach a consensus on a proposed action or determination and the chair determines that allotting further time will cause a decision to be unduly delayed, the Committee shall decide the matter by majority vote of its members.

Sec. 5. *Implementing Measures.* The Secretaries of the Treasury, the Interior, Agriculture, and Homeland Security are directed to issue, in consultation with the USTR, such regulations and other measures as are necessary or appropriate to implement section 501 of the Act.

Sec. 6. *General Provisions.*

(a) Each department and agency shall bear its own expenses incurred in connection with the Committee's functions, including expenses it incurs in carrying out verification visits described in section 501(c)(3) of the Act.

(b) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) authority granted by law to a department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) 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.

Sec. 7. *Publication.* The USTR is authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, May 1, 2009

[FR Doc. E9–10648
Filed 5–5–09; 8:45 am]
Billing code 3190–01–P

Rules and Regulations

Federal Register
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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2008–1327; Directorate Identifier 2008–NM–161–AD; Amendment 39–15859; AD 2009–06–22]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A318, A319, A320, and A321 Airplanes

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

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting a typographical error in an existing airworthiness directive (AD) that was published in the **Federal Register** on March 24, 2009 (74 FR 12247). The error resulted in publication of an incorrect AD number. This AD applies to certain Airbus Model A318, A319, A320, and A321 airplanes. This AD requires the installation of improved cockpit door latch/striker assemblies.

DATES: Effective April 28, 2009.

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

FOR FURTHER INFORMATION CONTACT: Tim Dulin, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2141; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: On March 12, 2009, the FAA issued AD 2009–06–22, amendment 39–15859 (74 FR 12247, March 24, 2009), for certain Airbus Model A318, A319, A320, and A321 airplanes. The AD requires the installation of improved cockpit door latch/striker assemblies.

As published, that final rule incorrectly specified the AD number in a single location in the AD as ''2009–09–22'' instead of ''2009–06–22.''

No other part of the regulatory information has been changed; therefore, the final rule is not republished in the **Federal Register**.

The effective date of this AD remains April 28, 2009.

§ 39.13 [Corrected]

■ In the **Federal Register** of March 24, 2009, on page 12249, in the first column, paragraph 2. of **PART 39—AIRWORTHINESS DIRECTIVES** is corrected to read as follows:

* * * * *

2009–06–22 Airbus: Amendment 39–15859. Docket No. FAA–2008–1327; Directorate Identifier 2008–NM–161–AD.

* * * * *

Issued in Renton, Washington, on April 27, 2009.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E9–10421 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1076; Airspace Docket No. 08–ANE–102]

Amendment to Class E Airspace; Rutland, VT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule, confirmation of effective date.

SUMMARY: This action confirms the effective date of a direct final rule that amends the Class E Airspace at Rutland-Southern Vermont Regional (RUT); Rutland, VT to provide adequate controlled airspace for those aircraft using Instrument Approach Procedures to the airport. The action became necessary due to the decommissioning of the IRA NDB and new Standard Instrument Approach Procedures (SIAPs) being developed for Rutland-Southern Vermont Regional Airport. This rule also imparts a technical amendment to change the name of the airport from Rutland State Airport to Rutland-Southern Vermont Regional.

DATES: *Effective Date:* 0901 UTC, May 6, 2009. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320: telephone (404) 305–5610.

SUPPLEMENTARY INFORMATION:

Confirmation of Effective Date

The FAA published this direct final rule with a request for comments in the **Federal Register** on December 15, 2008 (73 FR 75936), Docket No. FAA–2008–1076; Airspace Docket No. 08–ANE–102. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on March 12, 2009. No adverse comments were received, and thus this notice confirms that effective date.

Issued in College Park, Georgia, on April 22, 2009.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E9–10372 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–0809; Airspace Docket No. 08–ASO–13]

Establishment of Class E Airspace; Morehead, KY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This action confirms the effective date of a direct final rule establishing Class E Airspace at Morehead, KY. Controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the Standard Instrument Approach Procedures (SIAPs) at the airport.

DATES: *Effective Date:* 0901 UTC, May 6, 2009. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5610.

SUPPLEMENTARY INFORMATION:

Confirmation of Effective Date

The FAA published a direct final rule with a request for comments in the **Federal Register** (73 FR 62878) on October 22, 2008, Docket No. FAA–2008–0809; Airspace Docket No. 08–ASO–13. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment or a written notice of intent to submit such an adverse comment were received within the comment period, the regulation would become effective on January 15, 2009. No adverse comments were received, and thus this notice confirms that effective date.

* * * * *

Issued in College Park, Georgia, on April 21, 2009.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E9–10394 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1168; Airspace Docket No. 08–ASO–19]

Establishment of Class E Airspace; Clewiston, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This action confirms the effective date of a direct final rule that establishes Class E Airspace at Clewiston, FL needed to support new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) developed for Airglades Airport. As a result, controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAP and for Instrument Flight Rule (IFR) operations changing the operating status of the airport from Visual flight Rules (VFR) to include IFR operations concurrent with the publication of the SIAP.

DATES: *Effective Dates:* 0901 UTC, May 6, 2009. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5610.

SUPPLEMENTARY INFORMATION:

Confirmation of Effective Date

The FAA published this direct final rule with a request for comments in the **Federal Register** on December 15, 2008 (73 FR 75939), Docket No. FAA–2008–1168; Airspace Docket No. 08–ASO–19. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on March 12, 2009. No adverse comments were received, and thus this notice confirms that effective date.

* * * * *

Issued in College Park, Georgia, on April 22, 2009.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E9–10396 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2008–1094; Airspace Docket No. 08–ASO–18]

Establishment of Class E Airspace; Russellville, AL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This action confirms the effective date of a direct final rule that establishes Class E Airspace at Russellville, AL needed to support new Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures (SIAPs) developed for Russellville Municipal Airport. As a result, controlled airspace extending upward from 700 feet Above Ground Level (AGL) is needed to contain the SIAP and for Instrument Flight Rule (IFR) operations changing the operating status of the airport from Visual flight Rules (VFR) to include IFR operations concurrent with the publication of the SIAP.

DATES: *Effective Date:* 0901 UTC, May 6, 2009. The Director of the Federal Register approves this incorporation by reference action under Title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box

20636, Atlanta, Georgia 30320; telephone (404) 305–5610.

SUPPLEMENTARY INFORMATION:

Confirmation of Effective Date

The FAA published this direct final rule with a request for comments in the **Federal Register** on December 15, 2008 (73 FR 75941), Docket No. FAA–2008–1094; Airspace Docket No. 08–ASO–18. The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on March 12, 2009. No adverse comments were received, and thus this notice confirms that effective date.

* * * * *

Issued in College Park, Georgia, on April 21, 2009.

Barry A. Knight,

Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E9–10395 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2009–0203; Airspace Docket No. 09–ASO–12]

Modification of Class D and E Airspace; Albemarle, NC

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule, request for comments.

SUMMARY: This action modifies Class D and Class E airspace at Albemarle, NC. Controlled airspace is being expanded to contain the Final Approach Fix (FAF) for a Standard Instrument Approach Procedure (SIAP) into Stanly County Airport. This action enhances the National Airspace System by providing controlled airspace in the vicinity of Albemarle, NC.

DATES: Effective 0901 UTC, August 27, 2009. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments. Comments for inclusion in the Rules Docket must be received on or before June 22, 2009.

ADDRESSES: Send comments on this rule to: U. S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2009–0203; Airspace Docket No. 09–ASO–12, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the rule, 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 Eastern Service Center, Federal Aviation Administration, Room 210, 1701 Columbia Avenue, College Park, Georgia 30337.

FOR FURTHER INFORMATION CONTACT: Melinda Giddens, Operations Support Group, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; Telephone (404) 305–5610, Fax 404–305–5572.

SUPPLEMENTARY INFORMATION:

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comments, and, therefore, issues it as a direct final rule. The FAA has determined that this rule only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Unless a written adverse or negative comment or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the effective date. If the FAA receives, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Although this action is in the form of a direct final rule, and was not preceded by a notice of proposed rulemaking, interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. The direct final rule is used in this case to facilitate the timing of the charting schedule and enhance the operation at the airport, while still allowing and requesting public comment on this rulemaking action. An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov*. Communications should identify both docket numbers and be submitted in triplicate to the address specified under the caption **ADDRESSES** above or through the Web site. All communications received on or before the closing date for comments will be considered, and this rule may be amended or withdrawn in light of the comments received. 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/.*

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of this action and determining whether additional rulemaking action would be needed. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. Those wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2009–0203; Airspace Docket No. 09–ASO–12.'' The postcard will be date stamped and returned to the commenter.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 revises Class D and E Airspace at Albemarle, NC by modifying the Stanly County Airport Class D and E airspace to provide adequate controlled airspace for IFR operations at Albemarle, NC. While designing a specific approach at Stanly County Airport a violation was discovered for the Final Segment due to an overlying Special Use Airspace (Alert

Area 531), thus the associated controlled airspace is being modified to incorporate the portion of the final that is affected. Controlled airspace extending upward from the surface of the Earth is required to encompass the airspace necessary for instrument approaches for aircraft operating under Instrument Flight Rules (IFR). Designations for Class D and E airspace areas extending upward from the surface of the Earth are published in FAA Order 7400.9S, signed October 3, 2008, and effective October 31, 2008, which is incorporated by reference in 14 CFR part 71.1. The Class D and E designations listed in this document will be published subsequently in the Order.

Agency Findings

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. 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 United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies controlled airspace at Albemarle, NC.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

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

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

■ 1. The authority citation for 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 Federal Aviation Administration Order 7400.9S, Airspace Designations and Reporting Points, signed October 3, 2008, effective October 31, 2008, is amended as follows:

Paragraph 5000 Class D Airspace.

* * * * *

ASO NC D Albemarle, NC [REVISED]

Stanly County Airport, NC
(Lat. 35°25′0.101″N., long 80°09′03″W.)

That airspace extending upward from the surface to and including 3,100 feet MSL within a 5.8-mile radius of Stanly County Airport and within 1.5 miles each side of the 043 degree bearing from Stanly County Airport to 7.8 miles Northeast. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO NC E5 Albemarle, NC [REVISED]

Stanly County Airport, NC
(Lat. 35°25′0.101″N., long 80°09′03″W.)

That airspace extending upward from 700 feet above the surface within an 8-mile radius of Stanly County Airport.

* * * * *

Issued in College Park, Georgia, on March 19, 2009.

Barry A. Knight,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. E9–10397 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 090406632–9631–01]

RIN 0694–AC74

Removal of T 37 Jet Trainer Aircraft and Parts From the Commerce Control List

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule removes the T 37 jet trainer aircraft and specially designed component parts from under the Department of Commerce's licensing jurisdiction on the Commerce Control List (CCL). T 37 jet trainer aircraft appear on the CCL administered by the Department of Commerce, Bureau of Industry and Security (BIS). However, the Department of State, Directorate of Defense Trade Controls (DDTC) reviews license applications for these aircraft and parts. BIS is removing these aircraft and parts from the CCL to avoid potentially overlapping coverage and reduce the possibility of confusion by the public.

DATES: This rule is effective: May 6, 2009.

FOR FURTHER INFORMATION CONTACT: Gene Christiansen in the Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, U.S. Department of Commerce at (202) 482–2984.

SUPPLEMENTARY INFORMATION:

Background

Both DDTC and BIS exercise licensing jurisdiction over certain exports and reexports. The policy for designating an item as being subject to the International Traffic in Arms Regulations (ITAR) (22 CFR parts 120–130) and, therefore, subject to DDTC licensing jurisdiction is described in 22 CFR 120.3. Generally, that policy is to apply DDTC licensing jurisdiction to items that are specifically designed, developed, configured, adapted or modified for a military application. Items not subject to DDTC

licensing jurisdiction or to the exclusive licensing jurisdiction of another government agency are subject to the Export Administration Regulations (EAR) and BIS's licensing jurisdiction.

The T 37 jet trainer was designed as a military trainer aircraft. Such aircraft are subject to the ITAR unless excluded under the provisions of 22 CFR 121.3(b), which relate to the engine type and power of the trainer aircraft. The T 37 and its specially designed component parts do not meet the terms of that exclusion. However, the T 37 jet trainer aircraft and their specially designed component parts have been listed on the CCL (found in 15 CFR Part 774, Supp. No. 1) since at least 1993. As such, under a strict interpretation of ITAR and the CCL as currently drafted, the T 37 jet trainer aircraft could fall within the jurisdiction of both DDTC and BIS, potentially causing members of the public to conclude incorrectly that an export license is required from both agencies for this item. By removing T 37 jet trainer aircraft from the CCL, this rule clarifies that export licenses should not be obtained from BIS, avoids potentially overlapping coverage and reduces the possibility of confusion on the part of the public. Export and reexport license applications for the T 37 jet trainer aircraft and parts should be directed to DDTC.

Rulemaking Requirements

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

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves a collection previously approved by the OMB under control number 0694–0088, ''Multi-Purpose Application,'' which carries a burden hour estimate of 58 minutes to prepare and submit form BIS–748. Miscellaneous and recordkeeping activities account for 12 minutes per submission. BIS believes that this rule will have no impact on the burden associated with that collection because the Department of State exercises licensing jurisdiction over the aircraft or parts affected by this rule and BIS has not issued a license for them in recent years.

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

4. The provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable. Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to William Arvin, Office of Exporter Services, Bureau of Industry and Security, Department of Commerce, Room H2705, Washington, DC 20230.

List of Subjects in 15 CFR Part 774

Exports, Foreign trade.

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

PART 774—[AMENDED]

■ 1. The authority citation for 15 CFR part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.*, 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 46 U.S.C. app. 466c; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of July 23, 2008, 73 FR 43603 (July 25, 2008).

■ 2. In Supplement No. 1 to Part 774, Category 9—Propulsion Systems, Space Vehicles and Related Equipment, Export Control Classification Number 9A018, revise paragraph a. of the Items paragraph of the List of Items Controlled section to read as follows:

9A018 Equipment on the Wassenaar Arrangement Munitions List

* * * * *

List of Items Controlled

* * *

Items: a. Military trainer aircraft bearing ''T'' designations:

a.1. Using reciprocating engines; or

a.2. Turbo prop engines with less than 600 horse power (h.p.); and

a.3. Specially designed component parts.

* * * * *

Dated: April 29, 2009.

Matthew S. Borman,

Acting Assistant Secretary for Export Administration.

[FR Doc. E9–10468 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–33–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

22 CFR Part 215

RIN 0412–AA61

Privacy Act of 1974, Implementation of Exemptions

AGENCY: United States Agency for International Development.

ACTION: Final rule; delay effective date.

SUMMARY: This document delays the effective date by 90 days for the final rule exempting portions of the Partner Vetting System from one or more provisions of the Privacy Act, as published in the **Federal Register** on January 2, 2009 and delayed on February 2, 2009, and on April 2, 2009.

DATES: The effective date for the final rule published on January 2, 2009 (74 FR 9) and delayed on February 2, 2009 (74 FR 5808), and on April 2, 2009 (74 FR 14931) is further delayed until August 4, 2009.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact Jeff Denale, Chief, Counterterrorism and Information Security Division, Office of Security, United States Agency for International Development, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW., Washington, DC 20523, or by phone on (202) 712–1264.

Dated: May 4, 2009.

Mark Webb,

Acting Director, Office of Security.

[FR Doc. E9–10531 Filed 5–4–09; 11:15 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0083; FRL–8900–2]

Revisions to the California State Implementation Plan, Santa Barbara County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Santa Barbara County Air Pollution Control District (SBCAPCD) portion of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving this local rule that is administrative and addresses changes for clarity and consistency.

DATES: This rule is effective on July 6, 2009 without further notice, unless EPA receives adverse comments by June 5, 2009. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2009–0083, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.
2. *E-mail: steckel.andrew@epa.gov.*
3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule we are approving with the date that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule No.	Rule title	Adopted	Submitted
SBCAPCD	102	Definitions	06/19/08	10/20/08

On November 18, 2008, this rule submittal was found to meet the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved a version of Santa Barbara County Air Pollution Control District Rule 102 into the SIP on November 23, 2005 (70 FR 70734).

C. What is the purpose of the submitted rule revisions?

Section 110(a) of the CAA requires states to submit regulations that control volatile organic compounds, oxides of nitrogen, particulate matter, and other air pollutants which harm human health and the environment. This rule was developed as part of the local agency's program to control these pollutants.

SBCAPCD Rule 102 is being amended by adding and/or modifying several definitions that are used in various parts of the SBCAPCD rulebook to improve rule clarity. EPA's technical support document (TSD) has more information about this rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating this rule?

This rule describes administrative provisions and definitions that support emission controls found in other local agency requirements. In combination with the other requirements, this rule must be enforceable (see section 110(a) of the Act) and must not relax existing requirements (see sections 110(l) and 193). EPA policy that we used to help evaluate enforceability requirements consistently includes the Bluebook (''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988) and the Little Bluebook (''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001).

B. Does the rule meet the evaluation criteria?

We believe this rule is consistent with the relevant policy and guidance regarding enforceability and SIP relaxations. The TSD has more information on our evaluation.

C. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving this submitted rule because we believe it fulfills all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in

the Proposed Rules section of this **Federal Register,** we are simultaneously proposing approval of the same submitted rule. If we receive adverse comments by June 5, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on July 6, 2009. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it approves a state rule implementing a Federal standard.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). This rule will be effective *June 5, 2009.*

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 2, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(361) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(361) New and amended regulations were submitted on October 20, 2008, by the governor's designee.

(i) Incorporation by Reference.

(A) Santa Barbara County Air Pollution Control District.

(*1*) Rule 102, ''Definitions,'' adopted on October 18, 1971 and revised on June 19, 2008.

* * * * *

[FR Doc. E9–10533 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0668; FRL–8780–1]

Revisions to the California State Implementation Plan, North Coast Unified Air Quality Management District.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the North Coast Unified Air Quality Management District (NCUAQMD) portion of the California State Implementation Plan (SIP). This action revises and adds various definitions of terms used by the NCUAQMD. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving local rules that are administrative and address changes for clarity and consistency.

DATES: This rule is effective on July 6, 2009 without further notice, unless EPA receives adverse comments by June 5, 2009. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2008–0668, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air–4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment.

If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we'', ''us'' and ''our'' refer to EPA.

Table of Contents

I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted	Submitted
NCAQMD	100	General Provisions	05/19/05	07/18/08
NCAQMD	101	Definitions	05/15/08	07/18/08
NCAQMD	108	Severability of Rules and Regulations	05/19/05	07/18/08

On August 22, 2008, these rules were found to meet the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

We approved a version of Rule 100 into the SIP on December 5, 1984 (49 FR 47490). There is no previous version of Rules 101 and 108 in the SIP although we approved Rule 130 in February 9, 1999 (64 FR 6223), which is now being replaced by Rule 101.

C. What is the purpose of the submitted rule revisions?

Section 110(a) of the CAA requires states to submit regulations that control volatile organic compounds, oxides of nitrogen, particulate matter, and other air pollutants which harm human health and the environment. These rules were developed as part of the local agency's program to control these pollutants.

NCUAQMD Rule 100 has been re-codified and added to Regulation I, Air Quality Rules. This revision simply re-codifies existing requirements. Rule 100 defines NCUAQMD and sets its purpose to protect, maintain and achieve State and Federal Air Quality Standards. The rule lists the procedures and immediate action the Air Pollution Control Officer should follow in the event of atmospheric conditions causing a dangerous or potentially hazardous concentration of air contaminants. The rule also defines which documents in the NCUAQMD's possession are considered public records and gives the authority of the regulations and how the regulations are to be interpreted.

NCUAQMD Rule 101 was amended to include new definitions, eliminate definitions that were no longer needed and change some existing definitions. Rule 101 has been re-codified and added to Regulation I, Air Quality Rules. This revised rule provides definitions for terms used in the NCUAQMD rules and regulations document.

This re-codification includes incorporating in Rule 101 the substantive definitions of various terms found throughout the four NCUAQMD Regulations (I, II, III, and IV). Where multiple definitions of the same term exist, a single ''consistent'' definition is included in Rule 101.

NCUAQMD Rule 108, Severability of Rules and Regulations, is a new rule and has been added to establish legal severability among the rules and regulations. Legal severability references the notion that if one part of a rule, or one rule, or one regulation is found to be unenforceable, that does not ''contaminate'' the enforceability of the other provisions, rules or regulations.

EPA's technical support document (TSD) has more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

These rules describe administrative provisions and definitions that support emission controls found in other local agency requirements. In combination with the other requirements, these rules must be enforceable (see section 110(a) of the Act) and must not relax existing requirements (see sections 110(l) and 193). EPA policy that we used to help evaluate enforceability requirements consistently includes the Bluebook (''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988) and the Little Bluebook (''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001).

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability and SIP relaxations. The TSD has more information on our evaluation.

C. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by June 5, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on July 6, 2009. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

These rules will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

These rules will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. These rules are not subject to Executive Order 13045, because it approves a state rule implementing a Federal standard.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution, or Use

These rules are not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal

agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. section 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing these rules and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). These rules will be effective *July 6, 2009.*

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by *July 6, 2009.* Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of these rules for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: February 10, 2009.

Jane Diamond,

Acting Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52 [AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(359)(i)(A)(3), (4) and (*5*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(359) * * *

(i) * * *

(A) * * *

(*3*) Rule 100, ''General Provisions,'' originally adopted on November 3, 1982 and amended on May 19, 2005.

(*4*) Rule 101, ''Definitions,'' originally adopted on November 3, 1982 and amended on May 19, 2005 and May 15, 2008.

(*5*) Rule 108, ''Severability of Rules and Regulations,'' originally adopted on May 19, 2005.

* * * * *

[FR Doc. E9–10509 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0891, FRL–8782–7]

Revisions to the California State Implementation Plan, North Coast Unified Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the North Coast Unified Air Quality Management District (NCUAQMD) portion of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving local rules that address particulate matter (PM–10) emissions from general sources, fugitive sources, and open burning and volatile organic compound (VOC) emissions from petroleum loading and storage.

DATES: This rule is effective on July 6, 2009 without further notice, unless EPA receives adverse comments by June 5, 2009. If we receive such comment, we will publish a timely withdrawal in the **Federal Register** to notify the public that this rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2008–0891, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov. Follow the on-line instructions.*

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or e-mail. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Alfred Petersen, EPA Region IX, (415) 947–4118, *petersen.alfred@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

Table of Contents

I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were revised by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

District	Rule No.	Rule title	Revised	Submitted
NCUAQMD	104.2	Visible Emissions	05/19/08	07/18/08
NCUAQMD	104.3	Particulate Matter	05/19/08	07/18/08
NCUAQMD	104.4	Fugitive Dist Emissions	05/19/08	07/18/08
NCUAQMD	104.10	Petroleum Loading and Storage	05/19/08	07/18/08
NCUAQMD	200	Effective Date and Definitions	05/15/08	07/18/08
NCUAQMD	201	General Prohibitions and Exemptions for Selected Open Burning	05/17/07	07/18/08
NCUAQMD	202	Burn Hours and Notice of Ignition	05/15/08	07/18/08
NCUAQMD	203	General Burn Practices, Requirements, and Conditions	05/15/08	07/18/08
NCUAQMD	204	Ignition Devices and Methods	05/15/08	07/18/08
NCUAQMD	205	Certificates from Department of Fish and Game	07/18/03	07/18/08
NCUAQMD	206	Burning at Disposal Sites	12/16/04	07/18/08
NCUAQMD	207	Wildland Vegetation Management Burning	05/15/08	07/18/08
NCUAQMD	208	Burn Registration Program	05/15/08	07/18/08

On August 22, 2008, the submittal of July 18, 2008 was found to meet the completeness criteria in 40 CFR part 51, appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

We approved the Rules 410 and 420 versions of NCUAQMD Rules 104.2 and 104.3 into the SIP on October 31, 1980 (45 FR 72147). We approved the Rules 430 and 482 versions of NCUAQMD Rules 104.5 and 104.10 into the SIP on August 2, 1978 (43 FR 33912).

We approved the Rules 2–100, 2–200, 2–300, 2–400, 2–500, versions of NCUAQMD Rules 200 through 208 into the SIP on January 29, 1985 (50 FR 3907). The Appendix A, Appendix B, and Appendix C to the SIP rules were approved on April 18, 1982 (47 FR 15784).

C. What are the purposes of the rule revisions?

Section 110(a) of the CAA requires states to submit regulations that control volatile organic compounds, oxides of nitrogen, particulate matter, and other air pollutants which harm human health and the environment. These rules were developed as part of the local agency's program to control these pollutants.

The purpose of the amendment to NCUAQMD Rule 104.2 is as follows:

- 104.2.3: A section is added to the rule to prohibit a Kraft recovery furnace from discharging into the atmosphere gases with greater than 20% opacity, except that this does not apply during periods of start-up, shutdown, or breakdown of a Kraft recovery furnace.

The purposes of amendments to NCUAQMD Rule 104.3 are as follows:

- 104.3.4.1.2: A provision is added to the rule to prohibit the emissions of particulate matter from exceeding 0.025 grains per standard cubic foot of exhaust gas from a new or modified Kraft recovery furnace.
- 104.3.4.3.1: A provision is added to the rule to prohibit the emissions of particulate matter from exceeding 0.5 pounds per ton of Kraft pulp mill production from any Kraft smelt dissolving tank.
- 104.3.4.1.2: A provision is added to the rule to prohibit the emissions of particulate matter from exceeding 0.2 pounds per ton of black liquor solids from a new or modified Kraft smelt dissolving tank.
- 104.3.6: A formula is added to the rule to calculate limits for particulate emissions from geothermal wells.

The purpose of the amendment to NCUAQMD Rule 104.4 is as follows:

- 104.4.1: The language of the prohibition on handling materials with unnecessary emission of particulates was revised without any change in meaning.

The purposes of the amendments to NCUAQMD Rule 104.10 are as follows:

- 482.c.1 (SIP rule): The exemption for stationary tanks installed prior to December 31, 1970 is removed.
- 104.10.1: The reference to Federal New Source Performance Standards (NSPS) for all tanks in excess of 40,000 gallons is changed to Rule 104.11, ''Federal New Source Performance Standards.''

The purposes of the amendments to SIP NCUAQMD Rules 2–100, 2–200, 2–300, 2–400, 2–500, Appendix A, Appendix B, and Appendix C are as follows:

- These rules are completely revised in numbering, content, and format to become NCUAQMD Rules 200 through 208.
- 102.2.01 (SIP): The exemption for an imminent fire hazard is removed.
- 102.5 (SIP): The exemption for fires conducted in a mechanized burner is removed.
- 200.2.0: Sixteen new definitions were added to clarify new features in the rule.
- 200.2.9: A limited exemption is added for fire hazard reduction by burning at multi-unit residential facilities and commercial entities.
- 200.2.9: An exemption is added for ceremonial fires.
- 201: Provisions are added to base a Permissive-Burn Day decision on meteorological conditions that will not cause a violation of the National Ambient Air Quality Standards or cause excessive transport of pollutants. A provision is added to the rules for a No-Burn Day for burn barrels if the risk of a fire hazard is too great.
- 202: Revisions to burn hours and the requirement to provide notice of ignition are added.
- 203: Prohibitions on the use of burn barrels are added in certain portions of the District. Revisions to the rules include drying requirements and the arrangement of burnable waste.
- 204: Waste ignition requirements are added to the rule.
- 205: Included is a revised requirement for a certificate from the California Fish and Game stating that

agricultural burning for the sole purpose of habitat improvement is proper.

• 206: A prohibition is added for burning rubbish or garbage at disposal sites. An allowance is added for the APCO to approve burning of natural vegetation at disposal sites.

• 207: An expanded section for Wildland Vegetation Management Burning is provided that includes (a) a burn plan, (b) an acreage limit per day, and (c) an advance permissive-burn notice.

• 208: A Burn Registration Program is added for agricultural or prescribed burning projects that includes (a) an annual registration with the District of planned burn projects, (b) a daily burn authorization system operated by the District, and (c) smoke management planning that considers possible remedial actions on various burning contingencies listed in the rule.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the CAA), and must not relax existing requirements (see sections 110(l) and 193). NCUAQMD is an attainment area for PM–10 and for 8-hr ozone ambient air quality standards.

Evaluation of the rules follows:

• NCUAQMD Rule 104.2: The rule improves the SIP, because the rule stringency is increased by adding an opacity standard for emissions from a Kraft recovery furnace. The rule is enforceable and should be given full approval.

• NCUAQMD Rule 104.3: The rule improves the SIP, because four provisions to limit particulate matter emissions from Kraft process units and recovery wells are added to the rule to increase stringency. The rule is enforceable and should be given full approval.

• NCUAQMD Rule 104.4: The rule improves the SIP by revising language to improve clarity of requirements. The rule is enforceable and should be given full approval.

• NCUAQMD Rule 104.10: The rule improves the SIP by removing the exemption for tanks in excess of 40,000 gallons installed before December 31, 1970. The rule enforceability by EPA may be limited, because federal NSPS standards are referenced by NCUAQMD Rule 104.11, ''Federal NSPS,'' which is not in the SIP. References to rule requirements should be in the SIP or in publications available to the public. This enforceablility issue also existed in the current SIP rule approved by EPA. Therefore, we will make a recommendation for correction of the enforceability issue in a future revision of the rule, which should be given full approval.

• NCUAQMD Rule 200–208: The rules improve the SIP by adding various requirements to increase the stringency of the rules and by improving clarity. The rules are enforceable and should be given full approval.

Guidance and policy documents that we used to help evaluate specific enforceability requirements consistently include the following:

1. *Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,* EPA (May 25, 1988). [The Bluebook]

2. *Guidance Document for Correcting Common VOC & Other Rule Deficiencies,* EPA Region 9 (August 21, 2001). [The Little Bluebook]

B. Do the rules meet the evaluation criteria?

We believe that NCUAQMD Rules 104.2, 104.3, 104.4, 104.10, and 200 through 208 are consistent with the relevant policy and guidance regarding enforceability and SIP relaxations and should be given full approval.

The TSD has more information on our evaluation.

C. EPA Recommendation to Further Improve Rules

A recommendation is made in the TSD to improve NCUAQMD Rules 104.2 and 104.10 at the next rule revision without affecting the current approvability.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the CAA, EPA is fully approving NCUAQMD Rules 104.2, 104.3, 104.4, 104.10, and 200 through 208 because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by June 5, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on July 6, 2009. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: April 20, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(359) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(359) New and amended regulations were submitted on July 18, 2008, by the Governor's designee.

(i) Incorporation by reference.

(A) North Coast Unified Air Quality Management District.

(*1*) Rule 104.2, ''Visible Emissions,'' Rule 104.3, ''Particulate Matter,'' Rule 104.4, ''Fugitive Dust Emissions,'' and Rule 104.10, ''Petroleum Loading and Storage,'' originally adopted on November 3, 1982 and revised on May 19, 2005.

(*2*) Rule 200, ''Effective Date and Definitions,'' Rule 202, ''Burn Hours and Notice of Ignition,'' Rule 203, ''General Burn Practices, Requirements, and Conditions,'' Rule 204, ''Ignition Devices and Methods,'' Rule 207, ''Wildland Vegetation Management,'' and Rule 208, ''Burn Registration Program,'' originally adopted on July 18, 2003 and revised on May 15, 2005; Rule 201, ''General Prohibitions and Exemptions for Selected Open Burning'' originally adopted on July 18, 2003 and revised on May 17, 2007; Rule 205, ''Certificates from Department of Fish and Game,'' adopted on July 18, 2003; and Rule 206, ''Burning at Disposal Sites,'' originally adopted on July 18, 2003 and revised on December 16, 2004.

[FR Doc. E9–10521 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0839; FRL–8783–9]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the South Coast Air Quality Management District (SCAQMD) and Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NOx) emissions from boilers, process heaters, steam generators and residential water heaters. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on July 6, 2009 without further notice, unless EPA receives adverse comments by June 5, 2009. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2008–0839], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the

body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Idalia Perez, EPA Region IX, (415) 972–3248, *perez.idalia@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we'', ''us'' and ''our'' refer to EPA.

Table of Contents

I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agencies and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted	Submitted
SCAQMD	1121	Control of Nitrogen Oxides from Residential Type, Natural Gas-Fired Water Heaters.	09/03/04	07/18/08
SMAQMD	411	NO_x from Boilers, Process Heaters and Steam Generators ...	08/23/07	03/07/08

On August 22, 2008, the submittal of SCAQMD Rule 1121 was found to meet the completeness criteria in 40 CFR part 51, Appendix V, which must be met before formal EPA review. On April 17, 2008, the submittal of SMAQMD Rule 411 was found to meet the completeness criteria in 40 CFR part 51, Appendix V, which must be met before formal EPA review.

B. Are there other versions of these rules?

We approved a version of SCAQMD Rule 1121 into the SIP on November 16, 2001. The SCAQMD adopted revisions to the SIP-approved version on September 3, 2004 and CARB submitted them to us on July 18, 2008. We approved a version of SMAQMD Rule 411 into the SIP on August 1, 2007. The SMAQMD adopted revisions to the SIP-approved version on August 23, 2005 and CARB submitted them to us on March 7, 2008.

C. What is the purpose of the submitted revisions?

NO_X helps produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control NO_X emissions. SCAQMD Rule 1121 regulates emissions of NO_X from residential natural gas-fired heaters with heat input rates less than 75,000 Btu/hour. The rule includes a mitigation fee that can be paid in lieu of meeting interim emission limits and has a compliance date of January 1, 2008. SCAQMD amended the SIP-approved rule to delay compliance deadlines and simplify the mitigation fee. SMAQMD Rule 411 regulates emissions of NO_X from boilers, process heaters and steam generators with a rated heat input capacity equal to or greater than 1 million Btu per hour. The amendments to the SIP-approved rule serve to include those who qualify for the low fuel usage exemption included in the SIP-approved rule but who missed the original deadline to apply for it. EPA's technical support documents (TSD) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see sections 182(a)(2) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). The SCAQMD regulates an ozone nonattainment area (see 40 CFR part 81), so Rule 1121 must fulfill RACT. The SMAQMD also regulates an ozone nonattainment area (see 40 CFR part 81), so Rule 411 must also fulfill RACT.

Guidance and policy documents that we use to help evaluate enforceability and RACT requirements consistently include the following:

1. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.
2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
4. ''State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 59 FR 41998 (August 16, 1994).
5. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).
6. ''PM–10 Guideline Document,'' EPA 452/R–93–008, April 1993.
7. ''Alternative Control Techniques Document—NO_X Emissions from Industrial/Commercial/Institutional (ICI) Boilers,'' EPA, March 1994.
8. ''Determination of Reasonably Available Control Technology and Best Available Retrofit Control for Industrial, Institutional, and Commercial Boilers,

Steam Generators, and Process Heaters,'' CARB, July 18, 1991.

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. The TSD have more information on our evaluation.

C. EPA Recommendations To Further Improve the Rule

The TSD for SMAQMD Rule 411 describes additional rule revisions that do not affect EPA's current action but are recommended for the next time the local agency modifies the rule.

D. Public comment and final action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register,** we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by June 5, 2009, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on July 6, 2009. This will incorporate these rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2009. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: March 2, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(354)(i)(C) and (359)(i)(B) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(354) * * *

(i) * * *

(C) Sacramento Metropolitan Air Quality Management District

(*1*) Rule 411, ''NOx from Boilers, Process Heaters and Steam Generators'' adopted on October 27, 2005 and amended on August 23, 2007.

* * * * *

(359) * * *

(i) * * *

(B) South Coast Air Quality Management District

(*1*) Rule 1121, ''Fuel Burning Equipment,'' adopted on December 10,

1999 and amended on September 3, 2004.

* * * * *

[FR Doc. E9–10520 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2008–0105; FRL–8409–1]

Morpholine 4-C_{6-12} Acyl Derivatives; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of Morpholine 4-C_{6-12} Acyl derivatives (CAS Reg. No. 887947–29–7), herein referred to in this document as morpholine amide when used as the inert ingredient in pesticide formulations applied in or on growing crops. Huntsman Corporation submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of morpholine amide.

DATES: This regulation is effective May 6, 2009. Objections and requests for hearings must be received on or before July 6, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2008–0105. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Alganesh Debesai, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8353; e-mail address: *debesai.alganesh@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

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

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2008–0105 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before July 6, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2008–0105, by one of the following methods:

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

II. Background and Statutory Findings

In the **Federal Register** of June 13, 2008 (73 FR 33814) (FRL–8367–3), EPA issued a notice pursuant to section 408 of FFDCA, 21 U.S.C. 346a, as amended by FQPA (Pub. L. 104–170), announcing the filing of a pesticide petition (PP 6E7093) by Huntsman Corporation, 8600 Gosling Road, The Woodlands, TX 77381. The petition requested that 40 CFR 180.920 be amended by establishing an exemption from the requirement of a tolerance for residues of Morpholine 4-C_{6-12} Acyl derivatives (CAS Reg. No. 887947–29–7), herein referred to in this document as morpholine amide when used as inert ingredient in pesticide formulations applied in or on growing crops. That notice included a summary of the petition prepared by the petitioner.

There were no comments received in response to the notice of filing.

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Toxicological Profile

Consistent with section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The nature of the toxic effects caused by morpholine amide is discussed in this unit.

The following provides a brief summary of the risk assessment and conclusions for the Agency's review of morpholine amide. The Agency's full decision document for this action is available in the Agency's electronic docket (regulations.gov) under the docket number EPA–HQ–OPP–2008–0105. The toxicological database for morpholine amide (CAS Reg. No. 887947–29–7) is limited; however, adequate studies are available on the structurally related compound, lauric DEA. Like lauric DEA, morpholine amide is expected to be readily absorbed and metabolized to succinic and adipic morpholine amide. Free fatty acids, mainly capric and caprylic acid as well as morpholine are expected to be potential impurities (minute quantity). Adequate toxicological information is available on these metabolites and impurities. The toxicological database on morpholine amide consists of: An acute toxicity battery, a mutagenicity battery and a reproductive and developmental screening study in rats (including neurotoxicity screening). There are no long term or carcinogenicity studies available on morpholine amide. However, studies on the structurally similar compound lauric DEA included two oral subchronic studies in rats, one subchronic study in dogs, a mutagenicity battery, a metabolism study, and subchronic and carcinogenicity studies in rats and mice via the dermal route of exposure. In addition, many subchronic and chronic studies are available on morpholine (a manufacturing impurity). EPA has toxicological data on fatty acids and caprylic acid, a potential metabolite of morpholine amide. Taking all these studies into consideration, EPA concluded that these studies can be used to evaluate the toxicity of morpholine amide. Other than the chronic studies, all other data are adequate to characterize the potential toxicity of morpholine amide.

Animal studies show that morpholine amide has low acute toxicity (oral LD_{50} in the rat > 2,000 milligram/kilograms (mg/kg) and inhalation LC_{50} in the rat > 2.0 mg/L). Although morpholine amide was a mild eye irritant in the rabbit, it was not a skin irritant (rabbit). It was positive for skin sensitization in the Guinea pig. Based upon the metabolism and low toxicity characteristics of lauric DEA, subchronic and chronic toxicity of morpholine amide is also expected to be low. Although no specific neurotoxicity studies were performed, in the combined repeated dosed reproductive and developmental toxicity screening test, potential indications of neurotoxicity such as lethargy and altered functional observation battery (FOB) parameters were observed at a high dose of 600 mg/kg/day. However, these clinical signs were judged to be to high dose toxicity rather than as a result of a neurotoxic reaction. Moreover, since the toxic effects were seen only at a high dose, the NOAEL (200 mg/kg/day) will be protective from these effects (three fold lower than the dose that produced clinical signs of neurotoxicity). Additionally, the slight decrease in relative brain weight (≤ 6%) in the reproductive and developmental screening study was not considered as the toxicologically relevant effect because the absolute brain weight was not affected, there were no pathological findings and this slight change in relative brain weight is considered due to changes in body weight at 600 mg/kg/day.

No fetal effects were seen in a combined repeat dose reproductive and developmental toxicity study in Wistar Hannover rats at doses that produced maternal toxicity (lethargy and alterations in functional observational parameters). No treatment-related effects were observed for any reproductive or litter parameters at any dose level. The NOAEL for systemic toxicity is 200 mg/kg/day. The NOAEL for both reproductive and developmental toxicity is 600 mg/kg/day (the highest dose tested (HDT)). Based on this information, there in no concern, at this time, for increased sensitivity to infants and children to morpholine amide when used as an inert ingredient in pesticide formulations applied to growing crops.

Based on negative response of morpholine amide in mutagenicity, equivocal evidence of carcinogenic activity of lauric DEA (dermal route, only one species, one sex), lack of carcinogenicity of impurity (morpholine) and other metabolites, EPA concluded that morpholine amide is not likely to be carcinogenic.

The free fatty acid impurities on the subject chemical are not likely to impart any significant toxicity. Fatty acid salts have been reported to have a low acute toxicity. A chronic inhalation exposure of rats to morpholine, a potential impurity of the subject chemical for 2 years at concentration of 150 parts per

million (approximately 533 mg/m^3) or less revealed no carcinogenic potential or chronic systemic toxicity. Consistent with its known irritating properties, morpholine produced only local irritation, which was limited almost exclusively to high dose animals.

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs.

Morpholine amide's acute toxicity is so low that it is not expected to pose an acute risk and derivation of an aPAD is unnecessary. A cPAD of 0.67 mg/kg/day was derived from the NOAEL of 200 mg/kg/day for the systemic toxicity seen in the reproductive and developmental toxicity study. A safety factor of 300 (10x for interspecies and 10x for intra-species variations and additional 3X FQPA safety factor for the lack of chronic study) was used.

V. Aggregate Exposures

In examining aggregate exposure, section 408 of FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

In the absence of actual residue data for morpholine amide, the Agency performed a dietary (food and drinking water) exposure assessment for morpholine amide for the proposed pre-harvest use using worst case assumptions. These assumptions included that:

1. Morpholine amide would be used as an inert ingredient in all food use pesticide formulations applied to all crops,

2. One hundred percent of all food crops would be treated with pesticides containing morpholine amide,

3. Morpholine amide residues would be present in all crops at levels equal to or exceeding the highest established tolerance levels for any pesticide active ingredient for pre-harvest uses, and

4. A conservative default value of 1,000 parts per billion for the concentration of an inert ingredient in all sources of drinking water was used. This approach is highly conservative as it is extremely unlikely that morpholine amide would have such use as a pesticide product inert ingredient and be present in food commodities and drinking water at such high levels.

VI. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to morpholine amide and any other substances, and these chemicals do not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that these chemicals have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism of EPA's website at *http://ww.epa.gov/pesticides/cumulative/*.

VII. Additional Safety Factor for the Protection of Infants and Children

Section 408 of the FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. EPA concluded that the FQPA safety factor for morpholine amide should be reduced to 3X for the following reasons.

1. Although the toxicological database on morpholine amide is limited, studies on the structurally similar compound lauric DEA are available. These studies include two oral subchronic studies in rats, one subchronic study in dogs, mutagenicity battery, metabolism study, and subchronic and carcinogenicity studies in rats and mice via dermal route of exposure. In addition, many subchronic and chronic studies are available on morpholine (a manufacturing impurity). EPA does not have a chronic toxicity study for either morpholine amide or lauric DEA. This lack of a chronic study is largely offset by the results of the Organization for Economic Cooperation and Development (OECD) reproduction/developmental screening toxicity study – which showed no target organ toxicity at doses up to 600 mg/kg/day – and the existing subchronic data.

2. EPA concluded that there is no evidence of increased susceptibility to infants and children. No fetal effects were seen in the combined repeated dosed reproductive and developmental toxicity study in Wistar Hannover rats at doses that produce maternal toxicity (lethargy and alterations in functional observational parameters). No treatment-related effects were observed for any reproductive or litter parameters at any dose level. The NOAEL for systemic toxicity is 200 mg/kg/day. The NOAEL for both reproductive and

developmental toxicity is 600 mg/kg/day (the HDT). No developmental toxicity study in rabbit is available in the morpholine amide database. However, EPA concluded that the developmental toxicity study in rabbits is not likely to provide lower endpoint than the endpoint selected for the risk assessment since no developmental or reproductive toxicity was observed in rats at doses up to and including 600 mg/kg/day.

3. There is low concern that morpholine amide is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity. As noted, the slight decrease in relative brain weight (≤ 6%) in the OECD reproductive/developmental screening toxicity study in rats was not considered as the toxicologically relevant effect and the clinical signs (lethargy and altered FOB parameters) in the OECD reproductive/developmental screening study in rats are considered to be due to high dose toxicity.

4. In the absence of actual exposure data on morpholine amide, a highly conservative exposure estimate using default parameters is not likely to underestimate risk to infants and children.

Although there is some uncertainty due to the absence of a chronic study and a rabbit developmental study, there is low concern that risks will be underestimated due the results of the OECD reproduction/developmental screening toxicity study showing no organ toxicity at high doses, the lack of a finding of developmental toxicity in that study, and the very conservative exposure assessment that has been conducted for morpholine. Nonetheless, a FQPA safety factor of 3X is being retained, primarily due to the absence of a chronic toxicity study.

VIII. Determination of Safety for U.S. Population

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate uncertainty/safety factors. EPA calculates the aPAD and cPAD by dividing the POD by all applicable uncertainty/safetys.

As noted in this unit, morpholine amide is not expected to pose an acute risk. To evaluate chronic risk, EPA compared estimated chronic exposure to the cPAD of 0.67 mg/kg/day. Utilizing a highly conservative aggregate exposure assessment, the resulting chronic exposure estimates do not exceed the Agency's level of concern (<100% cPAD). Children 1–2 years old were the most highly exposed population with the chronic exposure estimate occupying 67.6% of the cPAD. In addition, this highly conservative exposure assessment is protective of any possible non-occupational exposures to morpholine amide as it results in exposure estimates orders of magnitude greater than the high-end exposure estimates for residential uses of pesticides routinely used by EPA.

Taking into consideration all available information on morpholine amide, it has been determined that there is a reasonable certainty that no harm to any population subgroup, including infants and children, will result from aggregate exposure to this chemical. Therefore, the exemption from the requirement of a tolerance for residues of morpholine amide (CAS Reg. No. 887947–29–7), when used as inert ingredient in pre-harvest applications, under 40 CFR 180.920 can be considered safe under section 408(q) of the FFDCA.

IX. Other Considerations

A. Analytical Method

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. Existing Exemptions

There are no existing exemptions for morpholine amide.

C. International Tolerances

The Agency is not aware of any country requiring a tolerance for morpholine amide nor have any CODEX Maximum Residue Levels been established for any food crops at this time.

X. Conclusions

Therefore, a tolerance exemption is established for morpholine amide (CAS Reg. No. 887947–29–7) when used as inert ingredient in pesticide formulations applied to growing crops only.

XI. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

XII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: April 17, 2009.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.920, the table is amended by adding alphabetically the following inert ingredient to read as follows:

§ 180.920 Inert ingredients used pre-harvest; exemptions from the requirement of a tolerance.

* * * * *

Inert ingredients	Limits	Uses
* * *	*	*
Morpholine 4-C_{6-12} Acyl Derivatives (CAS Reg. No. 887947–29–7)		As a solvent
* * *	*	*

[FR Doc. E9–10071 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0166; FRL–8409–8]

Novaluron; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a time-limited tolerance for residues of novaluron in or on strawberry. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on strawberries. This regulation establishes a maximum permissible level for residues of novaluron in this food commodity. The time-limited tolerance expires and is revoked on December 31, 2011.

DATES: This regulation is effective May 6, 2009. Objections and requests for hearings must be received on or before July 6, 2009, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0166. All documents in the docket are listed in the docket index available in *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; e-mail address: *ertman.andrew@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

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

B. How Can I Access Electronic Copies of this Document?

In addition to accessing electronically available documents at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0166 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before July 6, 2009.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked

confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2009–0166, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with sections 408(e) and 408(l)(6) of FFDCA, 21 U.S.C. 346a(e) and 346a(1)(6), is establishing a time-limited tolerance for residues of the insecticide novaluron, *N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide in or on strawberries at 0.50 parts per million (ppm). This time-limited tolerance expires and is revoked on December 31, 2011. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the CFR.

Section 408(l)(6) of FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under section 18 of FIFRA. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on section 18 related time-limited tolerances to set binding precedents for the application of section 408 of FFDCA and the new safety standard to other tolerances and exemptions. Section 408(e) of FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, i.e., without having received any petition from an outside party.

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.'' EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Novaluron on Strawberries and FFDCA Tolerances

The Florida Department of Agriculture and Consumer Services (FDACS) requested the use of novaluron through an emergency exemption to control sap beetles on strawberries. According to the FDACS, sap beetles are a zero tolerance pest. The presence of larvae in a ripe strawberry can lead to the rejection of the entire shipment. The FDACS stated that even with the currently available insecticides this pest is not adequately controlled as growers have experienced up to 25 percent yield loss due to load rejection. After having reviewed the submission, EPA determined that emergency conditions exist for this State, and that the criteria for an emergency exemption are met. EPA has authorized under FIFRA section 18 the use of novaluron on strawberries for control of sap beetles in Florida.

As part of its evaluation of the emergency exemption application, EPA assessed the potential risks presented by residues of novaluron in or on strawberries. In doing so, EPA considered the safety standard in section 408(b)(2) of FFDCA, and EPA decided that the necessary tolerance under section 408(l)(6) of FFDCA would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing this tolerance without notice and opportunity for public comment as provided in section 408(l)(6) of FFDCA. Although this time-limited tolerance expires and is revoked on December 31, 2011, under section 408(l)(5) of FFDCA, residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on strawberries after that date will not be unlawful, provided the pesticide was applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by this time-limited tolerance at the time of that application. EPA will take action to revoke this time-limited tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because this time-limited tolerance is being approved under emergency conditions, EPA has not made any decisions about whether novaluron meets FIFRA's registration requirements for use on strawberries or whether a permanent tolerance for this use would be appropriate. Under these circumstances, EPA does not believe that this time-limited tolerance decision serves as a basis for registration of novaluron by a State for special local needs under FIFRA section 24(c). Nor does this tolerance serve as the basis for persons in any State other than Florida to use this pesticide on this crop under FIFRA section 18 absent the issuance of an emergency exemption applicable within that State. For additional information regarding the emergency exemption for novaluron, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to

give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue....''

Consistent with the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure expected as a result of this emergency exemption request and the time-limited tolerances for residues of novaluron on strawberries at 0.50 ppm. EPA's assessment of exposures and risks associated with establishing time-limited tolerances follows.

A. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a Benchmark Dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-term, intermediate-term, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the Level of Concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for novaluron used for human risk assessment can be found at *http://www.regulations.gov* in document *Novaluron; Human Health Risk Assessment for the Proposed Use in/on Strawberry*, pages 9–10 in docket ID number EPA–HQ–OPP–2009–0166.

B. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to novaluron, EPA considered exposure under the time-limited tolerances established by this action as well as all existing novaluron tolerances in 40 CFR 180.598. EPA assessed dietary exposures from novaluron in food as follows:

i. *Acute exposure*. No acute effects were identified in the toxicological studies for novaluron; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Continuing Survey of Food Intake by Individuals (CSFII). As to residue levels in food, EPA incorporated anticipated residues (average field trial residues) for some commodities, including strawberries; empirical processing factors for apple juice (translated to pear juice), tomato puree and tomato paste; and Dietary Exposure Evaluation Model (DEEM) (ver 7.81) default processing factors for the remaining processed commodities. In estimating dietary exposure from secondary residues in livestock, EPA relied on anticipated residues for meat and milk commodities but used tolerance-level residues for poultry commodities. 100 percent crop treated (PCT) was assumed for all existing and new uses of novaluron.

iii. *Cancer*. Based on the results of carcinogenicity studies in rats and mice, EPA has classified novaluron as ''not likely to be carcinogenic to humans;'' therefore, a quantitative cancer exposure assessment is unnecessary.

iv. *Anticipated residue information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

2. *Dietary exposure from drinking water*. The residues of concern in drinking water are novaluron and its chlorophenyl urea and chloroaniline degradates. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for novaluron and its degradates in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of novaluron. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of novaluron, chlorophenyl urea and chloroaniline for chronic exposures for non-cancer assessments are estimated to be 1.8 parts per billion (ppb), 0.86 ppb and 2.6 ppb, respectively, for surface water and 0.0055 ppb, 0.0045 ppb and 0.0090 ppb, respectively, for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. The highest drinking water concentrations were estimated for surface water. Of the three EDWC values for surface water, the chronic EDWC for the terminal metabolite, chloroaniline, is the highest (assuming 100 percent molar conversionfrom parent to aniline). This is consistent with the expected degradation pattern for novaluron. Therefore, for chronic dietary risk assessment, the water concentration value for chloroaniline of 2.6 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Novaluron is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and'' other substances that have a common mechanism of toxicity.''

EPA has not found novaluron to share a common mechanism of toxicity with any other substances, and novaluron does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that novaluron does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see the policy statements released by EPA's Office of Pesticide Programs concerning common mechanism determinations and procedures for cumulating effects from substances found to have a common mechanism on EPA's website at *http://www.epa.gov/pesticides/cumulative*.

C. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional SF when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. The prenatal and postnatal toxicology database for novaluron includes rat and rabbit prenatal developmental toxicity studies and a 2–generation reproduction toxicity study in rats. There was no evidence of increased quantitative or qualitative susceptibility following *in utero* exposure of rats or rabbits in the developmental toxicity studies and no evidence of increased quantitative or qualitative susceptibility of offspring in the reproduction study. Neither maternal nor developmental toxicity was seen in the developmental studies up to the limit doses. In the reproduction study, offspring and maternal toxicity (increased absolute and relative spleen weights) were similar and occurred at the same dose; and reproductive effects (decreases in epididymal sperm counts and increased age at preputial separation in the F_1 generation) occurred at a higher dose than that which resulted in maternal toxicity.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for novaluron is complete, except for immunotoxicity testing. EPA began requiring functional immunotoxicity testing of all food and non-food use pesticides on December 26, 2007. Since this requirement went into effect after the tolerance petition was submitted, these studies are not yet available for novaluron. In the absence of specific immunotoxicity studies, EPA has evaluated the available novaluron toxicity data to determine whether an additional database uncertainty factor is needed to account for potential immunotoxicity. There was no evidence of adverse effects on the organs of the immune system at the LOAEL in any study novaluron. In addition, novaluron does not belong to a class of chemicals (e.g., the organotins, heavy metals, or halogenated aromatic hydrocarbons) that would be expected to be immunotoxic. Based on the considerations in this Unit, EPA does not believe that conducting a special series 870.7800 immunotoxicity study will result in a point of departure less than the NOAEL of 0.011 mg/kg/day used in calculation the cPAD for novaluron, and therefore, an additional database uncertainty factor is not needed to account for potential immunotoxicity.

ii. There were signs of neurotoxicity in the acute neurotoxicity study in rats, including clinical signs (piloerection, fast/irregular breathing), functional observation battery (FOB) parameters (head swaying, abnormal gait) and neuropathology (sciatic and tibial nerve degeneration). However, the signs observed were not severe and were seen only at the limit dose (2,000 mg/kg/day); further, the neuropathological effects that were seen at the limit dose also occurred in a few untreated control animals. No signs of neurotoxicity or neuropathology were observed in the subchronic neurotoxicity study in rats at doses up to 1,752 mg/kg/day in males, and 2,000 mg/kg/day in females or in any other subchronic or chronic toxicity study in rats, mice or dogs, including the developmental and reproduction studies. Therefore, novaluron does not appear to cause significant neurotoxicant effects, and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that novaluron results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100 PCT and tolerance-level or anticipated residues derived from reliable residue field trials. EPA made conservative (protective) assumptions in the ground water and surface water modeling used to assess exposure to novaluron in drinking water. Residential exposures are not expected. These assessments will not underestimate the exposure and risks posed by novaluron.

D. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-term, intermediate-term, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. An acute aggregate risk assessment takes into account exposure estimates from acute dietary consumption of food and drinking water. No adverse effect resulting from a single-oral exposure was identified, therefore, no acute dietary endpoint was selected. Therefore, novaluron is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to novaluron from food and water will utilize 76% of the cPAD for children 1–2 years old, the population group receiving the greatest

exposure. There are no residential uses for novaluron.

3. *Short-term risk*. Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Novaluron is not registered for any use patterns that would result in residential exposure. Therefore, the short-term aggregate risk is the sum of the risk from exposure to novaluron through food and water and will not be greater than the chronic aggregate risk.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account intermediate-term non-dietary, non-occupational exposure plus chronic exposure to food and water (considered to be a background exposure level).

Novaluron is not registered for any use patterns that would result in intermediate-term residential exposure. Therefore, the intermediate-term aggregate risk is the sum of the risk from exposure to novaluron through food and water, which has already been addressed, and will not be greater than the chronic aggregate risk.

5. *Aggregate cancer risk for U.S. population*. Novaluron has been classified as ''not likely to be carcinogenic to humans'' and therefore is not expected to pose a cancer risk to humans.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to novaluron residues.

V. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodologies (a gas chromatography/electron- capture detection (GC/ECD) method; and a high pressure liquid chromatography/ ultraviolet detection (HPLC/UV) method)) are available to enforce the tolerance expression. The methods may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no CODEX residue limits for residues of novaluron on strawberry.

VI. Conclusion

Therefore, a time-limited tolerance is established for residues of novaluron, *N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide, in or on strawberry at 0.50 ppm. This tolerance expires and is revoked on December 31, 2011.

VII. Statutory and Executive Order Reviews

This final rule establishes a tolerance under sections 408(e) and 408(l)(6) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established in accordance with sections 408(e) and 408(l)(6) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq*.) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: April 28, 2009.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.598 is amended by revising paragraph (b) to read as follows:

§ 180.598 Novaluron; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions*. Time-limited tolerances specified in the following table are established for residues of the insecticide novaluron, *N*-[[[3-chloro-4-[1,1,2-trifluoro-2-(trifluoromethoxy)ethoxy] phenyl]amino]carbonyl]-2,6-difluorobenzamide in or on the

specified agricultural commodities, resulting from use of the pesticide pursuant to FFIFRA section 18 emergency exemptions. The tolerances expire and are revoked on the date specified in the following table.

Commodity	Parts per million	Expiration/revocation date
Strawberry	0.50	12/31/11

* * * * *

[FR Doc. E9–10499 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105; DA 09–749]

IP-Enabled Services; Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons With Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities

AGENCY: Federal Communications Commission.

ACTION: Final rule; extension of waiver.

SUMMARY: In this document, the Commission, via the Consumer and Governmental Affairs Bureau, extends the limited waiver granted in the *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities,* Order (*2008 TRS 711 Waiver Order*) of the requirement that traditional telecommunications relay service (TRS) providers (those providing relay service via the public switched telephone network and a text telephone (TTY)) must automatically and immediately call an appropriate Public Safety Answering Point (PSAP) when receiving an emergency 711-dialed call placed by an interconnected voice over Internet Protocol (VoIP) user. In taking this action, the Commission grants, to the extent provided herein, the petition for extension of waiver filed by AT&T Inc. (AT&T) and Sprint Nextel Corporation (Sprint) with respect to traditional TRS providers' duty to automatically and immediately route emergency 711 calls that originate on the network of an interconnected VoIP provider.

DATES: Effective on April 1, 2009. Traditional TRS providers are granted a waiver until June 29, 2009.

FOR FURTHER INFORMATION CONTACT: Lisa Boehley, Consumer and Governmental Affairs Bureau at (202) 418–7395 (voice), or e-mail: *Lisa.Boehley@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's document DA 09–749, adopted and released April 1, 2009. This document also contains a separate document seeking comment on issues raised by the petition for extension of waiver filed by AT&T and Sprint. The full text of this document and copies of any subsequently filed documents in this matter will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document and copies of subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's duplicating contractor at their Web site: *http://www.bcpiweb.com* or call 1–800–378–3160. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document can also be downloaded in Word or Portable Document Format (PDF) at: *http://www.fcc.gov/cgb/dro.*

Synopsis

On June 15, 2007, the Commission released the Report and Order (*VoIP TRS Order*), published at 72 FR 43546, August 6, 2007, WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105, FCC 07–110. In the *VoIP TRS Order,* the Commission extended its pre-existing TRS rules to interconnected VoIP providers, including the duty to offer 711 abbreviated dialing access to TRS. The *VoIP TRS Order* required interconnected VoIP providers to offer 711 abbreviated dialing ''to ensure that TRS calls can be made from any telephone, anywhere in the United States, and that such calls will be properly routed to the appropriate relay center.''

In the Order and Public Notice Seeking Comment (*October 2007 Order and Notice*), released on October 9, 2007, published at 72 FR 61813, November 1, 2007, and 72 FR 61882, November 1, 2007, WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105, DA 07–4178, the Commission clarified the 711 abbreviated dialing requirement adopted in the *VoIP TRS Order* and granted interconnected VoIP providers a six-month waiver of the requirement to route the inbound leg of a 711-dialed call to an ''appropriate TRS provider,'' as defined by the Commission. The Commission also determined that the geographic location identification challenges associated with interconnected VoIP-originated 711 calls rendered traditional TRS providers unable to consistently identify the ''appropriate'' PSAP to which to route such calls. On this basis, the Commission found good cause to grant traditional TRS providers a six-month waiver of the obligation set forth in § 64.604(a)(4) of its rules to automatically and immediately route the outbound leg of an interconnected VoIP-originated emergency 711 call to an ''appropriate'' PSAP.

In the *2008 TRS 711 Waiver Order,* released on April 4, 2008, published at 73 FR 28057, May 15, 2008, WC Docket No. 04–36, CG Docket No. 03–123, WT Docket No. 96–198 and CC Docket No. 92–105, DA 07–4178, the Commission granted interconnected VoIP providers an extension of time, until March 31, 2009, to route 711-dialed calls to an appropriate relay center, in the context of 711-dialed calls in which the calling party is using a non-geographically relevant telephone number or a nomadic interconnected VoIP service. The Commission also granted traditional TRS providers an extension of time,

until March 31, 2009, to fulfill their obligation to implement a system to automatically and immediately call an appropriate PSAP when receiving an emergency 711-dialed call via an interconnected VoIP service.

In this document, the Commission extends for 90 days (until June 29, 2009) the limited waiver granted to traditional TRS providers in the *2008 TRS 711 Waiver Order.* In taking this action, the Commission grants, to the extent provided herein, the petition for extension of waiver filed by AT&T and Sprint from the requirement of § 64.604(a)(4) of the Commission's rules with respect to traditional TRS providers' duty to automatically and immediately route emergency 711 calls that originate on the network of an interconnected VoIP provider. The Commission's reasons for extending the waiver are three-fold. First, petitioners note that the routing of the outbound leg of an interconnected VoIP-originated, 711-dialed call to an appropriate PSAP by a TRS provider continues to present significant technical and operational challenges. Second, to the extent that interconnected VoIP providers are only recently able to consistently deliver the inbound leg of a 711-dialed call to the appropriate relay center, the Commission agrees that implementation of a solution to allow TRS providers to properly route emergency 711-dialed VoIP calls will take additional time beyond the March 31, 2009 deadline for interconnected VoIP providers. Third, as the petition reflects, addressing these challenges requires further collaboration among a variety of stakeholders including TRS providers, interconnected VoIP providers and their vendors, PSAPs, the emergency services community, and the consumers. In light of the foregoing, the Commission finds good cause to grant traditional TRS providers an extension of the current waiver of § 64.604(a)(4) of its rules until June 29, 2009.

During the period of this waiver, a traditional TRS provider that cannot automatically and immediately route to an appropriate PSAP the outbound leg of an emergency 711 call placed via TTY by an interconnected VoIP user, as required by § 64.604(a)(4) of the Commission's rules, must maintain a manual system for doing so, to the extent feasible, that accomplishes the proper routing of emergency 711 calls as efficiently as possible. Further, during this period, traditional TRS providers must take steps to remind individuals with hearing or speech disabilities to dial 911 directly (as a text-to-text, TTY-to-TTY call) in an emergency, whether using a PSTN-based service or interconnected VoIP service, rather than making a TRS call via 711 in an emergency. Finally, the Commission expects traditional TRS providers to continue their collaboration with industry stakeholders in order to address any remaining issues, such that a further extension of this waiver will be unnecessary.

Based on the record, the Commission allows the waiver relief previously granted to interconnected VoIP providers of the requirement to route 711-dialed calls to an appropriate relay center to expire after the March 31, 2009 deadline. Accordingly, interconnected VoIP providers will be required to properly route all 711-dialed calls to an appropriate relay center (*i.e.,* the relay center serving the state in which the caller is geographically located or that corresponds to the caller's last registered address). Given that compliance issues remain with respect to traditional TRS providers' handling and routing of the outbound leg of emergency 711 VoIP calls, interconnected VoIP providers, however, must continue to take steps to remind persons with speech or hearing disabilities to dial 911 directly (as a TTY-to-TTY call), rather than dialing 711 (as a relay call), in the event of an emergency.

Ordering Clauses

Pursuant to Sections 1, 2, and 225 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, and 225, and Sections 0.141, 0.361, and 1.3 of the Commission's rules, 47 CFR 0.141, 0.316 and 1.3, document DA 09–749 *is adopted.*

Traditional TRS providers are granted an extension of time, until June 29, 2009, to implement a system, as set forth in § 64.604(a)(4) of the Commission's rules, 47 CFR 64.604(a)(4), to automatically and immediately call an appropriate PSAP when receiving an emergency 711-dialed call via an interconnected VoIP service.

The Petition of AT&T and Sprint Nextel for Extension of Waiver is granted to the extent provided herein.

Federal Communications Commission.

Catherine Seidel,

Chief, Consumer and Governmental Affairs Bureau.

[FR Doc. E9–10502 Filed 5–5–09; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–899; MB Docket No. 09–34; RM–11522]

Television Broadcasting Services; Bryan, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants a petition for rulemaking filed by Comcorp of Bryan License Corp., the licensee of post-transition station KYLE–DT, DTV channel 29, to substitute its originally assigned DTV channel 28, for post-transition DTV channel 29 at Bryan, Texas and to move its transmitter location and make associated technical changes.

DATES: This rule is effective May 6, 2009.

FOR FURTHER INFORMATION CONTACT: David J. Brown, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 09–34, adopted April 22, 2009, and released April 23, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C.

3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Texas, is amended by adding DTV channel 28 and removing DTV channel 29 at Bryan.

Federal Communications Commission.

Clay C. Pendarvis,

Associate Chief, Video Division, Media Bureau.

[FR Doc. E9–10537 Filed 5–5–09; 8:45 am]

BILLING CODE 6712–01–P

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 525 and 552

[GSAR Amendment 2009–04; GSAR Case 2006–G520 (Change 30) Docket 2008–0007; Sequence 2]

RIN 3090–AI66

General Services Administration Acquisition Regulation; GSAR Case 2006–G520; Rewrite of Part 525, Foreign Acquisition

AGENCIES: General Services Administration (GSA), Office of the Chief Acquisition Officer.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to revise and update the agency's implementation of Federal Acquisition Regulation (FAR) Part 25.

DATES: *Effective Date*: July 6, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Meredith Murphy at (202) 208–6925, or by e-mail at *meredith.murphy@gsa.gov*. For information pertaining to the status or publication schedules, contact the Regulatory Secretariat (VPR), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755. Please cite GSAR Case 2006–G520.

SUPPLEMENTARY INFORMATION:

A. Background

This is part of the General Services Administration Acquisition Manual (GSAM) Rewrite Project, initiated in 2006 to revise, update, and simplify the GSAM. An Advance Notice of Proposed Rulemaking, with a request for comments, was published in the **Federal Register** at 71 FR 7910 on February 15, 2006. The three comments received on Part 525 were addressed in the proposed rule.

A notice of proposed rulemaking was published in the **Federal Register** at 73 FR 44208 on July 30, 2008. The public comment period for the proposed rule closed September 29, 2008. The draft revisions proposed to remove the outdated material from the GSAR, *i.e.*, all of GSAR Part 525.

One comment was received in response to the proposed rule. The commenter requested ''clarification in detail'' of the Buy American Act (BAA) and the Trade Agreements Act (TAA) for GSA multiple award contract holders. The commenter has asked for interpretation of the FAR, not a change to the proposed rule. The comment is, therefore, outside the scope of the GSAM Rewrite.

No comments were received regarding the proposed changes to GSAR Part 525. Therefore, the proposed rule is being converted to a final rule without change.

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

B. Regulatory Flexibility Act

The General Services Administration does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the changes are primarily editorial in nature. No comments were received in response to the shift from GSAR to GSAM. A Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. GSA will consider comments from small entities concerning the affected GSAR Parts 525 and 552 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (GSAR case 2006–G520), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 525 and 552

Government procurement.

Dated: March 11, 2009.

Rodney P. Lantier,

Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, General Services Administration.

■ Therefore, GSA amends 48 CFR parts 525 and 552 as set forth below:

■ 1. The authority citation for 48 CFR part 525 is revised to read as follows:

Authority: 40 U.S.C. 121(c).

PART 525—FOREIGN ACQUISITION

Subpart 525.3 [Removed]

■ 2. Remove Subpart 525.3.

Subpart 525.5 [Removed]

■ 3. Remove Subpart 525.5.

Subpart 525.11 [Removed]

■ 4. Remove Subpart 525.11.

■ 5. The authority citation for 48 CFR part 552 continues to read as follows:

Authority: 40 U.S.C. 121(c).

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

552.225–70 [Removed]

■ 6. Remove section 552.225–70.

[FR Doc. E9–10419 Filed 5–5–09; 8:45 am]

BILLING CODE 6820–61–S

Proposed Rules

Federal Register
Vol. 74, No. 86
Wednesday, May 6, 2009

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.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0839; FRL–8783–8]

Revisions to the California State Implementation Plan, South Coast Air Quality Management District; Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the South Coast Air Quality Management District (SCAQMD) and Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from residential water heaters, Boilers, Process Heaters and Steam Generators. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by June 5, 2009.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2008–0839], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Idalia Perez, EPA Region IX, (415) 972–3248, *perez.idalia@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: SCAQMD 1121 and SMAQMD 411. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: March 2, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E9–10515 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0891, FRL–8782–6]

Revisions to the California State Implementation Plan, North Coast Unified Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the North Coast Unified Air Quality Management District (NCUAQMD) portion of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve local rules that address particulate matter (PM–10) emissions from general sources, fugitive sources, and open burning and volatile organic compound (VOC) emissions from petroleum loading and storage.

DATES: Any comments on this proposal must arrive by *June 5, 2009.*

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2008–0891, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.
- *E-mail: steckel.andrew@epa.gov.*
- *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that

you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Alfred Petersen, Rules Office (AIR–4), U.S. Environmental Protection Agency, Region IX, (415) 947–4118, *petersen.alfred@epa.gov*.

Information: This proposal addresses the approval of NCUAQMD Rules 104.2, 104.3, 104.4, 104.10, and 200 through 208. In the Rules and Regulations section of this **Federal Register,** we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: April 20, 2009.

Laura Yoshii,

Regional Administrator, Region IX.

[FR Doc. E9–10522 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2008–0668; FRL–8779–9]

Revisions to the California State Implementation Plan, North Coast Unified Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the North Coast Unified Air Quality Management District portion of the California State Implementation Plan (SIP). This action revises and adds various definitions of terms used by the NCUAQMD. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve local rules that are administrative and address changes for clarity and consistency.

DATES: Any comments on this proposal must arrive by *June 5, 2009.*

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2008–0668, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov*.

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: NCUAQMD Rules 100, 101 and 108. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: February 10, 2009.

Jane Diamond,

Acting Regional Administrator, Region IX.

[FR Doc. E9–10523 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0083; FRL–8900–3]

Revisions to the California State Implementation Plan, Santa Barbara County Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Santa Barbara County Air Pollution Control District (SBCAPCD) portion of the California State Implementation Plan (SIP). This action revises and adds various definitions of terms used by the SBCAPCD. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve a local rule that is administrative and address changes for clarity and consistency.

DATES: Any comments on this proposal must arrive by *June 5, 2009.*

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2009–0083, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or e-mail. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rule: Rule 102, Definitions. In the Rules and Regulations section of this **Federal Register,** we are approving this local rule in a direct final action without prior proposal because we believe this SIP revision is not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: March 2, 2009.

Laura Yoshii,

Acting Regional Administrator, Region IX.

[FR Doc. E9–10535 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No.090421699–9797–01]

RIN 0648–XO74

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications Modification

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

ACTION: Proposed rule.

SUMMARY: NMFS proposes a regulation to adjust the harvest specifications for Pacific sardine in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of January 1, 2009, through December 31, 2009. The proposed action would increase the tonnage of Pacific sardine allocated for industry conducted research from 1200 metric tons (mt) to 2400 mt and decreases the second and third period directed harvest allocations by 750 mt and 450 mt, respectively.

DATES: Comments must be received by June 5, 2009.

ADDRESSES: You may submit comments on this proposed rule identified by 0648–XO74 by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802.
- Fax: (562)980–4047

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you prefer to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: On February 20, 2009, NMFS published a final rule implementing the harvest guideline (HG) and annual specifications for the 2009 Pacific sardine fishing season off the U.S. West Coast (74 FR 7826) under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq (Magnuson-Stevens Act). These specifications and associated management measures were based on recommendations adopted by the Pacific Fishery Management Council (Council) at their November 2008 public meeting in San Diego, California (73 FR 60680). For the 2009 Pacific sardine fishing season, the Council adopted, and NMFS approved, an acceptable biological catch (ABC) or maximum HG of 66,932 mt. This ABC/HG was determined according to the regulations implementing the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP)(50 CFR part 660, subpart I). The Council also recommended, and NMFS approved, that 1,200 mt be initially subtracted from the ABC and reserved for an industry-conducted research project, which is planned but not yet approved. This 1,200 mt set-aside was intended to allow research fishing, which is planned for the second seasonal period (July 1—September 15, 2009), to continue if that period's allocation is reached and directed fishing is closed. As stated in the final rule implementing the 2009 specifications, the use of the 1,200 mt would require NMFS to issue an Exempted Fishing Permit (EFP) because fishing would occur after the directed fishery is closed.

At the Council's March 2009 public meeting the Council reviewed two industry research/EFP proposals for conducting Pacific sardine biomass surveys and moved the two proposals forward for public comment with the recommendation that industry combine the proposals to create a single EFP application to be reviewed for final adoption at the June 2009 Council meeting. After hearing the research proposals and public comment, the Council then recommended that the original 1200 mt set-aside be increased to 2400 mt. To account for the additional 1,200 mt, the Council recommended that the second and third period directed fishery allocations be reduced by 750 mt and 450 mt respectively. This is approximately a proportional reduction in the two allocations.

NMFS will publish a notice in the **Federal Register** requesting comments on the proposed EFP in the near future and a decision on whether to issue an EFP for the use of the research set-aside will be made prior to the start of the second seasonal period (July 1, 2009). If NMFS determines that an EFP cannot be issued, then the set-aside -either the current 1,200 mt or the proposed 2,400 mt-will be re-allocated to the third period's directed harvest allocation.

Classification

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

These proposed specifications are exempt from review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as follows:

The purpose of this proposed action is to make minor modifications to the 2009 Pacific sardine specifications. This proposed rule does not make significant changes to those specifications, which were implemented through proposed and final rulemaking and for which an Initial and a Final Regulatory Flexibility Analysis was completed.

The small entities that would be affected by the proposed action are the 63 vessels that compose the West Coast CPS finfish fleet. These vessels are considered small business entities by the U.S. Small Business Administration because the vessels do not have annual receipts in excess of $4.0 million. Therefore, there would be no economic impacts resulting from disproportionality between small and large business entities under the proposed action.

The profitability of these vessels as a result of this proposed rule is based on the average Pacific sardine ex-vessel price per mt. When the 2009 Pacific sardine specifications were implemented it was determined that if the fleet were to take the entire 2009 Pacific sardine HG of 65,732 metric tons (mt), the potential revenue to the fleet would be approximately $11 million. This proposed action has the potential, if an Exempted Fishing Permit is approved at a later date, to reduce the available HG by 1200 mt (750 mt in the second period and 450 mt in the third period) and potential fleet revenue by $168,000. However, over the course of the fishing season these amounts represent very small portions of the overall allowable harvest and equal less than half the amount taken by the fleet in a normal fishing day. Therefore the potential drop in profitability to fleet overall would be small. Furthermore, even the re-allocated 1200 mt of sardine would be sold commercially by members of the fleet, also small business entities, operating under an exempted fishing permit.

Based on the disproportionality and profitability analysis above, this rule if adopted, will not have a significant economic impact on a substantial number of these small entities.

As a result, an Initial Regulatory Flexibility Analysis is not required and none has been prepared.

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

Dated: April 30, 2009.

James W. Balsiger,

Acting Assistant Administrator For Fisheries, National Marine Fisheries Service.

[FR Doc. E9–10506 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 74, No. 86
Wednesday, May 6, 2009

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

Forest Service

Information Collection; Request for Comment; Objections to New Land Management Plans, Plan Amendments, and Plan Revisions

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: Under the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested people and organizations on the extension of a currently approved information collection, objections to new land management plans, plan amendments, and plan revisions.

DATES: Comments must be received in writing on or before July 6, 2009 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Forest Service, Assistant Director for Planning, Ecosystem Management Coordination, Mail Stop 1104, 1400 Independence Avenue, SW., Washington, DC 20250–1104.

Comments also may be submitted via facsimile to (202) 205–1012 or by e-mail to: *rterney@fs.fed.us.*

The public may inspect comments received at the Ecosystem Management Coordination Office, 201 14th St., SW., Washington, DC, during normal business hours. Visitors are encouraged to call ahead to (202) 205–0895 to assist entry into the building.

FOR FURTHER INFORMATION CONTACT: Regis Terney, Ecosystem Management Coordination, at (202) 205–0895 or e-mail to: *rterney@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Objection to new land management plans, plan amendments, and plan revisions.

OMB Number: 0596–0158.

Expiration Date of Approval: January 31, 2010.

Type of Request: Extension of a currently approved collection.

Abstract: The information that would be required by Title 36, Code of Federal Regulations, part 219—Planning, subpart A—National Forest System Land Management Planning (36 CFR part 219, subpart A), section 219.13 is the minimum information needed for a person to make clear the objection to a proposed land management plan, plan amendment, or plan revision. Under 36 CFR 219.13, an person must provide name, mailing address, and if possible, telephone number; and state the issues, the parts of the plan, amendment or revision that is the subject of the objection; and state how the person believes the plan, amendment, or revision is inconsistent with law, regulation, or policy or how the person disagrees with the decision and supply any recommendations for change. The reviewing officer must review the objection(s) and relevant information and then respond to the objector(s) in writing.

Estimate of Annual Burden: 10 hours to prepare the objection.

Type of Respondents: Interested and affected people, organizations, and governmental units who participate in the planning process: such as people who live in or near National Forest System (NFS) lands; local, State, and Tribal governments who have an interest in the plan; Federal agencies with an interest in the management of NFS lands and resources; not-for-profit organizations interested in NFS management, such as environmental groups, recreation groups, educational institutions; and commercial users of NFS land and resources.

Estimated Annual Number of Respondents: 1,210 a year.

Estimated Annual Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 12,100 hours.

Comment is invited on: (1) Whether the right information is being requested, including whether the information will have practical value; (2) whether the instructions in 36 CFR 219.13 are clear; (3) whether the Forest Service estimate of the burden of the collection of information is accurate, (10 hours); (4) ways to enhance the quality, usefulness, and clarity of the information to be collected; (5) ways to make the objections available to people, (6) ways to minimize the burden of the collection of information on people, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received on this notice, including names and addresses when given, will be a matter of public record. Comments will be summarized and included in the request for Office of Management and Budget approval.

Dated: April 30, 2009.

Gloria Manning,

Associate Deputy Chief, National Forest System.

[FR Doc. E9–10299 Filed 5–5–09; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

South Gifford Pinchot National Forest Resource Advisory Committee Meeting Notice

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The South Gifford Pinchot National Forest Resource Advisory Committee will meet on Monday, June 8, 2009 at the Stevenson Community Library, 120 NW Vancouver Ave., Stevenson, Washington. The meeting will begin at 9 a.m. and continue until 4 p.m. The purpose of the meeting is to make recommendations on approximately 45 proposals for Title II funding of projects under the Secure Rural Schools and County Self-Determination Act of 2000.

All South Gifford Pinchot National Forest Resource Advisory Committee meetings are open to the public. Interested citizens are encouraged to attend. The ''open forum'' provides opportunity for the public to bring issues, concerns, and discussion topics to the Advisory Committee. The ''open forum'' is scheduled to occur at 9:10 a.m. on June 8. Interested speakers will need to register prior to the open forum period. The committee welcomes the

public's written comments on committee business at any time.

FOR FURTHER INFORMATION CONTACT: Direct questions regarding this meeting to Roger Peterson, Public Affairs Specialist, at (360) 891–5007, or write Forest Headquarters Office, Gifford Pinchot National Forest, 10600 NE. 51st Circle, Vancouver, WA 98682.

Dated: April 20, 2009.

Janine Clayton,

Forest Supervisor.

[FR Doc. E9–10466 Filed 5–5–09; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Announcement of Value-Added Producer Grant Application Deadlines

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of solicitation of applications.

SUMMARY: The Rural Business-Cooperative Service (RBS) announces the availability of approximately $18 million in competitive grant funds for fiscal year (FY) 2009 to help independent agricultural producers enter into value-added activities.

Awards may be made for planning activities or for working capital expenses, but not for both. The maximum grant amount for a planning grant is $100,000 and the maximum grant amount for a working capital grant is $300,000.

Ten percent of available funds are reserved to fund applications submitted by Beginning Farmers or Ranchers and Socially Disadvantaged Farmers or Ranchers as defined at 7 U.S.C. 1991(a) and 2003(e). An additional ten percent of available funds are reserved to fund Mid-Tier Value Chain projects, as defined in section I of this notice (both collectively referred to as ''reserved funds'').

DATES: Applications for grants must be submitted on paper or electronically according to the following deadlines:

Paper applications for unreserved funds must be postmarked and mailed, shipped, or sent overnight no later than July 6, 2009, to be eligible for FY 2009 grant funding. Paper applications for reserved funds must be postmarked and mailed, shipped, or sent overnight no later than June 22, 2009 to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.

Electronic applications for unreserved funds must be received by July 6, 2009, to be eligible for FY 2009 grant funding. Electronic applications for reserved funds must be received no later than June 22, 2009, to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.

ADDRESSES: An application guide and other materials may be obtained at *http://www.rurdev.usda.gov/rbs/coops/vadg.htm* or by contacting the applicant's USDA Rural Development State Office. The State Office can be reached by calling 800–670–6553 and pressing ''1.''

Paper applications must be submitted to the Rural Development State Office for the State in which the Project will primarily take place. Addresses may be found at: *http://www.rurdev.usda.gov/recd_map.html.*

Electronic applications must be submitted through the Grants.gov Web site at: *http://www.grants.gov,* following the instructions found on this Web site.

FOR FURTHER INFORMATION CONTACT: Applicants should visit the program Web site at *http://www.rurdev.usda.gov/rbs/coops/vadg.htm,* which contains application guidance, Frequently Asked Questions and an Application Guide with templates. Or applicants may contact their USDA Rural Development State Office. The State Office can be reached by calling 800–670–6553 and pressing ''1,'' or by selecting the Contact Information link at the above Web site.

Applicants are encouraged to contact their State Offices well in advance of the deadline to discuss their projects and ask any questions about the application process. Also, applicants may submit drafts of their applications to their State Offices for a preliminary review anytime prior to June 5, 2009. The preliminary review will only assess the eligibility of the application and its completeness. The results of the preliminary review are not binding on the Agency.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: USDA Rural Development.

Funding Opportunity Title: Value-Added Producer Grants.

Announcement Type: Initial announcement.

Catalog of Federal Domestic Assistance Number: 10.352.

Dates: Application Deadline: Applications for grants must be submitted on paper or electronically according to the following deadlines:

Paper applications for unreserved funds must be postmarked and mailed, shipped, or sent overnight no later than July 6, 2009 to be eligible for FY 2009 grant funding. Paper applications for reserved funds must be postmarked and mailed, shipped, or sent overnight no later than June 22, 2009 to be eligible for FY 2009 grant funding. Late applications are not eligible for FY 2009 grant funding.

Electronic applications for unreserved funds must be received by July 6, 2009 to be eligible for FY 2009 grant funding. Electronic applications for reserved funds must be received by June 22, 2009. Late applications are not eligible for FY 2009 grant funding.

I. Funding Opportunity Description

This solicitation is issued pursuant to section 231 of the Agriculture Risk Protection Act of 2000 (Pub. L. 106–224) as amended by section 6202 of the Food, Conservation, and Energy Act of 2008 (Pub. L. 110–246) (see 7 U.S.C. 1621 note)) authorizing the establishment of the Value-Added Agricultural Product Market Development grants, also known as Value-Added Producer Grants. The Secretary of Agriculture has delegated the program's administration to USDA Rural Development Cooperative Programs.

The primary objective of this grant program is to help Independent Producers of Agricultural Commodities, Agriculture Producer Groups, Farmer and Rancher Cooperatives, and Majority-Controlled Producer-Based Business Ventures develop strategies to create marketing opportunities and to help develop Business Plans for viable marketing opportunities regarding production of bio-based products from agricultural commodities. Cooperative Programs will competitively award funds for Planning Grants and Working Capital Grants. In order to provide program benefits to as many eligible applicants as possible, applicants must apply only for a Planning Grant or for a Working Capital Grant, but not both. Grants will only be awarded if Projects are determined to be economically viable and sustainable.

USDA Rural Development is encouraging projects that highlight innovative uses of agricultural products. This may include using existing agricultural products in non-traditional ways and/or merging agricultural products with technology in creative ways. As with all value-added efforts, generating new products, creating expanded marketing opportunities and increasing producer income are the end goal. Applications proposing to develop innovative, sustainable products, businesses, or marketing opportunities that accelerate creation of new economic opportunities and commercialization in the agri-food, agri-science, or agriculture products

integrated or merged with other sciences or technologies are invited. This may include alternative uses of agricultural products as well as, value-added processing of agricultural commodities to produce bio-materials (*e.g.* plastics, fiberboard), green chemicals, functional foods (*e.g.* lutin enhanced ''power bar'' snacks, soy enhanced products), nutraceuticals, on-farm renewable energy, and biofuels (*e.g.* ethanol, biodiesel).

Please note that businesses of all sizes may apply, but priority will be given to Small and Medium-Sized Farms or Ranches that are structured as Family Farms and there is no restriction on the minimum grant size that will be awarded. In FY 2008, 31 percent of awards were $50,000 or less.

Definitions

The definitions at 7 CFR 4284.3 and 4284.904 are incorporated by reference, with the exception of the definition of Value-Added, which is superseded by the definition of Value-Added Agricultural Product as published in the 2008 Farm Bill and is included below. In addition, the Agency uses the following terms in this NOSA: Agricultural Commodity, Beginning Farmer or Rancher, Business Plan, Conflict of Interest, Family Farm, Feasibility Study, Local and Regional Supply Network, Locally-Produced Agricultural Food Product, Marketing Plan, Medium-Sized Farm, Mid-Tier Value Chain, Pro Forma Financial Statements, Project, Small Farm, Socially Disadvantaged Farmer or Rancher, and Venture. It is the Agency's position that those terms are defined as follows.

Agricultural Commodity—An unprocessed product of farms, ranches, nurseries, and forests. Agricultural Commodities include: Livestock, poultry, and fish; fruits and vegetables; grains, such as wheat, barley, oats, rye, triticale, rice, corn, and sorghum; legumes, such as field beans and peas; animal feed and forage crops; seed crops; fiber crops, such as cotton; oil crops, such as safflower, sunflower, corn, and cottonseed; trees grown for lumber and wood products; nursery stock grown commercially; Christmas trees; ornamentals and cut flowers; and turf grown commercially for sod. Agricultural Commodities do not include horses or animals raised as pets, such as cats, dogs, and ferrets.

Beginning Farmer or Rancher—See 7 U.S.C. 1991(a):

Business Plan—A formal statement of a set of business goals, the reasons why they are believed attainable, and the plan for reaching those goals, including three years of pro forma financial statements. It may also contain background information about the organization or team attempting to reach those goals.

Conflict of Interest—A situation in which a person or entity has competing professional or personal interests that make it difficult for the person or business to act impartially. An example of a Conflict of Interest is a grant recipient or an employee of a recipient that conducts or significantly participates in conducting a Feasibility Study for the recipient.

Family Farm—See 7 CFR 761.2.

Feasibility Study—An independent, third party analysis that shows how the Venture would operate under a set of assumptions—the technology used (the facilities, equipment, production process, etc.), the qualifications of the management team, and the financial aspects (capital needs, volume, cost of goods, wages, etc.). The analysis should answer the following questions about the Venture.

(1) Where is it now?

(2) Where do the owners of the Venture want to go?

(3) Why do the owners of the Venture want to go forward with the Venture?

(4) How will the owners of the Venture accomplish the Venture?

(5) What resources are needed?

(6) Who will provide assistance?

(7) When will the Venture be completed?

(8) How much will the Venture cost?

(9) What are the risks?

Local and Regional Supply Network—An interconnected group of food-related business enterprises through which food products move from production through consumption in a local or regional area of the U.S. Examples of food-related business enterprises are Agricultural Producers, processors, distributors, wholesalers, retailers, and consumers. Entities that are engaged in agricultural production, food processing, distribution, marketing, or consumption on a national or global scale are not considered to be part of a local and regional supply network.

Locally-Produced Agricultural Food Product—Any agricultural food product that is raised, produced, and distributed in—

(1) the locality or region in which the final product is marketed, so that the total distance that the product is transported is less than 400 miles from the origin of the product; or

(2) the State in which the product is produced.

Marketing Plan—A plan for the Venture conducted by a qualified consultant that identifies a market window, potential buyers, a description of the distribution system and possible promotional campaigns.

Medium-Sized Farm—A farm or ranch that has averaged $500,000 or less in annual gross sales of agricultural products in the last three years.

Mid-Tier Value Chain—Local and regional supply networks that link independent producers with businesses and cooperatives that market Value-Added Agricultural Products in a manner that—

(1) targets and strengthens the profitability and competitiveness of small and medium-sized farms and ranches that are structured as a family farm; and

(2) obtains agreement from an eligible Agricultural Producer Group, Farmer or Rancher Cooperative, or Majority-Controlled Producer-Based Business Venture that is engaged in the value chain on a marketing strategy.

Pro Forma Financial Statements—Financial statements that identify the future financial position of a company. They are part of the Business Plan and include an explanation of all assumptions, such as input prices, finished product prices, and other economic factors used to generate the financial statements. They must include cash flow statements, income statements, and balance sheets. Income statements and cash flow statements must be monthly for the first year, then annual for future years. The balance sheet should be annual for all years.

Project—Includes all proposed activities to be funded by the VAPG and Matching Funds:

Small Farm—A farm or ranch that has averaged $250,000 or less in annual gross sales of agricultural products in the last three years.

Socially Disadvantaged Farmer or Rancher—See 7 U.S.C. 2003(e):

Value-Added Agricultural Product—Any agricultural commodity or product that

(1)(i) has undergone a change in physical state;

(ii) was produced in a manner that enhances the value of the agricultural commodity or product, as demonstrated through a Business Plan that shows the enhanced value, as determined by the Secretary;

(iii) is physically segregated in a manner that results in the enhancement of the value of the Agricultural Commodity or product;

(iv) is a source of farm- or ranch-based renewable energy, including E–85 fuel; or

(v) is aggregated and marketed as a locally-produced agricultural food product; and

(2) as a result of the change in physical state or the manner in which the Agricultural Commodity or product was produced, marketed, or segregated—

(i) the customer base for the agricultural commodity or product is expanded; and

(ii) a greater portion of the revenue derived from the marketing, processing, or physical segregation of the agricultural commodity or product is available to the producer of the commodity or product.

Venture—Includes the Project and any other activities related to the production, processing, and marketing of the Value-Added product that is the subject of the VAPG grant request. Please note that not all Venture-related expenses will be eligible for this program.

II. Award Information

Type of Award: Grant.

Fiscal Year Funds: FY 2009.

Approximate Total Funding: $18 million.

Approximate Number of Awards: 80.

Approximate Average Award: $140,000.

Floor of Award Range: None.

Ceiling of Award Range: $100,000 for Planning Grants and $300,000 for Working Capital Grants.

Anticipated Award Date: September 1, 2009.

Budget Period Length: Not to exceed 3 years.

Project Period Length: Not to exceed 3 years.

III. Eligibility Information

A. Eligible Applicants

Applicants must be an Independent Producer, Agriculture Producer Group, Farmer or Rancher Cooperative, or Majority-Controlled Producer-Based Business Venture as defined in 7 CFR part 4284, subpart A. Local and Regional Supply Networks, as defined in Section I of this notice are eligible only to apply for funds reserved for Mid-Tier Value Chain Projects.

An applicant applying as an Independent Producer must be 100 percent owned by Independent Producers. The owner(s) must currently own and produce more than 50 percent of the Agricultural Commodity that will be used for the Value-Added Agricultural Product, and that product must be owned by the Independent Producer owners from its raw commodity state through the marketing of the final product. Examples of Independent Producers are steering committees, sole proprietorships, LLCs, LLPs, and other for-profit corporations.

An applicant applying as an Agriculture Producer Group must have a mission that includes working on behalf of Independent Producers. The majority of its membership and board of directors must meet the definition of an Independent Producer. The applicant must identify the Independent Producers on whose behalf the proposed Project will be completed. Note that this type of applicant may not apply on behalf of its entire membership. The Independent Producers on whose behalf the proposed Project will be completed must currently own and produce more than 50 percent of the Agricultural Commodity that will be used for the Value-Added Agricultural Product, and that product must be owned by the Independent Producer owners from its raw commodity state through the marketing of the final product. Examples of Agricultural Producer Groups are trade associations.

An applicant applying as a Farmer or Rancher Cooperative must be in good standing and incorporated as a cooperative in its state of incorporation. The cooperative must be 100 percent owned by farmers and ranchers. These owners must currently own and produce more than 50 percent of the Agricultural Commodity that will be used for the Value-Added Agricultural Product, and that product must be owned by the Independent Producer owners from its raw state through the marketing of the final product.

An applicant applying as a Majority-Controlled Producer-Based Business Venture must have more than 50 percent of its ownership and control held by Independent Producers or partnerships, LLCs, LLPs, corporations, or cooperatives that are themselves 100 percent owned and controlled by Independent Producers. The Independent Producer owners must currently own and produce more than 50 percent of the Agricultural Commodity that will be used for the Value-Added Agricultural Product, and that product must be owned by the Independent Producer owners from its raw commodity state through the marketing of the final product. Examples of Majority-Controlled Producer-Based Business Ventures are LLCs, LLPs, and other for-profit corporations. No more than 10 percent of program funds can go to applicants that are Majority-Controlled Producer-Based Business Ventures.

For the Mid-Tier Value Chain reserved funds only, an applicant applying as a Local and Regional Supply Network must be either one of the organizations that is a member of the network who agrees to be the legal representative for the network and assume responsibility for the management of grant funds, if selected for funding, or the applicant must be a legal entity that is comprised of the business enterprises that are members of the network. The network must operate on a local and/or regional basis in the United States. And, it must link independent producers with businesses and cooperatives that market Value-Added Agricultural Products in a manner that targets and strengthens the profitability and competitiveness of Small and Medium-Sized Farms and Ranches that are structured as a Family Farm. Finally, the network must obtain an agreement from an eligible Agricultural Producer Group, Farmer or Rancher Cooperative, or Majority-Controlled Producer-Based Business Venture that is engaged in the value chain on a marketing strategy. For Planning Grants, examples of agreements include, but are not limited to, letters of intent to partner on marketing, distribution, or processing. For Working Capital Grants, examples of agreements include, but are not limited to, marketing agreements, distribution agreements, and processing agreements.

Applicants other than Independent Producers must limit their Projects to Emerging Markets.

If the applicant is an unincorporated group (steering committee), it must form a legal entity before the Grant Agreement can be approved by the Agency. A steering committee may only apply as an Independent Producer. Therefore, the steering committee must be 100 percent composed of Independent Producers and the business to be formed must meet the definition of Independent Producer, as defined in 7 CFR 4284, subpart A.

Entities that contract out the production of an Agricultural Commodity are not considered Independent Producers.

Farmer or Rancher Cooperatives that are 100 percent owned by farmers and ranchers must apply as Farmer or Rancher Cooperatives. It is the Agency's position that if a cooperative is 100 percent owned and controlled by agricultural harvesters (*e.g.* fishermen, loggers), it is eligible only as an Independent Producer and not as a Farmer or Rancher Cooperative. If a cooperative is not 100 percent owned and controlled by farmers and ranchers or 100 percent owned and controlled by agricultural harvesters, it may still be eligible to apply as a Majority-Controlled Producer-Based Business Venture, provided it meets the definition in 7 CFR part 4284, subpart A.

Any businesses that are selected for awards must provide documentation that they are in good standing with the state of incorporation.

In addition to the above requirements, applicants may be considered for reserved funds if they meet the definition of a Beginning Farmer or Rancher or a Socially Disadvantaged Farmer or Rancher as defined in Section I of this notice.

B. Cost Sharing or Matching

Matching Funds are required, must be at least equal to the amount of grant funds requested, and are subject to the same use restrictions as grant funds. Applicants must verify in their applications that eligible Matching Funds are available for the time period of the grant. Unless provided by other authorizing legislation, other Federal grant funds cannot be used as Matching Funds. Matching Funds must be spent at a rate equal to or greater than the rate at which grant funds are expended. If Matching Funds are provided in an amount exceeding the minimum requirement the applicant must spend their Matching Funds contribution at a proportional rate. For example, if an applicant proposes to provide 75 percent of the total Project cost in Matching Funds and a grant is awarded, the Agency expects that the grantee will expend at least $0.75 of Matching Funds for every $0.25 of grant funds expended.

Matching Funds must be provided by either the applicant or by a third party in the form of cash or eligible in-kind contributions. Applicants that are awarded grants may not change the source, type, or amount of Matching Funds proposed in their applications without prior written approval from the Agency. Matching Funds must be spent on eligible expenses and must be from eligible sources.

C. Other Eligibility Requirements

Product Eligibility: The project proposed must involve a Value-Added product as defined in Section I of this notice. There are five methods through which value-added can be demonstrated. Regardless of which method is used an expansion of customer base AND an increase in revenue to the agricultural producers must also be demonstrated.

1. A change in physical state occurs when an Agricultural Commodity cannot be returned to its original state. Examples of value-added products in this category are fish fillets, diced tomatoes, ethanol, bio-diesel, and wool rugs. Common production or harvesting methods are not considered a change in physical state. For example, dehydrated corn, bottled milk, raw fiber, Christmas trees, and cut flowers are not eligible in this category.

2. Production in a manner that enhances the value of the Agricultural Commodity occurs when a nonstandard production method adds value per unit of production over a standard production method. It is the Agency's position that only Working Capital applications are eligible for this category because the enhanced value must be demonstrated using information from a Feasibility Study and Business Plan developed for the Venture. Examples are organic carrots, eggs produced from free-range chickens, and beef produced from cattle fed a ''natural'' diet. Branded products or products packaged in a non-standard way are not eligible under this category.

3. Physical segregation that enhances the value of the Agricultural Commodity occurs when a physical barrier (*i.e.* distance or a structure) separates a commodity from other varieties of the same commodity on the same farm during production and that the separation continues through the harvesting, processing, and marketing of the product or commodity. An example is genetically-modified corn and non-genetically modified corn produced on the same farm, but physically separated so that no cross-pollination occurs.

4. A source of farm- or ranch-based renewable energy is an Agricultural Commodity or Product used to generate energy on a farm or ranch. An example is an anaerobic digester. Fuels such as ethanol, bio-diesel, or switchgrass pellets, that are not generated on a farm or ranch owned or leased by the owners of the Venture are not eligible under this category. However, these types of fuel may be considered under the first category.

5. Aggregation and marketing of locally-produced agricultural food products occurs when any food product made from an Agricultural Commodity is raised, produced, and marketed within 400 miles of the farm that produced the commodity or within the same State as that farm. Examples are strawberry ice cream sold at a farmers market that is within 400 miles of the dairy farm that produced the milk from which the ice cream was made, or organic lettuce sold to local restaurants. Please note that organic produce or other types of products that are produced in a manner that enhances their value can apply for planning grants under this category as long as 100 percent of the marketing of the product will occur within 400 miles of the farm that produced the Agricultural Commodity.

In addition to the above requirements, applications may be considered for reserved funds if the proposed project meets the definition of a Mid-Tier Value Chain as defined in Section I of this notice. Mid-Tier Value Chains must involve local and regional supply networks that contain at least two alliances, linkages, or partnerships within the value chain. They must also directly impact the profitability and competitiveness of Small and Medium-Sized Farms and Ranches that are structured as Family Farms. Finally, the project must include an agreement from an Agricultural Producer Group, Farmer or Rancher Cooperative, or Majority-Controlled Producer-Based Business Venture that is engaged in the value chain on a marketing strategy.

Purpose Eligibility: The application must specify whether grant funds are requested for planning activities or for working capital. Applicants may not request funds for both types of activities in one application. Working capital expenses are not considered eligible for Planning Grants and planning expenses are not considered eligible for Working Capital Grants. Applications requesting more than the maximum grant amount will be considered ineligible.

It is the Agency's position that applicants other than Independent Producers applying for a Working Capital Grant must demonstrate that the Venture has not been in operation more than two years at the time of application in order to show that the applicant is entering an Emerging Market.

Additionally, it is the Agency's position that all Working Capital Grant applicants must be marketing the Value-Added Agricultural Product(s) that is(are) the subject of the grant application at the time of application.

Grant Period Eligibility: Applicants may propose a timeframe for the grant project up to 36 months in length. Projects cannot begin earlier than October 1, 2009 and cannot end later than September 30, 2012. Applications that request funds for a time period beginning prior to October 1, 2009 and/or ending after September 30, 2012, will be considered ineligible. Applicants may propose a start date falling any time during FY 2009 (October 1, 2009 to September 30, 2010). If the project period will be longer than one year, the applicant must identify a separate, unique task(s) for the first year and for any subsequent year of the proposed project. Any applications proposing a project of longer than one year with duplicative or similar activities in each year is ineligible for funding. The Agency will consider requests for an extension on a case-by-case basis if

extenuating circumstances prevent a grantee from completing an award within the approved grant period, but no extensions can be approved to extend the grant period beyond a total of three years.

Multiple Grant Eligibility: An applicant can submit only one application in response to this notice. The application must designate whether the application submitted should be considered for the general fund or for one of the reserved programs.

Applicants who have already received a Planning Grant for the proposed Project cannot receive another Planning Grant for the same Project. Applicants who have already received a Working Capital Grant for a Project cannot receive any additional grants for that Project.

Current Grant Eligibility: If an applicant currently has a VAPG, it must be completed prior to the beginning of the FY 2009 grant period.

Judgment Eligibility: In accordance with 7 CFR 4284.6.

IV. Application and Submission Information

A. Address To Request Application Package

The application package for applying on paper for this funding opportunity can be obtained at *http://www.rurdev.usda.gov/rbs/coops/vadg.htm.* Alternatively, applicants may contact their USDA Rural Development State Office. The State Office can be reached by calling 800–670–6553 and pressing ''1.'' For electronic applications, applicants must visit *http://www.grants.gov* and follow the instructions.

B. Content and Form of Submission

Applications must be submitted on paper or electronically. An Application Guide may be viewed at *http://www.rurdev.usda.gov/rbs/coops/vadg.htm.* It is strongly recommended that applicants use the template provided on the Web site. The template can be filled out electronically and printed out for submission with the required forms for a paper submission or it can be filled out electronically and submitted as an attachment through Grants.gov.

If an application is submitted on paper, one signed original and one copy of the complete application must be submitted.

If the application is submitted electronically, the applicant must follow the instructions given at *http://www.grants.gov.* Applicants are strongly advised to visit the site well in advance of the application deadline to ensure that they have obtained the proper authentication and have sufficient computer resources to complete the application.

The Agency will conduct an initial screening of all applications for eligibility and to determine whether the application is complete and sufficiently responsive to the requirements set forth in this notice to allow for an informed review. Information submitted as part of the application will be protected from disclosure to the extent permitted by law.

Applicants must complete and submit the elements listed below, except as noted in the next paragraph. Please note that the requirements in the following locations within 7 CFR part 4284 have been combined with other requirements to simplify the application and reduce duplication: 7 CFR 4284.910(c)(5)(i), 4284.910(c)(5)(ii), and 4284.910(c)(5)(iv).

Applicants requesting less than $50,000 are not required to submit the following items at the time of application. However, if selected for an award, the applicants will be required to submit these items as part of the conditions of the award: Form SF–424A (section IV, B.2), Form SF–424B (section IV, B.3), Title Page (section IV, B.4), Goals of the Project (section IV, B.8.i), and Performance Evaluation Criteria (section IV, B.8.ii).

1. Form SF–424, ''Application for Federal Assistance.'' The form must be completed, signed and submitted as part of the application package. All applicants are also required to have an Employer Identification Number (or a Social Security Number if the applicant is an individual or steering committee) and a DUNS number (including individuals and sole proprietorships). The DUNS number is a nine-digit identification number which uniquely identifies business entities. To obtain a DUNS number, access *http://www.dnb.com/us*, or call (866) 705–5711.

2. Form SF–424A, ''Budget Information—Non-Construction Programs.'' This form must be completed and submitted as part of the application package.

3. Form SF–424B, ''Assurances—Non-Construction Programs.'' This form must be completed, signed, and submitted as part of the application package.

4. Title Page (limited to one page). The title page must include the title of the project and may include other relevant identifying information.

5. Table of Contents. A detailed Table of Contents (TOC) immediately following the title page is required.

6. Executive Summary (limited to one page). The Executive Summary should briefly describe the Project, including goals, tasks to be completed and other relevant information that provides a general overview of the Project. The applicant must clearly state whether the application is for a Planning Grant or a Working Capital Grant and the grant amount requested.

7. Eligibility Discussion (limited to six pages). The applicant must provide the following information so that the Agency can assess the eligibility of the applicant and the proposed Project. Answers of zero or none may not disqualify an applicant, depending on what type of applicant organization is applying.

i. *Applicant Eligibility.* Applicants must provide the following information so that the Agency can determine the eligibility of the applicant organization for assistance.

- Describe the applicant in a brief statement (for example, individual farm or membership organization, etc.) and identify its legal structure (for example sole proprietorship, LLC, LLP, cooperative, non-profit organization, or others described in detail).
- Identify the owners or members who will be contributing the Agricultural Commodity to which value will be added to the Project. Applicants must provide the names of the individuals who are owners or members, as well as the percentage of their ownership in the organization. If the applicant organization is owned by entities other than individuals, it must identify those entities and provide a list of the individuals who own each entity. If the list is longer than a few lines, it should be attached as an appendix to the application and will not be counted toward the page limit of this section.
- A statement that certifies that these owners or members are actively and currently engaged in the production of the Agricultural Commodity.
- Describe how the applicant organization is governed or managed, including a description of who and how many owners/members have voting rights, if applicable.
- The number of individuals on the governing board (*e.g.* board of directors).
- The number of individuals on the governing board who have voting rights and are currently engaged in the production of the Agricultural Commodity to which value will be added and will be providing that commodity to the Project.
- If the applicant organization is a membership organization, include the organization's mission statement, which must be copied from the organization's

articles of incorporation, bylaws, or other governing documents.

• The amount of the Agricultural Commodity needed for the Project. Planning applications must provide an estimate.

• The amount of the Agricultural Commodity that will be provided by the owners or members of the applicant organization. Planning applications must provide an estimate.

• The amount of the Agricultural Commodity that will be purchased or donated from third-party sources.

• How the owners or members providing the Agricultural Commodity to the Project will maintain ownership of the commodity from its raw state to marketing the Value-Added Agricultural Product.

• In addition to the above information, if applying for Beginning Farmer or Rancher or Socially Disadvantaged Farmer or Rancher reserved funds, provide documentation demonstrating that the applicant organization meets the definition of a Beginning Farmer or Rancher or a Socially Disadvantaged Farmer or Rancher.

• In addition to the above information, if applying for Mid-Tier Value Chain reserved funds, provide a discussion that demonstrates that the applicant meets the definition of a Local or Regional Supply Network. The discussion must include the following: (1) A description of whether the applicant organization is the network itself or the legal representative that is a member organization and business enterprise of the network, (2) a description of the network, its member organizations, and its purpose, and (3) a description of the alliances, linkages, or partnerships within the value chain of which the network is comprised.

ii. *Product Eligibility. Applicants must provide the following information so that the Agency can determine the eligibility of the Value-Added Agricultural Product to be marketed.*

• The Agricultural Commodity to which value will be added.

• Describe the method or process through which value will be added. This must include at least one of the following: a change in physical state, a non-standard production method that enhances the commodity's value, physical segregation, on-farm or on-ranch generation of renewable energy, and/or a locally-produced agricultural food product.

• The dollar amount of value added per production unit to the Agricultural Commodity that is attributed to the value-added process. Applicants for planning grants must estimate this amount while applicants for working capital grants must use the amount from their Feasibility Study and Business Plan results.

• The Value-Added Agricultural Product that will be produced.

• Describe the expansion of customer base for the Value-Added Agricultural Product. Those applying for a planning grant must provide an estimate for the expansion of customer base. Those applying for a working capital grant must supply the relevant information from the Feasibility Study and Business Plan that was completed for the Venture. If no expansion of customer base exists or is likely to exist, the application is not eligible for funding.

• The amount of the increased portion of revenue derived from marketing the Value-Added Agricultural Product that will be available to the producers of the Agricultural Commodity to which value is added. Applicants for a planning grant must provide an estimate for the increase in revenue. Those applying for a working capital grant must supply the relevant information from the Feasibility Study and Business Plan that was completed for the Venture. If no increase in revenue exists or is likely to exist, the application is not eligible for funding.

• In addition to the above requirements, if applying for Mid-Tier Value Chain reserved funds, provide a discussion that demonstrates the Project incorporates an increase in the profitability and competitiveness of Small and Medium-Sized Farms and Ranches that are structured as Family Farms due to the manner in which the Value-Added Agricultural Product is marketed and a copy of an agreement with an Agricultural Producer Group, Farmer or Rancher Cooperative, or Majority-Controlled Producer-Based Business Venture that is engaged in the value chain on a marketing strategy and that includes the names of the parties and a description of the nature of their collaboration.

iii. *Purpose Eligibility.* Applicants must provide the following information so that the Agency can determine the eligibility of the proposed use of funds. In addition to reviewing the responses to these questions, the Agency will also evaluate the budget and work plan submitted in response to the Proposal Evaluation Criteria to determine the eligibility of the use of funds.

• A statement that an independent, third-party Feasibility Study has been conducted for the proposed Venture. The applicant must provide the name of the party who conducted the Feasibility Study and the date it was completed. The Feasibility Study should not be submitted with the application, but the Agency may request it at any time in order to facilitate its eligibility review.

• A statement that a Business Plan has been developed for the proposed Venture. The applicant must provide the name of the party who developed the Business Plan and the date it was completed. The Business Plan should not be submitted with the application, but the Agency may request it at any time in order to facilitate its eligibility review.

• Describe how long the applicant organization has been engaged in the Venture that is the subject of the application.

8. Proposal Narrative (limited to 15 pages).

i. Goals of the Project. The application must include a clear statement of the ultimate goals of the Project, including an explanation of how a market will be expanded and the degree to which incremental revenue will accrue to the benefit of the Agricultural Producer(s).

ii. Performance Evaluation Criteria. Applicants applying for Planning Grants must suggest at least one criterion by which their performance under a grant could be evaluated. Applicants applying for Working Capital Grants must identify the projected increase in customer base, revenue accruing to Independent Producers, and number of jobs attributed to the Project. Working capital projects with significant energy components must also identify the projected increase in capacity (*e.g.* gallons of ethanol produced annually, megawatt hours produced annually) attributed to the Project. Please note that these criteria are different from the Proposal Evaluation Criteria and are a separate requirement.

iii. Proposal Evaluation Criteria. Each of the proposal evaluation criteria referenced in Section V.A. of this funding announcement must be addressed, specifically and individually, in narrative form. Applications that do not address the appropriate criteria (Planning Grant applications must address Planning Grant evaluation criteria and Working Capital Grant applications must address Working Capital Grant evaluation criteria) will be considered ineligible.

9. Certification of Matching Funds. Applicants must certify that Matching Funds will be available at the same time grant funds are anticipated to be spent and that Matching Funds will be spent in advance of grant funding, such that for every dollar of grant funds advanced, not less than an equal amount of Matching Funds will have been expended prior to submitting the request for reimbursement. This

certification is a separate requirement from the verification of Matching Funds requirement. To fulfill this requirement, applicants must include a statement for this section that reads as follows: ''[INSERT NAME OF APPLICANT] certifies that matching funds will be available at the same time grant funds are anticipated to be spent and that matching funds will be spent in advance of grant funding, such that for every dollar of grant funds advanced, not less than an equal amount of matching funds will have been expended prior to submitting the request for reimbursement.'' A separate signature is not required.

10. Verification of Matching Funds. Applicants must provide documentation of all proposed Matching Funds, both cash and in-kind. The documentation below must be included in the Appendix. Template letters for each type of matching funds are available at *http://www.rurdev.usda.gov/rbs/coops/applicants.htm.*

i. *Matching funds provided by the applicant in cash.* A copy of a bank statement with an ending date within one month of the application submission and showing an ending balance equal to or greater than the amount of cash Matching Funds proposed is required.

ii. *Matching funds provided through a loan or line of credit.* The applicant must include a signed letter from the lending institution verifying the amount available, the purposes for which funds may be used, and the time period of availability of the funds. Specific dates (month/day/year) corresponding to the proposed grant period or to dates within the grant period when matching funds will be made available, must be included.

iii. *Matching funds provided by the applicant through an in-kind contribution.* The application must include a signed letter from the applicant verifying the goods or services to be donated, the value of the goods or services, and when the goods and services will be donated. Specific dates (month/day/year) corresponding to the proposed grant period or to dates within the grant period when matching contributions will be made available, must be included. Note that applicant in-kind match for planning grants should not include values for applicant time spent on feasibility or business planning activities due to a possible conflict of interest. Although applicants may participate with their consultant in the feasibility and business planning activities, they may not include their time as an in-kind match contribution to the project. This represents a possible conflict of interest and should be avoided in the application. Also note that if the applicant organization is purchasing goods or services for the grant (*e.g.* salaries, inventory), the contribution is considered a cash contribution and must be verified as described in paragraph i. above. Also, if an owner or employee of the applicant organization is donating goods or services, the contribution is considered a third-party in-kind contribution and must be verified as described in paragraph v. below.

iv. *Matching funds provided by a third party in cash.* The application must include a signed letter from that third party verifying how much cash will be donated and when it will be donated. Specific dates (month/day/year) corresponding to the proposed grant period or to dates within the grant period when matching funds will be made available, must be included.

v. *Matching Funds provided by a third party in-kind donation.* The application must include a signed letter from the third party verifying the goods or services to be donated, the value of the goods or services, and when the goods and services will be donated. Specific dates (month/day/year) corresponding to the proposed grant period or to dates within the grant period when matching contributions will be made available, must be included.

Verification for cash or in-kind contributions donated outside the proposed time period of the grant will not be accepted. Verification for in-kind contributions that are over-valued will not be accepted. The valuation process for the in-kind funds does not need to be included in the application, especially if it is lengthy, but the applicant must be able to demonstrate how the valuation was achieved at the time of notification of tentative selection for the grant award. If the applicant cannot satisfactorily demonstrate how the valuation was determined, the grant award may be withdrawn or the amount of the grant may be reduced.

Matching Funds are subject to the same use restrictions as grant funds. Matching Funds must be spent or donated during the grant period and the funds must be expended at a rate equal to or greater than the rate grant funds are expended. Some examples of acceptable uses for matching funds are: skilled labor performing work required for the proposed Project, office supplies, and purchasing inventory. Some examples of unacceptable uses of matching funds are: real property, fixed equipment, buildings, and vehicles.

Expected program income may not be used to fulfill the Matching Funds requirement at the time of application. If program income is earned during the time period of the grant, it is subject to the requirements of 7 CFR part 3015, subpart F and 7 CFR 3019.24 and any provisions in the Grant Agreement.

C. Submission Dates and Times

Application Deadline Date: July 6, 2009 for unreserved funds. June 22, 2009 for reserved funds.

Explanation of Deadlines: Paper applications must be postmarked, mailed, shipped, or sent overnight by the deadline date (see Section IV.F. for the address). Final electronic applications must be received by Grants.gov by the deadline date. If an application does not meet the deadline above, it will not be considered for funding. Applicants will be notified that their applications did not meet the submission deadline.

D. Intergovernmental Review of Applications

Executive Order (EO) 12372, Intergovernmental Review of Federal Programs, applies to this program. This EO requires that Federal agencies provide opportunities for consultation on proposed assistance with State and local governments. Many states have established a Single Point of Contact (SPOC) to facilitate this consultation. A list of states that maintain an SPOC may be obtained at *http://www.whitehouse.gov/omb/grants/spoc.html.* If an applicant's state has an SPOC, the applicant may submit the application directly for review. Any comments obtained through the SPOC must be provided to Rural Development for consideration as part of the application. If the applicant's state has not established an SPOC, or the applicant does not want to submit the application, Rural Development will submit the application to the SPOC or other appropriate agency or agencies.

Applicants are also encouraged to contact their Rural Development State Office for assistance and questions on this process. The Rural Development State Office can be reached by calling 800–670–6553 and selecting option ''1'' or by viewing the following Web site: *http://www.rurdev.usda.gov/.*

E. Funding Restrictions

Funding restrictions apply to both grant funds and matching funds. Funds may only be used for planning activities or working capital for Projects focusing on processing and marketing a value-added product.

1. Examples of acceptable planning activities include:

i. Obtaining legal advice and assistance related to the proposed Venture;

ii. Conducting a Feasibility Study of a proposed Value-Added Venture to help determine the potential marketing success of the Venture;

iii. Developing a Business Plan that provides comprehensive details on the management, planning, and other operational aspects of a proposed Venture; and

iv. Developing a marketing plan for the proposed Value-Added product, including the identification of a market window, the identification of potential buyers, a description of the distribution system, and possible promotional campaigns.

2. Examples of acceptable working capital uses include:

i. Designing or purchasing an accounting system for the proposed Venture;

ii. Paying for salaries, utilities, and rental of office space;

iii. Purchasing inventory, office equipment (*e.g.* computers, printers, copiers, scanners), and office supplies (*e.g.* paper, pens, file folders); and

iv. Conducting a marketing campaign for the proposed Value-Added product.

3. No funds made available under this solicitation shall be used to:

i. Plan, repair, rehabilitate, acquire, or construct a building or facility, including a processing facility;

ii. Purchase, rent, or install fixed equipment, including processing equipment;

iii. Purchase vehicles, including boats;

iv. Pay for the preparation of the grant application;

v. Pay expenses not directly related to the funded Venture;

vi. Fund political or lobbying activities;

vii. Fund any activities prohibited by 7 CFR parts 3015 and 3019;

viii. Fund architectural or engineering design work for a specific physical facility;

ix. Fund any expenses related to the production of any commodity or product to which value will be added, including seed, rootstock, labor for harvesting the crop, and delivery of the commodity to a processing facility. The Agency considers these expenses to be ineligible because the intent of the program is to assist producers with marketing value-added products rather than producing Agricultural Commodities;

x. Fund research and development;

xi. Purchase land;

xii. Duplicate current services or replace or substitute support previously provided;

xiii. Pay costs of the Project incurred prior to the date of grant approval;

xiv. Pay for assistance to any private business enterprise which does not have at least 51 percent ownership by those who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence; or

xv. Pay any judgment or debt owed to the United States; or

xvi. Conduct activities on behalf of anyone other than a specific Independent Producer or group of Independent Producers. The Agency considers conducting industry-level Feasibility Studies and Business Plans that are also known as feasibility study templates or guides or business plan templates or guides to be ineligible because the assistance is not provided to a specific group of Independent Producers.

xvii. Pay for any goods or services provided by a person or entity who has a Conflict of Interest. Also, note that in-kind Matching Funds may not be provided by a person or entity that has a Conflict of Interest. See Section IV.B.10.iii of this notice for additional information.

F. Other Submission Requirements

Paper applications must be submitted to the Rural Development State Office for the State in which the Project will primarily take place. Addresses can be found online at: *http://www.rurdev.usda.gov/recd_map.html* or in the **ADDRESSES** section at the beginning of this Notice.

Applications can also be submitted electronically at *http://www.grants.gov.* Applications submitted by electronic mail or facsimile will not be accepted. Each application submission must contain all required documents in one envelope, if by mail or courier delivery service.

V. Application Review Information

A. Criteria

All eligible and complete applications will be evaluated based on the following criteria. Applications for Planning Grants have different criteria to address than applications for Working Capital Grants.

1. Criteria for Planning Grant applications:

i. *Nature of the proposed venture* (0–8 points). Projects will be evaluated for technological feasibility, operational efficiency, profitability, sustainability and the likely improvement to the local rural economy. Evaluators may rely on their own knowledge and examples of similar ventures described in the proposal to form conclusions regarding this criterion. Points will be awarded based on the greatest expansion of markets and increased returns to producers.

ii. *Qualifications of those doing work* (0–8 points). Proposals will be reviewed for whether the personnel who are responsible for doing proposed tasks, including those hired to do the studies, have the necessary qualifications. If a consultant or others are to be hired, more points may be awarded if the proposal includes evidence of their availability and commitment as well. If staff or consultants have not been selected at the time of application, the application should include specific descriptions of the qualifications required for the positions to be filled. Qualifications of the personnel and consultants should be discussed directly within the response to this criterion. If resumes are included, those pages will count toward the page limit for the narrative.

iii. *Commitments and support* (0–5 points). Producer commitments will be evaluated on the basis of the number of Independent Producers currently involved as well as how many may potentially be involved, and the nature, level and quality of their contributions. End-user commitments will be evaluated on the basis of potential markets and the potential amount of output to be purchased. Proposals will be reviewed for evidence that the project enjoys third party support and endorsement, with emphasis placed on financial and in-kind support as well as technical assistance. Support should be discussed directly within the response to this criterion. If support letters are included, those pages will count toward the page limit for the narrative. Points will be awarded based on the greatest level of documented and referenced commitment.

iv. *Project leadership* (0–8 points). The leadership abilities of individuals (*i.e.* owners, not consultants) who are proposing the Venture will be evaluated as to whether they are sufficient to support a conclusion of likely project success. Credit may be given for leadership evidenced in community or volunteer efforts. Leadership abilities should be discussed directly within the response to this criterion. If resumes are attached at the end of the application, those pages will count toward the page limit for the narrative.

v. *Work plan/budget* (0–8 points). Applicants must submit a work plan and budget. The work plan will be reviewed to determine whether it provides specific and detailed descriptions of tasks that will

accomplish the project's goals. The budget must present a detailed breakdown of all estimated costs associated with the planning activities and allocate these costs among the listed tasks. The source and use of grant and matching funds must be specified. Points may not be awarded unless sufficient detail is provided to determine if funds are being used for qualified purposes. Matching funds as well as grant funds must be accounted for in the budget to receive points. If the project period will be longer than one year, the work plan and budget must identify a separate, unique task(s) for the first year and for any subsequent year of the proposed project. Any applications proposing a project of longer than one year with duplicative or similar activities in each year is ineligible for funding.

vi. *Amount requested* (0 or 2 points). Two points will be awarded for grant requests of $50,000 or less. To determine the number of points to award, the Agency will use the amount indicated in the work plan and budget.

vii. *Project cost per owner-producer* (0–3 points). The applicant must state the number of Independent Producers that are owners of the Venture. Points will be calculated by dividing the amount of Federal funds requested by the total number of Independent Producers that are owners of the Venture. The allocation of points for this criterion shall be as follows:

- 0 points will be awarded to applications without enough information to determine the number of owner-producers.
- 1 point will be awarded to applications with a project cost per owner-producer of $70,001–$100,000.
- 2 points will be awarded to applications with a project cost per owner-producer of $35,001–$70,000.
- 3 points will be awarded to applications with a project cost per owner-producer of $1–$35,000.

An owner cannot be considered an Independent Producer unless he/she is a producer of the Agricultural Commodity to which value will be added as part of this Project. For Agriculture Producer Groups, the number used must be the number of Independent Producers represented who produce the commodity to which value will be added. In cases where family members (including husband and wife) are owners and producers in a Venture, each family member shall count as one owner-producer.

Applicants must be prepared to prove that the numbers and individuals identified meet the requirements specified upon notification of a grant award. Failure to do so shall result in withdrawal of the grant award.

viii. *Business management capabilities* (0–10 points). Applicants must discuss their financial management system, procurement procedures, personnel policies, property management system, and travel procedures. Up to two points can be awarded for each component of this criterion, based on the appropriateness of the system, procedures or policies to the size and structure of the business applying. Larger, more complex businesses will be expected to have more complex systems, procedures, and policies than smaller, less complex businesses.

ix. *Sustainability and economic impact* (0–15 points). Projects will be evaluated based on the expected sustainability of the Venture and the expected economic impact on the local economy.

x. *Innovation (including renewable energy)* (0 or 10 points). The applicant must describe the innovation that supports the Value-Added Agricultural Product; demonstrate how the project will accelerate adoption of innovation and commercialization; and document how the innovation will enhance the income and opportunity for farming and ranching operations. The applicant must also demonstrate how the proposed Value-Added Agricultural Product or process by which the product is made is forward-thinking, incorporates advanced ideas, or improves efficiency, effectiveness or competitive advantage. Projects that meet category (iv) of the definition of a Value-Added Agricultural Product, as defined in this notice, will receive 10 points.

xi. *Type of applicant* (0 or 8 points). If an application is from an applicant that is a Beginning Farmer or Rancher, a Socially Disadvantaged Farmer or Rancher, or an operator of a Small or Medium-Sized Farm or Ranch that is structured as a Family Farm, 8 points will be awarded. Applicants must provide documentation that they meet one of these definitions to receive points.

xii. *Administrator points* (up to 5 points, but not to exceed 10 percent of the total points awarded for the other 10 criteria). The Administrator of USDA Rural Development Business and Cooperative Programs may award additional points to recognize innovative technologies, insure geographic distribution of grants, or encourage Value-Added Projects in under-served areas. Applicants may submit an explanation of how the technology proposed is innovative and/or specific information verifying that the project is in an under-served area.

2. Criteria for Working Capital applications:

i. *Business viability* (0–8 points). Proposals will be evaluated on the basis of the technical and economic feasibility and sustainability of the Venture and the efficiency of operations. When responding to this criterion, applicants should reference critical data and information identified in the venture-specific feasibility study and business plan.

ii. *Customer base/increased returns* (0–8 points). Describe in detail how the customer base for the product being produced will expand because of the Value-Added Venture. Provide documented estimates of this expansion. Describe in detail how a greater portion of the revenue derived from the venture will be returned to the producers that are owners of the Venture. Applicants should also reference the pro forma financial statements developed for the Venture. Applications that demonstrate strong growth in a market or customer base and greater Value-Added revenue accruing to producer-owners will receive more points than those that demonstrate less growth in markets and realized Value-Added returns.

iii. *Commitments and support* (0–5 points). Producer commitments will be evaluated on the basis of the number of Independent Producers currently involved as well as how many may potentially be involved, and the nature, level and quality of their contributions. End-user commitments will be evaluated on the basis of identified markets, letters of intent or contracts from potential buyers and the amount of output to be purchased. Applications will be reviewed for evidence that the Project enjoys third-party support and endorsement, with emphasis placed on financial and in-kind support as well as technical assistance. Support should be discussed directly within the response to this criterion. If support letters are included, those pages will count toward the page limit for the narrative. Points will be awarded based on the greatest level of documented and referenced commitment.

iv. *Management team/work force* (0–8 points). The education and capabilities of project managers and those who will operate the Venture must reflect the skills and experience necessary to affect Project success. The availability and quality of the labor force needed to operate the Venture will also be evaluated. Applicants must provide the information necessary to make these determinations.

Applications that reflect successful track records managing similar projects will receive higher points for this criterion than those that do not reflect successful track records.

v. *Work plan/budget* (0–8 points). The work plan will be reviewed to determine whether it provides specific and detailed descriptions of tasks that will accomplish the project's goals and the budget will be reviewed for a detailed breakdown of estimated costs associated with the proposed activities and allocation of these costs among the listed tasks. The source and use of grant and matching funds must be specified. Points may not be awarded unless sufficient detail is provided to determine if funds are being used for qualified purposes. Matching Funds as well as grant funds must be accounted for in the budget to receive points. If the project period will be longer than one year, the work plan and budget must identify a separate, unique task(s) for the first year and for any subsequent year of the proposed project. Any applications proposing a project of longer than one year with duplicative or similar activities in each year is ineligible for funding.

vi. *Amount requested* (0 or 2 points). Two points will be awarded for grant requests of $150,000 or less. To determine the number of points to award, the Agency will use the amount indicated in the work plan and budget.

vii. *Project cost per owner-producer* (0–3 points). The applicant must state the number of Independent Producers that are owners of the Venture. Points will be calculated by dividing the amount of Federal funds requested by the total number of Independent Producers that are owners of the Venture. The allocation of points for this criterion shall be as follows:

- 0 points will be awarded to applications without enough information to determine the number of owner-producers.
- 1 point will be awarded to applications with a project cost per owner-producer of $200,001–$300,000.
- 2 points will be awarded to applications with a project cost per owner-producer of $100,001–$200,000.
- 3 points will be awarded to applications with a project cost per owner-producer of $1–$100,000.

An owner cannot be considered an Independent Producer unless he/she is a producer of the Agricultural Commodity to which value will be added as part of this Project. For Agriculture Producer Groups, the number used must be the number of Independent Producers represented who produce the commodity to which value will be added. In cases where family members (including husband and wife) are owners and producers in a Venture, each family member shall count as one owner-producer.

Applicants must be prepared to prove that the numbers and individuals identified meet the requirements specified upon notification of a grant award. Failure to do so shall result in withdrawal of the grant award.

viii. *Business management capabilities* (0–10 points). Applicants should discuss their financial management system, procurement procedures, personnel policies, property management system, and travel procedures. Up to two points can be awarded for each component of this criterion, based on the appropriateness of the system, procedures or policies to the size and structure of business applying. Larger, more complex businesses will be expected to have more complex systems, procedures, and policies than smaller, less complex businesses.

ix. *Sustainability and economic impact* (0–15 points). Projects will be evaluated based on the expected sustainability of the Venture and the expected economic impact on the local economy.

x. *Innovation (including renewable energy)* (0 or 10 points). The applicant must describe the innovation that supports the Value-Added Agricultural Product; demonstrate how the project will accelerate adoption of innovation and commercialization; and document how the innovation will enhance the income and opportunity for farming and ranching operations. The applicant must also demonstrate how the proposed Value-Added Agricultural Product or process by which the product is made is forward-thinking, incorporates advanced ideas, or improves efficiency, effectiveness or competitive advantage. Projects that meet category (iv) of the definition of a Value-Added Agricultural Product, as defined in this notice, will receive 10 points.

xi. *Type of applicant* (0 or 8 points). If an application is from an applicant that is a Beginning Farmer or Rancher, a Socially Disadvantaged Farmer or Rancher, or an operator of a Small or Medium-Sized Farm or Ranch that is structured as a Family Farm, 8 points will be awarded. Applicants must provide documentation that they meet one of these definitions to receive points.

xii. *Administrator points* (up to 5 points, but not to exceed 10 percent of the total points awarded for the other 10 criteria). The Administrator of USDA Rural Development Business and Cooperative Programs may award additional points to recognize innovative technologies, insure geographic distribution of grants, or encourage Value-Added projects in under-served areas. Applicants may submit an explanation of how the technology proposed is innovative and/or specific information verifying that the project is in an under-served area.

B. Review and Selection Process

The Agency will conduct an initial screening of all applications for eligibility and to determine whether the application is complete and sufficiently responsive to the requirements set forth in this notice to allow for an informed review. As part of this review, the Rural Development State Office may require Working Capital applicants to submit their Feasibility Studies and Business Plans after the application deadline, but prior to the selection of grantees to facilitate the eligibility review process.

All eligible and complete proposals will be evaluated by three reviewers based on criteria i through v described in Section V.A.1. or 2. One of these reviewers will be a Rural Development employee not from the servicing State Office and the other two reviewers will be non-Federal persons. All reviewers must either: (1) Possess at least five years of working experience in an agriculture-related field, or (2) have obtained at least a bachelors degree in one or more of the following fields: Agri-business, business, economics, finance, or marketing and have a minimum of three years of experience in an agriculture-related field (*e.g.* farming, marketing, consulting, university professor, research, officer for trade association, government employee for an agricultural program). Once the scores for criteria i through v have been completed by the three reviewers, they will be averaged to obtain the independent reviewer score.

The application will also receive one score from the Rural Development servicing State Office based on criteria vi through xi. This score will be added to the independent reviewer score.

Finally, the Administrator of USDA Rural Development Business and Cooperative Programs will award any Administrator points based on Proposal Evaluation Criterion xii. These points will be added to the cumulative score for criteria i through xi. A final ranking will be obtained based solely on the scores received for criteria i through xii. Applications will be funded in rank order until available funds are expended. Any unfunded applications for reserved funds will automatically be considered for unreserved funds, if

eligible, according to rank order. Note that applicants for Mid-Tier Value Chain reserved funds are unlikely to be eligible for unreserved funds.

After the award selections are made, all applicants will be notified of the status of their applications by mail. Grantees must meet all statutory and regulatory program requirements in order to receive their award. In the event that a grantee cannot meet the requirements, the award will be withdrawn. Applicants for Working Capital Grants must submit complete, independent third-party Feasibility Studies and Business Plans before the grant award can be finalized. All Projects will be evaluated by the servicing State Office prior to finalizing the award to ensure that funded Projects are likely to be feasible in the proposed project area. Regardless of scoring, a Project determined to be unlikely to be feasible by the servicing State Office with concurrence by the National Office will not be funded.

C. Anticipated Announcement and Award Dates

Award Date: The announcement of award selections is expected to occur on or about September 1, 2009.

VI. Award Administration Information

A. Award Notices

Successful applicants will receive a notification of tentative selection for funding from Rural Development. Applicants must comply with all applicable statutes, regulations, and this notice before the grant award will receive final approval.

Unsuccessful applicants will receive notification, including dispute resolution alternatives, by mail.

B. Administrative and National Policy Requirements

7 CFR parts 1901 subpart E, 3015, 3019, and 4284 are applicable and may be accessed at *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html#page1.*

The following additional requirements apply to grantees selected for this program:

Grant Agreement.

Form RD 1942–46.

Form RD 1940–1, ''Request for Obligation of Funds.''

Form RD 1942–46, ''Letter of Intent to Meet Conditions.''

Form AD–1047, ''Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions.''

Form AD–1048, ''Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transactions.''

Form AD–1049, ''Certification Regarding a Drug-Free Workplace Requirements (Grants).''

Form RD 400–4, ''Assurance Agreement.''

Additional information on these requirements can be found at *http://www.rurdev.usda.gov/rbs/coops/vadg.htm.*

Reporting Requirements: Grantees must provide Rural Development with a paper or electronic copy that includes all required signatures of the following reports. The reports must be submitted to the Agency contact listed on the Grant Agreement and Letter of Conditions. Failure to submit satisfactory reports on time may result in suspension or termination of the grant.

1. Form SF–269 or SF–269A. A ''Financial Status Report,'' listing expenditures according to agreed upon budget categories, on a semi-annual basis. Reporting periods end each March 31 and September 30, regardless of when the grant period begins. Reports are due 30 days after the reporting period ends.

2. Semi-annual written performance reports that compare accomplishments to the objectives stated in the Grant Agreement, identify all tasks completed to date, and provide documentation supporting the reported results. The report should discuss any problems or delays that may affect completion of the project, as well as objectives for the next reporting period. Compliance with any special condition on the use of award funds should also be discussed. Reports are due as provided in paragraph 1. of this section. Supporting documentation for completed tasks includes, but is not limited to, Feasibility Studies, marketing plans, Business Plans, articles of incorporation and bylaws and an accounting of how working capital funds were spent.

3. A Final Project written performance report that compares accomplishments to the objectives stated in the proposal is due within 90 days of the completion of the project. This report should identify all tasks completed and provide documentation supporting the reported results, as well as any problems or delays that affected completion of the project. Compliance with any special condition on the use of award funds should also be discussed. Supporting documentation for completed tasks includes, but is not limited to, Feasibility Studies, marketing plans, Business Plans, articles of incorporation and bylaws and an accounting of how working capital funds were spent. Planning Grant Projects must also report the estimated increase in revenue, increase in customer base, number of jobs created, and any other relevant economic indicators generated by continuing the project into its operational phase. Working Capital Grants must report the increase in revenue, increase in customer base, number of jobs created, any other relevant economic indicators generated by the project during the grant period in addition to total funds used for the Venture during the grant period. Total funds must include other federal, state, local, and other funds used for the venture. Projects with significant energy components must also report expected or actual capacity (*e.g.* gallons of ethanol produced annually, megawatt hours produced annually) and any emissions reductions incurred during the project.

VII. Agency Contacts

For general questions about this announcement and for program technical assistance, applicants should contact their USDA Rural Development State Office at *http://www.rurdev.usda.gov/recd_map.html.* The State Office can also be reached by calling 800–670–6553 and pressing ''1.'' If an applicant is unable to contact their State Office, a nearby State Office may be contacted or the RBS National Office can be reached at Mail STOP 3250, Room 4016-South, 1400 Independence Avenue, SW., Washington, DC 20250–3250, Telephone: (202) 720–7558, e-mail: *cpgrants@wdc.usda.gov.* Applicants are also encouraged to visit the application website for application tools including an application guide and templates. The web address is: *http://www.rurdev.usda.gov/rbs/coops/vadg.htm.*

VIII. Non-Discrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD). To file a complaint of discrimination, write to USDA, Director, Office of Civil Rights,

1400 Independence Avenue, SW., Washington, DC 20250–9410, or call (866) 632–9992 (voice) or (202) 401–0216 (TDD). USDA is an equal opportunity provider and employer.

Dated: April 30, 2009.

William F. Hagy III,

Acting Administrator, Rural Business-Cooperative Service.

[FR Doc. E9–10424 Filed 5–5–09; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

International Trade Administration]

[A–489–807]

Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results and Preliminary 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 steel concrete reinforcing bars (rebar) from Turkey with respect to two companies, Ekinciler Demir ve Celik Sanayi A.S. and Ekinciler Dis Ticaret A.S. (collectively ''Ekinciler'') and Kaptan Demir Celik Endustrisi ve Ticaret A.S. (Kaptan).[1] The review covers the period April 1, 2007 through March 25, 2008.

We preliminarily determine that sales made by Ekinciler have not been made at below normal value (NV), while those made by Kaptan have. If these preliminary results are adopted in the final results of this 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 these preliminary results. We will issue the final results no later than 120 days from the date of publication of this notice.

DATES: *Effective Date:* May 6, 2009.

FOR FURTHER INFORMATION CONTACT: Hector Rodriguez or Holly Phelps, AD/CVD Operations, Office 2, Import Administration—Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0629 or (202) 482–0656, respectively.

[1] Certain companies other than Ekinciler and Kaptan are being rescinded from this administrative review.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 2008, the Department published in the **Federal Register** a notice of ''Opportunity To Request Administrative Review'' of the antidumping duty order on rebar from Turkey. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 73 FR 17317 (Apr. 1, 2008).

In accordance with 19 CFR 351.213(b)(2), on April 30, 2008, the Department received requests to conduct an administrative review of the antidumping duty order on rebar from Turkey from three producers/exporters of rebar, Ekinciler, Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. (Habas), and Kaptan. In their April 30, 2008, requests, Ekinciler and Habas requested that the Department revoke the antidumping duty order on rebar from Turkey with regard to them based on an absence of dumping, pursuant to 19 CFR 351.222(b)(2).

Also on April 30, 2008, the domestic interested parties, Nucor Corporation, Gerdau AmeriSteel Corporation and Commercial Metals Company, requested an administrative review for the three producers/exporters identified above, as well as for Ege Celik Endustrisi Sanayi ve Ticaret A.S. and Ege Dis Ticaret A.S. (collectively ''Ege Celik''), Izmir Demir Celik Sanayi A.S. (IDC), Kroman Celik Sanayi A.S. (Kroman), and Nursan Celik Sanayi ve Haddecilik A.S./Nursan Dis Ticaret A.S. (collectively ''Nursan''), pursuant to section 751(a) of the Tariff Act of 1930, as amended (the Act), and in accordance with 19 CFR 351.213(b)(1).

On June 4, 2008, the Department initiated an administrative review for the seven companies listed above. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 73 FR 31813 (June 4, 2008).

In June 2008, four exporters (*i.e.,* Ege Celik, IDC, Kroman, and Nursan) informed the Department that they had no shipments or entries of subject merchandise during the period of review (POR). Because we confirmed this with CBP, we are preliminarily rescinding the review with respect to these companies. For further discussion, *see* the ''Partial Rescission of Review'' section of this notice.

In July 2008, we issued the antidumping duty questionnaire to Ekinciler, Habas, and Kaptan. We received responses to the questionnaire from Ekinciler and Kaptan in September 2008.

In November 2008, we rescinded the administrative review with respect to Habas because the antidumping duty order was partially revoked in the 2006–2007 administrative review with respect to Habas, effective April 1, 2007. For further discussion, *see* the ''Partial Rescission of Review'' section of this notice.

Also in November 2008, we postponed the preliminary results of this review until no later than April 30, 2009. *See Certain Steel Concrete Reinforcing Bars From Turkey; Notice of Extension of Time Limits for Preliminary Results of Antidumping Duty Administrative Review,* 73 FR 66218 (Nov. 7, 2008).

In December 2008, the International Trade Commission (ITC) determined, pursuant to section 751(c) of the Act, that revocation of this order would not be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Steel Concrete Reinforcing Bar From Turkey; Determination,* 73 FR 77841 (Dec. 19, 2008) (*ITC Final*). *See also Steel Concrete Reinforcing Bars From Turkey,* Inv. No. 701–TA–745 (Second Review), USITC Pub. 4 (January 2009) (*USITC Pub. 4052*). As a result of the ITC's negative determination, the Department revoked the order on rebar from Turkey on January 5, 2009, effective as of March 26, 2008 (*i.e.,* the fifth anniversary of the date of publication in the **Federal Register** of the notice of continuation of this antidumping duty order). *See Revocation of Antidumping Duty Order: Certain Steel Concrete Reinforcing Bars From Turkey,* 74 FR 266 (Jan. 5, 2009) (*Revocation Notice*).

During the period December 2008 through April 2009, we issued supplemental questionnaires to Ekinciler and Kaptan. We received responses to these questionnaires from January 2009 through April 2009.

Scope of the Order

The product covered by this order is all stock deformed steel concrete reinforcing bars sold in straight lengths and coils. This includes all hot-rolled deformed rebar rolled from billet steel, rail steel, axle steel, or low-alloy steel. It excludes (i) plain round rebar, (ii) rebar that a processor has further worked or fabricated, and (iii) all coated rebar. Deformed rebar is currently classifiable under subheadings 7213.10.000 and 7214.20.000 of the *Harmonized Tariff Schedule of the United States* (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes. The

written description of the scope of this order is dispositive.

Period of Review

The POR is April 1, 2007, through March 25, 2008.

Partial Rescission of Review

As noted above, in April 2008, the Department received timely requests, in accordance with 19 CFR 351.213(b)(1), from the domestic interested parties to conduct a review for Ege Celik, IDC, Kroman, and Nursan, and in June 2008 the Department initiated an administrative review of these four companies. During this same month, each of these respondents informed the Department that it did not export rebar to the United States during the POR. We have confirmed this with CBP. *See* the April 30, 2009, memorandum to the file from Hector Rodriguez, Analyst, entitled, ''Confirmation of No Shipments for Certain Companies in the 2007–2008 Antidumping Duty Administrative Review on Certain Steel Concrete Reinforcing Bars from Turkey.'' Therefore, in accordance with 19 CFR 351.213(d)(3), and consistent with the Department's practice, we are preliminarily rescinding our review with respect to these companies. *See, e.g., Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065, 52067 (Sept. 12, 2007); and *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665, 67666 (Nov. 8, 2005).

In November 2008, we rescinded the administrative review with respect to Habas because the antidumping duty order was revoked in the 2006–2007 administrative review with respect to Habas, effective April 1, 2007. *See Certain Steel Concrete Reinforcing Bars from Turkey; Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 69607 (Nov. 19, 2008).

Comparisons to Normal Value

To determine whether sales of rebar from Turkey were made in the United States at less than NV, we compared the export price (EP) to the NV, as described in the ''Normal Value'' section of this notice. When making comparisons in accordance with section 771(16) of the Act, we considered all products sold in the home market as described in the ''Scope of the Order'' section of this notice, above, that were in the ordinary course of trade for purposes of determining appropriate product comparisons to U.S. sales.

Product Comparisons

In accordance with section 771(16) of the Act, we first attempted to compare products produced by the same company and sold in the U.S. and home markets that were identical with respect to the following characteristics: form, grade, size, and industry standard specification. Where there were no home market sales of 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.

Export Price

We used EP methodology for all U.S. sales, 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 prior to importation, and constructed export price methodology was not otherwise warranted based on the facts of record.

Regarding U.S. date of sale, Ekinciler and Kaptan each argued that the Department should use the contract date as the date of sale for its U.S. sales in this review. After analyzing the data on the record, we determine that the appropriate U.S. date of sale for Ekinciler is the contract date because, as in the three previous administrative reviews for Ekinciler, we find that the terms of sale (*i.e.*, price and quantity) were set at the contract date, given that the terms did not change prior to invoicing or shipment. *See Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Revoke in Part*, 73 FR 24535, 24538 (May 5, 2008) (*2006–2007 Preliminary Results*), unchanged in *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (Nov. 7, 2008) (*2006–2007 Final Results*); *Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Notice of Intent to Revoke in Part*, 72 FR 25253, 25256 (May 4, 2007) (*2005–2006 Preliminary Results*), unchanged in *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, (Nov. 6, 2007) (*2005–2006 Final Results*), and *Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 26455, 26458 (May 5, 2006) (*2004–2005 Preliminary Results*), unchanged in *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (Nov. 7, 2006) (*2004–2005 Final Results*). Furthermore, we note that there were no changes in Ekinciler's sales process between this and prior segments of the proceeding. However, for Kaptan, we determine that the appropriate U.S. date of sale is the earlier of invoice or shipment date because we found that Kaptan's contracts are changeable based on our findings that the terms of sale were not set at the contract date during the 2005–2006 administrative review. *See 2005–2006 Preliminary Results*, 72 FR at 25256, unchanged in *2005–2006 Final Results*.

A. Ekinciler

We based EP on packed prices to the first unaffiliated purchaser in the United States. We made deductions from the starting price for foreign inland freight, customs overtime fees, crane charges, terminal charges, inspection fees, ocean freight expenses, U.S. customs duties, and U.S. brokerage and handling expenses, in accordance with section 772(c)(2)(A) of the Act. Although Ekinciler reported revenue received by an affiliated party for certain port services performed for the vessels used to transport rebar to the United States, we made no adjustment for this revenue because the affiliate did not pass on the revenue to Ekinciler.

B. Kaptan

We based EP on packed prices to the first unaffiliated purchaser in the United States. We disallowed Kaptan's duty drawback claim for purposes of the preliminary results because Kaptan did not provide certain information requested by the Department in relation to this claim. However, we have afforded Kaptan an additional opportunity to provide this information, and we will consider Kaptan's response for purposes of our final results.

We made adjustments to the starting price for foreign inland freight expenses, inspection charges, loading and handling charges, foreign commission charges, ocean freight expenses, marine insurance, U.S. brokerage and handling expenses, and U.S. customs duties, where appropriate, in accordance with section 772(c)(2)(A) of the Act.

Regarding loading and handling charges, Kaptan reported that it used an affiliated party for loading services during the POR. Because the amounts paid by Kaptan to the affiliate differed significantly from the amounts that the affiliate charged to unaffiliated parties, we did not use the affiliate's charges and instead used the arm's-length price to unaffiliated parties. In addition, we disallowed certain freight-related revenue received from another affiliated service provider because Kaptan failed to demonstrate that this revenue was based upon an arm's-length transaction.

Normal Value

A. Home Market Viability and Selection of Comparison Markets

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is five percent or more of the aggregate volume of U.S. sales), we compared the volume of each respondent's home market sales of the foreign like product to the volume of U.S. sales of subject merchandise, in accordance with section 773(a)(1)(B) of the Act. Based on this comparison, we determined that each respondent had a viable home market during the POR. Consequently, we based NV on home market sales.

For each respondent, in accordance with our practice, we excluded home market sales of non-prime merchandise made during the POR from our preliminary analysis based on the limited quantity of such sales in the home market and the fact that no such sales were made to the United States during the POR. *See*, *e.g.*, *2006–2007 Preliminary Results*, 71 FR 26455, unchanged in *2006–2007 Final Results*; *2005–2006 Preliminary Results*, 72 FR at 25257, unchanged in *2005–2006 Final Results*; and *2004–2005 Preliminary Results*, 71 FR at 26459, unchanged in *2004–2005 Final Results*.

B. Affiliated-Party Transactions and Arm's-Length Test

During the POR Ekinciler and Kaptan made sales of rebar in the home market to affiliated parties, as defined in section 771(33) of the Act. Consequently, we tested these sales to ensure that they were made at arm's-length prices, in accordance with 19 CFR 351.403(c). To test whether the sales to affiliates were made at arm's-length prices, we compared the unit prices of sales to affiliated and unaffiliated customers net of all 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 that affiliated party was, on average, within a range of 98 to 102 percent of the price of the same or comparable merchandise sold to the unaffiliated parties at the same level of trade (LOT), we determined that the 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 (Nov. 15, 2002) (establishing that the overall ratio calculated for an affiliate must be between 98 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 home 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* section 771(15) of the Act and 19 CFR 351.102(b).

C. Cost of Production Analysis

Pursuant to section 773(b)(2)(A)(ii) of the Act, for Ekinciler and Kaptan there were reasonable grounds to believe or suspect that these respondents made home market sales at prices below their costs of production (COPs) in this review because the Department had disregarded sales that failed the cost test for these companies in the most recently completed segment of this proceeding in which these companies participated (*i.e.*, the 2005–2006 administrative review) at the time of the initiation of this administrative review. *See 2005–2006 Final Results*, 72 FR at 62632. As a result, the Department initiated an investigation to determine whether these companies made home market sales during the POR at prices below their COPs.

1. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the respondents' cost of materials and fabrication for the foreign like product, plus amounts for general and administrative (G&A) expenses and interest expenses. *See* the ''Test of Home Market Sales Prices'' section below for treatment of home market selling expenses.

We relied on the COP information provided by Ekinciler in its questionnaire response. We relied on the COP information provided by Kaptan in its questionnaire response, except for the following instances where the information was not appropriately quantified or valued:

i. We adjusted the reported cost of raw materials to include import duties that were not collected by the Turkish government due to the subsequent re-exportation of the material and the claimed duty drawback adjustment.

ii. Because Kaptan's financial revenue exceeded its expense, we did not include an amount for financial expense in the calculation of COP. This is in accordance with the Department's practice of determining that, when a company earns enough financial income that it recovers all of its financial expense, that company did not have a resulting cost for financing during that period. *See*, *e.g.*, *2005–2006 Preliminary Results*, 72 FR at 25257, unchanged in *2005–2006 Final Results*.

For further discussion of these adjustments, *see* the memorandum from Stephanie Arthur, Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, ''Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results—Kaptan Demir Celik Endustrisi Ve Ticaret A.S.,'' dated April 30, 2009.

2. Test of Home Market Sales Prices

We compared the weighted-average COP figures to home market prices of the foreign like product, as required under section 773(b) of the Act, to determine whether these sales had been made at prices below the COP. On a product-specific basis, we compared the COP to home market prices, less any applicable movement charges, selling expenses, and packing expenses.

In determining whether to disregard home market sales made at prices below the COP, we examined whether such sales were made: (1) In substantial quantities within an extended period of time; and (2) at prices which permitted the recovery of all costs within a reasonable period of time. *See* sections 773(b)(1)(A) and (B) of the Act.

3. Results of the COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of a respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product were at prices below the COP, we determined that sales of that model were made in ''substantial quantities'' within an extended period of time (as defined in section 773(b)(2)(B) of the Act), in accordance with section 773(b)(2)(C)(i) of the Act. In such cases, we also determined that

such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, for purposes of this administrative review, we disregarded these below-cost sales for Ekinciler and Kaptan and used the remaining sales as the basis for determining NV, in accordance with section 773(a)(1) of the Act.

D. Level of Trade

In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same LOT as EP. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value, that of the sales from which we derive selling expenses, G&A expenses, and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from the exporter to the unaffiliated U.S. customer.

To determine whether NV sales are at a different LOT than EP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act.

Both respondents in this review claimed that they sold rebar at a single LOT in their home and U.S. markets. Ekinciler and Kaptan reported that they sold rebar directly to various categories of customers in the home market. Regarding U.S. sales, both respondents reported only EP sales to the United States to a single customer category (*i.e.*, unaffiliated traders). Similar to their home market channels of distribution, Ekinciler and Kaptan reported direct sales to U.S. customers.

To determine whether sales to any of these customer categories were made at different LOTs, we examined the stages in the marketing process and selling functions along the chain of distribution for each of these respondents. Regarding home market sales, each of the respondents reported that it performed identical selling functions across customer categories in the home market. After analyzing the data on the record with respect to these functions, we find that the respondents performed the same selling functions for their home market customers, regardless of customer category or channel of distribution. Accordingly, we find that the respondents made all sales at a single marketing stage (*i.e.*, at one LOT) in the home market.

Regarding U.S. sales, each of the respondents reported that it only made sales to one customer category through one channel of distribution in the U.S. market and, thus, identical selling functions were performed for all sales. Therefore, after analyzing the data on the record with respect to these functions, we find that the respondents made all sales at a single marketing stage (*i.e.*, at one LOT) in the U.S. market.

Although each of the respondents provided certain additional services for U.S. sales (*e.g.*, brokerage and handling, port-related services, etc.) and not for home market sales, we did not find these differences to be material selling function distinctions significant enough to warrant a separate LOT for either respondent. Therefore, after analyzing the selling functions performed in each market, we find that the distinctions in selling functions are not material and thus, that the home market and U.S. LOTs are the same. Accordingly, we determined that sales in the U.S. and home markets during the POR for each respondent were made at the same LOT, and as a result, no LOT adjustment is warranted for either of the respondents.

E. Calculation of Normal Value

1. Ekinciler

We based NV on the starting prices to home market customers. Where appropriate, we made deductions from the starting price for billing adjustments. In addition, where appropriate, we made deductions for inland freight expenses, in accordance with section 773(a)(6)(B) of the Act.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(b), we made circumstance-of-sale adjustments for credit expenses, bank charges, and exporter association fees. We deducted home market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

Where appropriate, we made an adjustment to NV to account for differences in physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411(a).

2. Kaptan

We based NV on the starting prices to home market customers. Where appropriate, we made deductions from the starting price for billing adjustments. In addition, where appropriate, we made deductions for inland freight expenses, in accordance with section 773(a)(6)(B) of the Act.

Pursuant to section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410(b), we made circumstance-of-sale adjustments for credit expenses, bank charges, and exporter association fees. We deducted home market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act.

Where appropriate, we made an adjustment to NV to account for differences in physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411(a).

Currency Conversion

We made currency conversions into U.S. dollars pursuant to section 773A(a) of the Act and 19 CFR 351.415. Although the Department's preferred source for daily exchange rates is the Federal Reserve Bank, the Federal Reserve Bank does not track or publish exchange rates for New Turkish Lira. Therefore, we made currency conversions based on exchange rates from the Dow Jones Reuters Business Interactive LLC (trading as Factiva).

Preliminary Results of the Review

We preliminarily determine that the following margins exist for the respondents during the period April 1, 2007, through March 25, 2008:

Manufacturer/producer/exporter	Percent margin
Ekinciler Demir ve Celik Sanayi A.S./Ekinciler Dis Ticaret A.S ...	0.35
Kaptan Demir Celik Endustrisi ve Ticaret A.S	7.55

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 35 days after the date of publication of this notice. Parties who submit case briefs or rebuttal briefs in this proceeding are requested 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 the 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

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 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.

Pursuant to 19 CFR 351.212(b)(1), we calculated importer-specific assessment rates for each respondent based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total entered value of those sales.

We will instruct CBP to assess antidumping duties on all appropriate entries covered by these reviews if any importer-specific assessment rate calculated in the final results of these reviews 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). *See* 19 CFR 351.106(c)(1).

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.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003 (68 FR 23954). This clarification will apply to entries of subject merchandise during the POR produced by companies included in these preliminary results of review for which the reviewed companies did not know their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

In December 2008, the ITC determined, pursuant to section 751(c) of the Act, that revocation of this order would not be likely to lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See ITC Final* and *USITC Publication 4052.* As a result of the ITC's negative determination, the Department revoked the order on rebar from Turkey on January 5, 2009, effective as of March 26, 2008 (*i.e.,* the fifth anniversary of the date of publication in the **Federal Register** of the notice of continuation of this antidumping duty order). *See Revocation Notice.* Consequently, the collection of cash deposits of antidumping duties on entries of the subject merchandise is no longer required.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this 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 the results of this administrative review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: April 30, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–10513 Filed 5–5–09; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–894]

Certain Tissue Paper Products From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order

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

Preliminary Determination

We preliminarily determine that certain tissue paper products (''tissue paper'') from Thailand exported by Sunlake Décor Co., Ltd. (''Sunlake'') [1] are made from jumbo rolls and/or cut sheets of tissue paper produced in the People's Republic of China (''PRC''), and are circumventing the antidumping duty order on tissue paper from the PRC, as provided in section 781(b) of the Tariff Act of 1930, as amended (''the Act''). *See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 16223 (March 30, 2005) (''*Order*'').

DATES: *Effective Date:* May 6, 2009.

FOR FURTHER INFORMATION CONTACT: Brian Smith or Gemal Brangman, 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) 482–1766 or (202) 482–3773, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 10, 2008, the Seaman Paper Company of Massachusetts, Inc. (''the petitioner'') requested that the Department of Commerce (''the Department'') initiate a circumvention inquiry pursuant to section 781(b) of the Act, and 19 CFR 351.225(h), to determine whether imports of tissue paper from Thailand, which Sunlake made from jumbo rolls and/or cut sheets of tissue paper produced in the PRC, are circumventing the antidumping duty order on tissue paper from the PRC. *See* the petitioner's September 10, 2008, anti-circumvention inquiry request; *Order.* Specifically, the petitioner alleges that PRC-produced jumbo rolls and/or cut sheets of tissue paper sent to Thailand for completion or assembly into merchandise of the same class or kind as that covered by the antidumping duty order on tissue paper from the PRC constitutes circumvention pursuant to section 781(b) of the Act.

On October 21, 2008, the Department initiated a circumvention inquiry on certain imports of tissue paper from Thailand. *See Certain Tissue Paper Products from the People's Republic of China: Notice of Initiation of Anti-circumvention Inquiry,* 73 FR 63688 (October 27, 2008) (''*Initiation*''). In the *Initiation,* the Department stated that it would focus its analysis on the significance of the production process

[1] Sunlake is a company located in Thailand.

in Thailand by Sunlake (*i.e.,* the company the petitioner identified in its circumvention request and about which sufficient information to initiate an anti-circumvention inquiry was provided).

On November 21, 2008, the Department issued an anti-circumvention questionnaire to Sunlake. On December 16, 2008, Sunlake entered a notice of appearance in this proceeding. Also, on December 16, 2008, Sunlake requested additional time to file a response to the anti-circumvention questionnaire. Pursuant to this request, the Department extended the questionnaire response deadline until January 9, 2009. On January 8, 2009, Sunlake made a second request for additional time to file a response to the anti-circumvention questionnaire, in response to which the Department granted an extension until January 23, 2009.

On January 23, 2009, Sunlake notified the Department that it was unable to answer the questionnaire issued to Sunlake, and requested that the Department re-issue the questionnaire to focus on Sunlake's current operations. On January 27, 2009, the petitioner submitted comments in response to Sunlake's January 23, 2009, submission.

On January 30, 2009, the Department provided Sunlake a final opportunity to submit a complete response to the November 21, 2008, questionnaire. On February 6, 2009, Sunlake reasserted that it would not respond to the Department's questionnaire in its current form.

Scope of the Antidumping Duty Order

The tissue paper products subject to this order are cut-to-length sheets of tissue paper having a basis weight not exceeding 29 grams per square meter. Tissue paper products subject to this order may or may not be bleached, dye-colored, surface-colored, glazed, surface decorated or printed, sequined, crinkled, embossed, and/or die cut. The tissue paper subject to this order is in the form of cut-to-length sheets of tissue paper with a width equal to or greater than one-half (0.5) inch. Subject tissue paper may be flat or folded, and may be packaged by banding or wrapping with paper or film, by placing in plastic or film bags, and/or by placing in boxes for distribution and use by the ultimate consumer. Packages of tissue paper subject to this order may consist solely of tissue paper of one color and/or style, or may contain multiple colors and/or styles.

The merchandise subject to this order does not have specific classification numbers assigned to them under the Harmonized Tariff Schedule of the United States (''HTSUS''). Subject merchandise may be under one or more of several different subheadings, including: 4802.30; 4802.54; 4802.61; 4802.62; 4802.69; 4804.31.1000; 4804.31.2000; 4804.31.4020; 4804.31.4040; 4804.31.6000; 4804.39; 4805.91.1090; 4805.91.5000; 4805.91.7000; 4806.40; 4808.30; 4808.90; 4811.90; 4823.90; 4820.50.00; 4802.90.00; 4805.91.90; 9505.90.40. The tariff classifications are provided for convenience and customs purposes; however, the written description of the scope of this order is dispositive.[2]

Excluded from the scope of this order are the following tissue paper products: (1) Tissue paper products that are coated in wax, paraffin, or polymers, of a kind used in floral and food service applications; (2) tissue paper products that have been perforated, embossed, or die-cut to the shape of a toilet seat, *i.e.,* disposable sanitary covers for toilet seats; (3) toilet or facial tissue stock, towel or napkin stock, paper of a kind used for household or sanitary purposes, cellulose wadding, and webs of cellulose fibers (HTSUS 4803.00.20.00 and 4803.00.40.00).

Scope of the Circumvention Inquiry

The products covered by this inquiry are tissue paper products, as described above in the ''Scope of the Antidumping Duty Order'' section, which are produced in Thailand from PRC-origin jumbo rolls and/or cut sheets of tissue paper, and exported to the United States from Thailand by Sunlake.

Statutory Provisions Regarding Circumvention

Section 781(b) of the Act provides that the Department may find circumvention of an antidumping duty order when merchandise of the same class or kind subject to the order is completed or assembled in a foreign country other than the country to which the order applies. In conducting circumvention inquiries under section 781(b) of the Act, the Department relies upon the following criteria: (A) Merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is subject to an antidumping duty order; (B) before importation into the United States, such imported merchandise is completed or assembled in another foreign country from merchandise which is subject to the order or produced in the foreign country that is subject to the order; (C) the process of assembly or completion in the foreign country referred to in (B) is minor or insignificant; (D) the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the United States; and (E) the administering authority determines that action is appropriate to prevent evasion of such order.

The Department's questionnaire issued to Sunlake was designed to elicit information for purposes of conducting both qualitative and quantitative analyses in accordance with the criteria enumerated in section 781(b) of the Act, as outlined above. This approach is consistent with our analyses in prior circumvention inquiries. *See Certain Tissue Paper Products From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping Duty Order,* 73 FR 57591 (October 3, 2008); *Circumvention and Scope Inquiries on the Antidumping Duty Order on Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Partial Affirmative Final Determination of Circumvention of the Antidumping Duty Order, Partial Final Termination of Circumvention Inquiry and Final Rescission of Scope Inquiry,* 71 FR 38608 (July 7, 2006); *Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta from Italy: Affirmative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders,* 68 FR 54888 (September 19, 2003); *Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany and the United Kingdom; Negative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders,* 64 FR 40336 (July 26, 1999). Sunlake failed to provide any of the information requested in the Department's questionnaire.

Facts Available

Section 776(a)(2) of the Act provides that the Department will apply ''facts otherwise available'' if an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the

[2] On January 30, 2007, at the direction of U.S. Customs and Border Protection (''CBP''), the Department added the following HTSUS classifications to the AD/CVD module for tissue paper: 4802.54.3100, 4802.54.6100, and 4823.90.6700. However, we note that the six-digit classifications for these numbers were already listed in the scope.

information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with that request, the Department is obligated to ''promptly inform'' the respondent submitting the response as to the ''nature of the deficiency'' and, to the ''extent practicable, provide that person with an opportunity to remedy or explain the deficiency'' in light of the established time limits. If the Department finds the respondent's submission to be ''not satisfactory,'' section 782(d) allows the Department to disregard all or part of the submission.

As stated in the ''Background'' section, above, on November 21, 2008, the Department issued an anti-circumvention questionnaire to Sunlake. The original deadline to file a response to this questionnaire was December 19, 2008. At Sunlake's request, the Department extended this deadline to January 9, 2009, and then to January 23, 2009. On January 23, 2009, Sunlake notified the Department that it was ''unable'' to answer the Department's questionnaire because the questionnaire was ''allegedly premised upon the petitioners' erroneous assumption that Sunlake is currently engaged in the manufacture and export to the United States of cut-to-length tissue products made from jumbo rolls produced of Chinese origin that are converted in Sunlake's facility in Thailand.'' Sunlake conceded in its January 23, 2009, letter that prior to August 2008, its operations in Thailand involved minor conversion of PRC-origin jumbo rolls into cut-to-length tissue paper products. Sunlake refused to answer questions about its production activities before August 2008, and argued that the Department should re-issue its questionnaire to focus only on Sunlake's current operations, which it claimed incorporate only Thai-origin jumbo rolls in the production of cut-to-length tissue paper products.

On January 27, 2009, the petitioner submitted comments in response to Sunlake's January 23, 2009, submission. The petitioner argued that due to Sunlake's failure to respond to the questionnaire, the Department should resort to facts available and immediately issue an affirmative preliminary determination of circumvention, in conjunction with the imposition of suspension of liquidation and cash deposit requirements on all shipments of tissue paper products from Sunlake.

On January 30, 2009, the Department provided Sunlake a final opportunity to submit a complete response to the November 21, 2008 questionnaire. The Department informed Sunlake that in order for the Department to properly assess and verify Sunlake's manufacturing and selling practices for purposes of determining whether it is circumventing the antidumping duty order on tissue paper from the PRC, it was necessary that Sunlake respond fully to the questions contained in the Department's November 21, 2008, questionnaire. The Department also notified Sunlake that although it had already given the company ample time to respond to the anti-circumvention questionnaire, the Department would allow it one final opportunity to respond, and accordingly extended the response deadline until February 6, 2009.

On February 6, 2009, Sunlake reasserted that it would not respond to the Department's November 21, 2008, questionnaire.

The Department gave Sunlake over two months to respond to the November 21, 2008 questionnaire and, consistent with section 782(d) of the Act, explained to Sunlake why a complete response to the questionnaire was necessary, as discussed above. Sunlake, for its part, chose not to provide any of the information requested by the Department. Because Sunlake failed to answer the Department's questionnaire, despite being given ample opportunity to do so, the Department is not able to properly assess (or verify) Sunlake's manufacturing and selling practices for purposes of determining whether it is currently circumventing the antidumping duty order on tissue paper from the PRC, or has circumvented the order in the past. Therefore, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act, the Department preliminarily finds that the use of facts available is appropriate for Sunlake in this proceeding.

Application of Adverse Facts Available

In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to make an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with the request for information. *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India,* 70 FR 54023, 54025–26 (Sept. 13, 2005); *see also Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil,* 67 FR 55792, 55794–96 (Aug. 30, 2002). Adverse inferences are appropriate ''to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Rep. No. 103–316, Vol. 1, at 870 (1994) (''SAA''). Furthermore, ''affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.'' *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27340 (May 19, 1997). *See also Nippon Steel Corp. v. United States,* 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon*).

The Department advised Sunlake during the proceeding that if it failed to respond to the questionnaire by the extended deadline date (*i.e.,* February 6, 2009), the Department might conclude, pursuant to section 776(b) of the Act, that Sunlake had not acted to the best of its ability in this proceeding. The Department advised further that if it made such a determination under that provision, the application of adverse facts could be warranted. As explained above, Sunlake refused to answer the Department's questionnaire, and instead offered only to provide a response to specific questions of its choosing. Such a response is unacceptable and the Department will not allow Sunlake to supply only enough information ''to obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' We therefore find that Sunlake did not act to the best of its ability in this proceeding, within the meaning of section 776(b) of the Act. Thus, an adverse inference is warranted in selecting the facts otherwise available. *See Nippon,* 337 F. 3d at 1382–83. Accordingly, as adverse facts available (''AFA''), we preliminarily consider all of Sunlake's exports of tissue paper from Thailand to be of PRC origin, and conclude that Sunlake is circumventing the antidumping duty order on tissue paper from the PRC.

Section 776(b) of the Act authorizes the Department to use as AFA, information derived from the petition, the final determination in the less-than-fair-value (''LTFV'') investigation, any previous administrative review, or any information placed on the record. In selecting an AFA rate in post-LTFV segments, the Department's practice has been to assign the highest margin on the record of any segment of the proceeding. *See, e.g., Freshwater Crawfish Tail Meat*

from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 68 FR 19504 (April 21, 2003). The Court of International Trade (''CIT'') and the Federal Circuit have consistently upheld the Department's practice in this regard. *See Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990) (*Rhone Poulenc*); *NSK Ltd. v. United States,* 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a LTFV investigation); *see also Kompass Food Trading Int'l v. United States,* 24 CIT 678, 689 (July 31, 2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd. v. United States,* 360 F. Supp 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse ''as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.'' *See Static Random Access Memory Semiconductors from Taiwan; Final Determination of Sales at Less than Fair Value,* 63 FR 8909, 8932 (February 23, 1998). As discussed above, the Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* SAA at 870; *see also Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil,* 69 FR 76910 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 22.

For purposes of the preliminary determination and consistent with the statute, court precedent, and our normal practice, we have applied as AFA to Sunlake a margin of 112.64 percent, which is the highest rate on the record in any completed segment of this proceeding (*i.e.,* the LTFV investigation, and the first and second administrative reviews). As discussed further below, this rate has been corroborated.

Corroboration of Adverse Facts Available Rate

Section 776(c) of the Act provides that when the Department selects from among the facts otherwise available and relies on ''secondary information,'' the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The SAA states that ''corroborate'' means to determine that the information used has probative value. *See* SAA at 870. The Department has determined that to have probative value, information must be reliable and relevant. *See Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review,* 72 FR 58642 (October 16, 2007), and accompanying Issues and Decision Memorandum at Comment 6.

The AFA rate of 112.64 percent that we are applying in this determination of circumvention of the antidumping duty order on tissue paper from the PRC was derived from the petition and corroborated in the LTFV investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 7475 (February 14, 2005). Furthermore, this rate was applied in a review subsequent to the LTFV investigation, and no information has been presented in this segment of the proceeding that calls into question the reliability of this information. *See Certain Tissue Paper from the People's Republic of China: Preliminary Results and Preliminary Rescission, In Part, of Antidumping Duty Administrative Review,* 72 FR 17477, 17480–17481 (April 19, 2007) (unchanged in *Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review,* 72FR 58642, 58644–58645 (October 16, 2007)). Thus, the Department finds that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. The AFA rate we are applying for this determination was calculated based on export price information and production data from the petition, as well as the most appropriate surrogate value information available to the Department during the LTFV investigation. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China,* 70 FR 7475 (February 14, 2005). As there is no information on the record of this segment of the proceeding that demonstrates this rate is not appropriate for use as AFA, we determine this rate has relevance.

Because the AFA rate, 112.64 percent, is both reliable and relevant, we determine that it has probative value. As a result, we determine that the 112.64 percent rate is corroborated to the extent practicable for the purposes of this determination, in accordance with section 776(c) of the Act, and may reasonably be applied to entries of tissue paper produced in and exported from Thailand by Sunlake as AFA.

Suspension of Liquidation

In accordance with section 19 CFR 351.225(l), the Department will direct CBP to suspend liquidation and to require a cash deposit of estimated duties, at the rate of 112.64, on all unliquidated entries of certain tissue paper products produced in and exported from Thailand by Sunlake that were entered, or withdrawn from warehouse, for consumption on or after October 21, 2008, the date of initiation of the circumvention inquiry.

Notification to the International Trade Commission

The Department, consistent with section 781(e) of the Act and 19 CFR 351.225(f)(7)(i)(B), has notified the International Trade Commission (''ITC'') of this preliminary determination to include the merchandise subject to this inquiry within the antidumping duty order on certain tissue paper products from the PRC. Pursuant to section 781(e) of the Act, the ITC may request consultations concerning the Department's proposed inclusion of the subject merchandise. If, after consultations, the ITC believes that a significant injury issue is presented by the proposed inclusion, it will have 15 days to provide written advice to the Department.

Public Comment

Case briefs from interested parties may be submitted no later than 30 days from the date of publication of this notice. A list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. *See* 19 CFR 351.309(c). This summary should be limited to five pages total, including footnotes. Rebuttal briefs limited to issues raised in the case briefs may be filed no later than 35 days after the date of publication of this notice. *See* 19 CFR 351.309(d).

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, U.S. Department

of Commerce, Room 1117, within 30 days after the date of publication of this notice. *See* 19 CFR 351.310. Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. At the hearing, each party may make an affirmative presentation only on issues raised in that party's case brief and may make rebuttal presentations only on arguments included in that party's rebuttal brief. We intend to hold a hearing, if requested, no later than 40 days after the date of publication of this notice.

Final Determination

The final determination with respect to this circumvention inquiry will be issued no later than August 17, 2009, including the results of the Department's analysis of any written comments.

This affirmative preliminary circumvention determination is published in accordance with section 781(b) of the Act and 19 CFR 351.225.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. E9–10477 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

A–201–805

Certain Circular Welded Non–Alloy Steel Pipe from Mexico: Notice 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 partially rescinding its administrative review of the antidumping duty order on certain circular welded non–alloy steel pipe from Mexico for the period November 1, 2007, to October 31, 2008 with respect to four of the eight companies for which the review was initiated. This rescission is based on the timely withdrawal of the request for review by the interested party that requested the review. A complete list of the companies for which the administrative review is being rescinded is provided in the Background section below.

EFFECTIVE DATE: May 6, 2009.

FOR FURTHER INFORMATION CONTACT: Maryanne Burke or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Room 7866, Washington, DC 20230; telephone: (202) 482–5604 or (202) 482–0649, respectively.

Background:

On November 3, 2008, the Department published in the **Federal Register** its notice of opportunity to request an administrative review of the antidumping duty order on certain circular welded non–alloy steel pipe from Mexico. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 73 FR 65288 (November 3, 2008). On December 1, 2008, the United States Steel Corporation (U.S. Steel) requested an administrative review of the antidumping duty order on certain circular welded non–alloy steel pipe from Mexico for the period November 1, 2007, through October 31, 2008.

On December 24, 2008, the Department initiated a review of the eight companies for which an administrative review was requested.[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 FR 79055 (December 24, 2008).

On March 24, 2009, U.S. Steel timely withdrew its requests for review of the following companies: Niples del Norte, S.A. de C.V., Productos Laminados de Aceros, S.A. de C.V., Tuberias Procasa S.A. de C.V./Tuberias Procarsa S.A. de C.V., and PYTCO S.A de C.V.[2]

Scope of the Order

The merchandise covered by this order is circular welded non–alloy steel pipes and tubes, of circular cross–section, not more than 406.4 millimeters (16 inches) in outside diameter, regardless of wall thickness, surface finish (black, galvanized, or painted), or end finish (plain end, beveled end, threaded, or threaded and coupled). These pipes and tubes are generally known as standard pipes and tubes and are intended for the low–pressure conveyance of water, steam, natural gas, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinklers, and other related uses, and generally meet ASTM–53 specifications. Standard pipe may also be used for light load–bearing applications, such as for fence tubing, and as structural pipe tubing used for framing and support members for reconstruction or loading–bearing purposes in construction, shipbuilding, trucking, farm equipment, and related industries. Unfinished conduit pipe is also included in this order. All carbon steel pipes and tubes within the physical description outlined above are included with the scope of this order, except line pipe, oil country tubular goods, boiler tubing, mechanical tubing, pipe and tube hollows for redraws, finished scaffolding, and finished conduit. Standard pipe that is dual or triple certified/stenciled that enters the United States as line pipe of a kind used for oil or gas pipelines is also not included in this order.

The merchandise under the scope of the order is currently classifiable under subheadings 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and U.S. Customs and Border Protection (CBP) purposes, the Department's written description of the merchandise under this order is dispositive.

Rescission, in Part, of Administrative Review

Section 351.213(d)(1) of the Department's regulations provides that the Department will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review. Within 90 days of the date of publication of the notice or initiation, U.S. Steel withdrew its request for an administrative review for the following companies: Niples del Norte, S.A. de C.V., Productos Laminados de Aceros, S.A. de C.V., Tuberias Procasa S.A. de C.V./Tuberias Procarsa S.A. de C.V., and PYTCO S.A de C.V. Because U.S. Steel was the only party to request administrative reviews of these companies, we are rescinding the review with regards to Niples del Norte, S.A. de C.V., Productos Laminados de Aceros, S.A. de C.V.,

[1] U.S. Steel requested review of, *inter alia*, Hylsa, S.A. de C.V. (Hylsa) and Ternium Mexico, S.A. de C.V. (Ternium Mexico). However, in an ongoing changed circumstances review of this order, Ternium Mexico claims it is the successor-in-interest to Hylsa, the respondent in the original investigation. *See Initiation of Antidumping Duty Changed Circumstances Review: Circular Welded Non-Alloy Steel Pipe from Mexico*, 73 FR 63682 (October 27, 2008). The Department has not yet determined whether Ternium Mexico is, in fact, the successor-in-interest to Hylsa; therefore, at this time we are treating both producers in this segment of the proceeding as separate entities.

[2] On January, 16, 2009, U.S. Steel submitted clarification of its request, indicating Tuberias Procasa S.A. de C.V. and Tuberias Procarsa S.A. de C.V. are the same company.

Tuberias Procasa S.A. de C.V./Tuberias Procarsa S.A. de C.V., and PYTCO S.A de C.V.

The Department will issue appropriate assessment instructions directly to U.S. Customs and Border Protection (CBP) 41 days after the publication of this notice. The Department will direct CBP to assess antidumping duties for these companies at the cash deposit rate in effect on the date of entry for entries during the period November 1, 2007, to October 31, 2008.

Notification to Parties

This notice serves as a reminder to importers of their responsibility under section 351.402(f) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period of time. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with section 351.305(a)(3) of the Department's regulations. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This notice is issued and published in accordance with section 351.213(d)(4) of the Department's regulations and sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: April 28, 2009.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. E9–10493 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

A–570–868

Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China

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

ACTION: Notice of Final Determination of Circumvention of Antidumping Duty Order

SUMMARY: We determine that imports from the People's Republic of China (''PRC'') of folding metal tables with legs connected by cross–bars, so that the legs fold in sets, and otherwise meeting the description of in–scope merchandise, are within the class or kind of merchandise subject to the order on folding metal tables and chairs (''FMTCs'') from the PRC.

EFFECTIVE DATE: May 6, 2009.

FOR FURTHER INFORMATION CONTACT: Lilit Astvatsatrian or Charles Riggle, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–6412 or (202) 482–0650, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 27, 2008, the Department of Commerce (''Department'') published its preliminary affirmative determination that folding metal tables with cross–bars are circumventing the antidumping duty order on FMTCs from the PRC.[1] We invited interested parties to comment on our preliminary results. On November 26, 2008, Meco Corporation (''Meco''), the petitioner in the underlying investigation, Cosco Home and Office Products (''Cosco''),[2] an importer of subject merchandise, and Lifetime Products, Inc. and Lifetime (Xiamen) Plastic Products Ltd. (collectively, ''Lifetime''), a PRC producer/exporter of folding metal tables, submitted case briefs.

On January 12, 2009, Feili Furniture Development Limited Quanzhou City, Feili Furniture Development Co., Ltd., Feili Group (Fujian) Co., Ltd., and Feili (Fujian) Co., Ltd. (collectively ''Feili''), a PRC producer/exporter of folding metal tables, submitted rebuttal comments. On January 16, 2009, Meco, Cosco, Lifetime, and New–Tec Integration (Xiamen) Co., Ltd. and New–Tec Integration Co., Ltd. (collectively ''New–Tec''), a PRC producer/exporter of folding metal tables, submitted rebuttal comments.

Scope of the Order

The products covered by this order consist of assembled and unassembled folding tables and folding chairs made primarily or exclusively from steel or other metal, as described below:

1) Assembled and unassembled folding tables made primarily or exclusively from steel or other metal (folding metal tables). Folding metal tables include square, round, rectangular, and any other shapes with legs affixed with rivets, welds, or any other type of fastener, and which are made most commonly, but not exclusively, with a hardboard top covered with vinyl or fabric. Folding metal tables have legs that mechanically fold independently of one another, and not as a set. The subject merchandise is commonly, but not exclusively, packed singly, in multiple packs of the same item, or in five piece sets consisting of four chairs and one table. Specifically excluded from the scope of the order regarding folding metal tables are the following:

- Lawn furniture;
- Trays commonly referred to as ''TV trays;''
- Side tables;
- Child–sized tables;
- Portable counter sets consisting of rectangular tables 36'' high and matching stools; and, Banquet tables. A banquet table is a rectangular table with a plastic or laminated wood table top approximately 28'' to 36'' wide by 48'' to 96'' long and with a set of folding legs at each end of the table. One set of legs is composed of two individual legs that are affixed together by one or more cross–braces using welds or fastening hardware. In contrast, folding metal tables have legs that mechanically fold independently of one another, and not as a set.

2) Assembled and unassembled folding chairs made primarily or exclusively from steel or other metal (folding metal chairs). Folding metal chairs include chairs with one or more

[1] *See Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China*, 73 FR 63684 (October 27, 2008) (''*Preliminary Determination*'').

[2] Cosco submitted a revised case brief on January 7, 2009, with all untimely submitted new factual information, as well as all references and arguments based thereupon, redacted.

cross–braces, regardless of shape or size, affixed to the front and/or rear legs with rivets, welds or any other type of fastener. Folding metal chairs include: those that are made solely of steel or other metal; those that have a back pad, a seat pad, or both a back pad and a seat pad; and those that have seats or backs made of plastic or other materials. The subject merchandise is commonly, but not exclusively, packed singly, in multiple packs of the same item, or in five piece sets consisting of four chairs and one table. Specifically excluded from the scope of the order regarding folding metal chairs are the following:

Folding metal chairs with a wooden back or seat, or both;
Lawn furniture;
Stools;
Chairs with arms; and
Child–sized chairs.

The subject merchandise is currently classifiable under subheadings 9401.71.0010, 9401.71.0030, 9401.79.0045, 9401.79.0050, 9403.20.015, 9403.20.0030, 9403.70.8010, 9403.70.8020, and 9403.70.8030 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise is dispositive.

Based on a request by RPA International Pty., Ltd. and RPS, LLC (collectively, ''RPA''), the Department ruled on January 13, 2003, that RPA's poly–fold metal folding chairs are within the scope of the order because they are identical in all material respects to the merchandise described in the petition, the initial investigation, and the determinations of the Secretary.

On May 5, 2003, in response to a request by Staples, the Office Superstore Inc. (''Staples''), the Department issued a scope ruling that the chair component of Staples' ''Complete Office–To-Go,'' a folding chair with a tubular steel frame and a seat and back of plastic, with measurements of: height: 32.5 inches; width: 18.5 inches; and depth: 21.5 inches, is covered by the scope of the order because it is identical in all material respects to the scope description in the order, but that the table component, with measurements of: width (table top): 43 inches; depth (table top): 27.375 inches; and height: 34.875 inches, has legs that fold as a unit and meets the requirements for an exemption from the scope of the order.

On September 7, 2004, the Department found that table styles 4600 and 4606 produced by Lifetime Plastic Products Ltd. are within the scope of the order because these products have all of the components that constitute a folding metal table as described in the scope.

On July 13, 2005, the Department issued a scope ruling determining that ''butterfly'' chairs are not within the scope of the antidumping duty order because they do not meet the physical description of merchandise covered by the scope of the order because they do not have cross braces affixed to the front and/or rear legs, and the seat and back is one piece of cloth that is not affixed to the frame with screws, rivets, welds, or any other type of fastener.

On July 13, 2005, the Department issued a scope ruling determining that folding metal chairs imported by Korhani of America Inc. are within the scope of the antidumping duty order because the wooden seat is padded with foam and covered with fabric or polyvinyl chloride, attached to the tubular steel seat frame with screws, and has cross braces affixed to its legs.

On May 1, 2006, the Department issued a scope ruling determining that ''moon chairs'' are not included within the scope of the antidumping duty order because moon chairs have different physical characteristics, different uses, and are advertised differently that chairs covered by the scope of the order.

On October 4, 2007, the Department issued a scope ruling determining that International E–Z Up Inc.'s (''E–Z Up'') Instant Work Bench is not included within the scope of the antidumping duty order because its legs and weight do not match the description of the folding metal tables in the scope of the order.

On April 18, 2008, the Department issued a scope ruling determining that the VIKA Twofold 2–in–1 Workbench/Scaffold (''Twofold Workbench/Scaffold'') imported by Ignite USA, LLC from the PRC is not included within the scope of the antidumping duty order because its rotating leg mechanism differs from the folding metal tables subject to the order, i.e., the folding mechanisms of the Twofold Workbench/Scaffold are mechanisms that rotate either upward or downward at the sides of the top among three modes with locking devices. In storage mode, the legs can be folded in under either the fiberboard surface or under the scaffold surface. In addition, its weight is twice as much as the expected maximum weight for folding metal tables within the scope of the order.

As a result of this affirmative final determination of circumvention, the Department has determined that folding metal tables with legs affixed with cross–bars enabling the legs to fold in sets are covered by the scope of the antidumping duty order on folding metal tables and chairs from the PRC. Such tables are distinguishable from banquet tables, which are not subject to the antidumping duty order because, but for the cross–bars located near the table top that connects the legs, enabling the legs to fold in sets, these tables otherwise meet the description of merchandise subject to the order.

Analysis of Comments Received

All issues raised in the post–preliminary comments by parties in this review are addressed in the memorandum from John M. Andersen, Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Final Analysis Memorandum for the Minor Alterations Anti–Circumvention Inquiry of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China'' (February 19, 2009) (''Final Analysis Memorandum''), which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Final Analysis Memorandum is attached to this notice as an appendix. The Final Analysis Memorandum is a public document and is on file in the Central Records Unit (''CRU'') in room 1117 in the main Department building, and is also accessible on the Web at http://ia.ita.doc.gov/frn. The paper copy and electronic version of the memorandum are identical in content.

Final Ruling

In the case of an allegation of a ''minor alteration'' claim under section 781(c) of the Tariff Act of 1930, as amended (''the Act''), it is the Department's practice to look at the five factors listed in the Senate Finance Committee report to determine if circumvention exists in a particular case.[3] Because each anti–circumvention inquiry is highly dependent on the facts on the record, and must be analyzed in light of those specific facts, the Department has historically analyzed several additional criteria to determine

[3] *See* Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 71, 100th Cong., 1st Sess., at 100 (1987) (''Senate Finance Committee Report''), which explained that in circumvention inquiries regarding minor alterations, the Department ≥should consider such criteria as the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products.

if circumvention of the order is taking place.[4]

For this final determination, we continue to rely on the criteria that we considered in making our preliminary determination.[5] Based on our review of the record evidence and our analysis of the comments received, the Department continues to find that imports from the PRC of folding metal tables with legs connected by cross–bars, so that the legs fold in sets, and otherwise meet the description of in–scope merchandise, are circumventing the order and are properly considered to be within the class or kind of merchandise subject to the order on FMTCs from the PRC. For a complete discussion of the Department's analysis, *see* the Final Analysis Memorandum, dated concurrently with this notice.

As explained in the Final Analysis Memorandum in Comment 2, we determine that the folding metal tables with cross–bars at issue in this case are not expressly excluded from the order. The order expressly excluded banquet tables. No party has argued that these folding metal tables with cross–bars are banquet tables. As a result of our analysis of the overall physical characteristics of the products subject to this inquiry, we find that the PRC producers and exporters produce and export to the United States folding metal tables that match the physical description of folding metal tables in the scope of the FMTCs order except for the presence of cross–bars connecting the legs placed near the table top.[6] But for the addition of these cross–bars, these tables would be within the scope of the order.

There are no significant differences in the expectations of the ultimate users,[7] uses of the merchandise,[8] and channels of marketing between folding metal tables with and without cross–bars.[9] None of the companies, either producers or customers, provided evidence of customer involvement in the design of the tables with cross–bars.[10] As explained in the Final Analysis Memorandum, there are also no differences in the manner in which the folding metal tables with cross–bars are advertised or displayed compared with folding metal tables without cross–bars.[11] Furthermore, producers of such tables in the PRC acknowledged that the cost of adding cross–bars to tables in the course of production is negligible.[12] Moreover, we find that test results -- purported to demonstrate improvements to the tables as a result of the addition of cross–bars -- do not demonstrate that the addition of cross–bars improved the strength or stability of folding metal tables. Furthermore, although parties alluded to other supposed advantages attributable to the addition of cross–bars, *i.e.*, elimination of pinch points and quicker folding time, the record demonstrates that companies' advertisements for folding metal tables do not indicate that a cross–bar exists, much less that it represents an advantage over tables without cross–bars.[13] Therefore, we do not find that the cross–bars that are located near the table top provide a significant advantage.

As a result of our inquiry, we determine that imports from the PRC of folding metal tables with legs connected by cross–bars, so that the legs fold in sets, and otherwise meeting the description of in–scope merchandise, are circumventing the order and are properly considered to be within the class or kind of merchandise subject to the order on FMTCs from the PRC. *See* Section 781(c) of the Act.

Continuation of Suspension of Liquidation

In accordance with section 351.225(i) of the Department's regulations, for folding metal tables meeting the description of the folding metal tables described in the scope of the FMTCs order except that they have cross–bars connecting the legs, so that the legs fold in sets, we are directing U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation and to require a cash deposit of estimated duties at the applicable rates for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after June 1, 2007. With a final affirmative determination of circumvention, the Department normally instructs CBP to continue the suspension of liquidation that was directed in the affirmative preliminary determination of circumvention, pursuant to 19 CFR 351.225(l)(3). However, because doing so in the instant inquiry would include merchandise that entered during a completed review period, we will instruct CBP to continue to suspend liquidation for entries made on or after July 1, 2007, the first day of the only pending administrative review period of this order.

This final determination of circumvention is in accordance with section 781(c) of the Act and 19 CFR 351.225.

Dated: April 28, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

APPENDIX

List of Comments and Final Analysis Memorandum

Comment 1: Whether the Department Should Terminate the Anti–Circumvention Inquiry
Comment 2: Whether Folding Metal Tables with Cross–Bars Are Expressly Excluded from the Scope
Comment 3: Whether Folding Metal Tables with Cross–Bars Are Significantly Different from the In–Scope Merchandise
Comment 4: Whether Folding Metal Tables with Cross–Bars Represent a Significant Improvement over Folding Metal Tables with Independently Folding Legs
Comment 5: Whether to Deny Feili's Partial Revocation Request

[FR Doc. E9–10508 Filed 5–5–09; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Call for Applications for Commerce Spectrum Management Advisory Committee

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice and Call for Applications.

SUMMARY: The National Telecommunications and Information Administration (NTIA) is seeking applications from persons interested in serving on the Department of Commerce's Spectrum Management Advisory Committee (CSMAC) for new two-year terms. The CSMAC provides advice to the Assistant Secretary for Communications and Information and

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[4] *See, e.g., Preliminary Determination of Circumvention of Antidumping Order; Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 64926, 64929–31 (October 31, 2000).

[5] *See Preliminary Determination*, 73 FR 63684.

[6] *See* Final Analysis Memorandum; *see also* Preliminary Analysis Memorandum for the Minor Alterations Circumvention Inquiry of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China, at 12 (October 20, 2008) (''Preliminary Analysis Memo'').

[7] *See id.*, at 13.

[8] *See id.*, at 15.

[9] *See id.*, at 16.

[10] *See id.*, at 21.

[11] *See* Final Analysis Memorandum, at 18–20; *see also* Preliminary Analysis Memorandum, at 18–19.

[12] *See* Preliminary Analysis Memorandum, at 17.

[13] *See* Final Analysis Memo at 13–18; *see also* Preliminary Analysis Memorandum, at 24.

NTIA Administrator on spectrum policy matters.

DATES: Applications must be postmarked or electronically transmitted on or before June 1, 2009.

ADDRESSES: Applications materials should be sent to Joe Gattuso, Designated Federal Officer, by email to spectrumadvisory@ntia.doc.gov; by U.S. mail or commercial delivery service to: Office of Policy Analysis and Development, National Telecommunications and Information Administration, 1401 Constitution Avenue N.W., Room 4725, Washington, DC 20230; or by facsimile transmission to (202) 482–6173.

FOR FURTHER INFORMATION CONTACT: Joe Gattuso at (202) 482–0977 or *jgattuso@ntia.doc.gov.*

SUPPLEMENTARY INFORMATION: The CSMAC was chartered in 2005 under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 and is consistent with the National Telecommunications and Information Administration Act, 47 U.S.C. § 904(b). The Department of Commerce renewed the CSMAC's charter on April 6, 2009. The CSMAC advises the Assistant Secretary of Commerce for Communications and Information on a broad range of issues regarding spectrum policy. In particular, the charter provides that the CSMAC will provide advice and recommendations on needed reforms to domestic spectrum policies and management in order to: license radio frequencies in a way that maximizes their public benefit; keep wireless networks as open to innovation as possible; and make wireless services available to all Americans. The CSMAC functions solely as an advisory body in compliance with the FACA. Additional information about the CSMAC and its activities may be found at *http://www.ntia.doc.gov/advisory/spectrum.*

Members of the CSMAC are experts in radio spectrum policy and do not represent any organization or interest. They serve on the CSMAC in the capacity of Special Government Employee. Members will not receive compensation or reimbursement for travel or for per diem expenses.

There are currently 18 members of the CSMAC, who were appointed by the Secretary of Commerce for two-year terms commencing on January 16, 2009. The renewed charter, effective April 6, 2009, allows up to 25 members to serve on the CSMAC.

The Secretary of Commerce may appoint up to seven additional individuals with expertise in those sectors and interests in spectrum policy issues relevant to the CSMAC. Moreover, the charter requires that the CSMAC be fairly balanced in terms of the points of view represented by the members and the functions to be performed. For purposes of obtaining balance, the Secretary will consider for membership interested persons with professional or personal qualifications or experience that will contribute to the CSMAC's work. Such qualifications should generally include, but may not be limited to, expertise and experience in academia, not-for-profit organizations, public advocacy, and in civil society.

Applicants should submit their resume or *curriculum vitae* and a statement that summarizes the applicant's qualifications and experience. The statement should identify any particular expertise or area of interest relevant to the CSMAC's work. This will aid in the assessment of whether the applicant's qualifications and experience will contribute to the balance of points of view represented on the committee.

Dated: May 1, 2009.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. E9–10467 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF COMMERCE

International Trade Administration

(C–533–821)

Certain Hot–Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review

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

SUMMARY: On December 30, 2008, the U.S. Department of Commerce (the Department) published in the **Federal Register** its preliminary results of the administrative review of the countervailing duty (CVD) order on certain hot–rolled carbon steel flat products (hot–rolled carbon steel) from India for the period of review (POR) January 1, 2007, through December 31, 2007. *See Certain Hot–Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review*; 73 FR 79791 (December 30, 2008) (*Preliminary Results*). We preliminarily found that Essar Steel Ltd. (Essar) received countervailable subsidies during the POR. We received comments on our *Preliminary Rresults* from the Government of India (GOI), petitioners, and the respondent company, Essar.[1] The final results are listed in the section ''Final Results of Review'' below.

We also preliminarily rescinded the administrative review regarding Ispat Industries Limited (Ispat), JSW Steel Limited (JSW), and Tata Steel Limited (Tata) due to the fact that they had no shipments during the POR. We received no comments on the partial rescission of administrative review for Ispat, JSW, and Tata and, therefore, we hereby rescind the administrative review with regard to these firms.

EFFECTIVE DATE: May 6, 2009.

FOR FURTHER INFORMATION CONTACT: Gayle Longest at (202) 482–3338, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave, NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 2001, the Department published in the **Federal Register** the CVD order on certain hot–rolled carbon steel flat products from India. *See Notice of Amended Final Determination and Notice of Countervailing Duty Order: Certain Hot–Rolled Carbon Steel Flat Products from India*, 66 FR 60198 (December 3, 2001). On December 30, 2009, the Department published in the **Federal Register** its *Preliminary Result*s of the administrative review of this order for the period January 1, 2007, through December 31, 2007. *See Preliminary Results*, 73 FR 79791. In accordance with 19 CFR 351.213(b), this administrative review covers Essar, a producer and exporter of subject merchandise.

On January 21, 2009, we issued supplemental questionnaires to Essar and the GOI. We received responses from Essar and the GOI on January 28, 2009.

In the *Preliminary Results*, we invited interested parties to submit briefs or request a hearing. On January 29, 2009, we received comments from the GOI. In addition, on February 6, 2009, we received comments from Essar as well as petitioners. On February 18, 2009, we received rebuttal comments from Essar and petitioners. We received a request for a hearing from Essar and the GOI on February 9, 2009. On March 27, 2009, we held a public hearing in room 7870 of the Commerce Building. Parties can

[1] Petitioners are the United States Steel Corporation and Nucor Corporation (collectively, petitioners).

find a transcript of the hearing on file in the central records unit (CRU), room 1117 of the main Department building.

Scope of Order

The merchandise subject to this order is certain hot–rolled carbon–quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non–metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.*, flat–rolled products rolled on four faces or in a closed box pass, or a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this order.

Specifically included in the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial–free (IF) steels, high–strength low–alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low–carbon steels with micro–alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro–alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro–alloying levels of elements such as silicon and aluminum.

Steel products included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: i) iron predominates, by weight, over each of the other contained elements; ii) the carbon content is 2 percent or less, by weight; and iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order.

- Alloy hot–rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.*, ASTM specifications A543, A387, A514, A517, A506).
- SAE/AISI grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTS.
- Tool steels, as defined in the HTS.
- Silico–manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- USS Abrasion–resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non–rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is currently classifiable in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot–rolled flat–rolled carbon–quality steel covered by this order, including: vacuum–degassed fully stabilized; high–strength low–alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise subject to this order is dispositive.

Period of Review

The POR for which we are measuring subsidies is from January 1, 2007, through December 31, 2007.

Analysis of Comments

On January 29, 2009 the GOI filed comments. On February 6, 2009, Essar and petitioners filed comments. On February 18, 2009, Essar and petitioners filed rebuttal comments. All issues in the respondents' and petitioners' case and rebuttal briefs are addressed in the accompanying Issues and Decision Memorandum for the Countervailing Duty Administrative Review on Certain Hot–Rolled Carbon Steel Flat Products from India (Decision Memorandum), which is hereby adopted by this notice. A listing of the issues that parties raised and to which we have responded is attached to this notice as Appendix I. Parties can find a complete discussion of the issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the CRU of the main commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at *http://ia.ita.doc.gov/frn.*

The paper copy and the electronic version of the Decision Memorandum are identical in content.

Final Results of Review

After reviewing comments from all parties, we have made adjustments to our calculations as explained in our Decision Memorandum. Consistent with the Preliminary Results, we find that Essar received countervailable subsidies during the POR.

Company	Total Net Countervailable Subsidy Rate
Essar Steel Ltd	76.88 percent *ad valorem*

Assessment Rates/Cash Deposits

The Department intends to issue assessment instructions to U.S. Customs and Border Protection (CBP) 15 days after the date of publication of these final results of review to liquidate shipments of subject merchandise by Essar entered, or withdrawn form warehouse, for consumption on or after January 1, 2007, through December 31,

2007, at the *ad valorem* rate listed above. We will also instruct CBP to collect cash deposits for the respondent at the countervailing duty rate indicated above on all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of review.

For all non–reviewed companies, the Department will instruct CBP to assess countervailing duties at the cash deposit rates in effect at the time of entry, for entries between January 1, 2007, and December 31, 2007. The cash deposit rates for all companies not covered by this review are not changed by the results of this review.

Return or Destruction of Proprietary Information

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: April 29, 2009.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix I Issues in Decision Memorandum

I. Partial Rescission of Review
II. Adverse Facts Available (AFA)
A. The GOI
B. Essar
  1. SGOC's Industrial Policy
  2. EPCGS
III. Subsidies Valuation Information
A. Benchmarks for Loans and Discount Rates
B. Use of Uncreditworthy Benchmarks for Essar
C. Allocation Period
IV. Analysis of Programs

A. Programs Administered by the Government of India

  1. Pre- and Post–Shipment Export Financing
  2. Export Promotion Capital Goods Scheme (EPCGS)
  3. Sale of High–Grade Iron Ore for LTAR
  4. SEZ Act
    a. Duty free import/domestic procurement of goods and services for development, operation, and maintenance of SEZ units program
    b. Exemption from excise duties on goods machinery and capital goods brought from the Domestic Tariff Area for use by an enterprise in the SEZ
    c. Exemption from the Central Sales Tax (CST)
    d. Exemption from the National Service Tax

B. Programs Administered by the State Government of Gujarat

  1. SGOG Special Economic Zone Act (SEZ Act)
    a. Stamp duty and registration fees for land transfers, loan agreements, credit deeds, and mortgages
    b. Sales tax, purchase tax, and other taxes payable on sales and transactions
    c. Sales and other state taxes on purchases of inputs (both goods and services) for the SEZ or a Unit within the SEZ
  2. Wharfage Fees Paid Under the SGOG's Captive Port Facilities Program

C. Programs Administered by the SGOC

SGOC Industrial Policy 2004–2009
  a. A direct subsidy of 35 percent to total capital cost for the project, up to a maximum amount equivalent to the amount of commercial tax/central sales tax paid in a seven year period
  b. A direct subsidy of 40 percent toward total interest paid for a period of 5 years (up to Rs. lakh per year) on loans and working capital for upgrades in technology
  c. Reimbursement of 50 percent of expenses (up to Rs. 75,000) incurred for quality certification
  d. Reimbursement of 50 percent of expenses (up to 5 lakh) for obtaining patents
  e. Total exemption from electricity duties for a period of 15 years from the date of commencement of commercial production
  f. Exemption from stamp duty on deeds executed for purchase or lease of land and buildings and deeds relating to loans and advances to be taken by the company for a period of three years from the date of registration
  g. Exemption from payment of ''entry tax'' for 7 years (excluding minerals obtained from mining in the state)
  h. 50 percent reduction of the service charges for acquisition of private land by Chhattisgarh Industrial Development Corporation for use by the company
  i. Allotment of land in industrial areas at a discount up to 100 percent

D. Programs Found Not To Confer a Countervailable Benefit During the POR

  1.Own Your Own Wagon Scheme
  2. Duty Free Replenishment Certificate (DFRC) Scheme

E. Programs Determined Not To Be Used
  1. GOI Programs
    a. Advance License Program (ALP)
    b. Duty Entitlement Passbook Scheme (DEPS)
    c. Export Processing Zones (EPZ) and Export Oriented Unit (EOU)
    d. Target Plus Scheme (TPS)
    e. Income Tax Exemption Scheme (Sections 10A, 10B, and 80 HHC)
    f. Market Development Assistance (MDA)
    g. Status Certificate Program
    h. Market Access Initiative
    i. Loan Guarantees from the GOI
    j. Steel Development Fund (SDF) Loans
    k. Exemption of Export Credit from Interest Taxes
    l. Captive Mining of Iron Ore
    m. Captive Mining of Coal
    n. Duty Free Import Authorization Scheme (DFIA)
    o. Wagon Investment Scheme (WIS)
    p. Drawback on goods brought or services provided from the Domestic Tariff area into a SEZ, or services provided in a SEZ by service providers located outside India
    q. 100 percent exemption from income taxes on export income from the first 5 years of operation, 50 percent for the next 5 years, and a further 50 percent exemption on export income reinvested in India for an additional 5 years
  2. State Government of Andhra Pradesh Programs Grants Under the Industrial Investment Promotion Policy of 2005–2010
    a. 25 percent reimbursement of cost of land in industrial estates and industrial development areas
    b. Reimbursement of power at the rate of Rs. 0.75 ''per unit'' for the period beginning April 1, 2005, through March 31, 2006 and for the four years thereafter to be determined by the Government of Andhra Pradesh (GOAP)
    c. 50 percent subsidy for expenses incurred for quality certification up to RS. 100 lakhs
    d. 25 percent subsidy on ''cleaner production measures'' up to Rs. 5 lakhs
    e. 50 percent subsidy on expenses incurred in patent registration, up

to Rs. 5 lakhs
f. 100 percent reimbursement of stamp duty and transfer duty paid for the purchase of land and buildings and the obtaining of financial deeds and mortgages
g. A grant of 25 percent of the tax paid to GAAP, which is applied as a credit against the tax owed the following year, for a period of five years from the date of commencement of production
h. Exemption from the GAAP Non–agricultural Land Assessment (NALA)
i. Provision of ''infrastructure'' for industries located more than 10 kilometers from existing industrial estates or industrial development areas
j. Guaranteed ''stable prices of municipal water for 3 years for industrial use'' and reservation of 10% of water for industrial use for existing and future projects

3. State Government of Gujarat Programs
a. State Government of Gujarat (SGOG) Provided Tax Incentives
(1). Sales Tax Exemptions of Purchases of Goods During the POR
(2). Sales Tax Deferrals on Purchases of Good from Prior Years (As Well as Deferrals Granted During the POR) which Were Outstanding During the POR)
(3). Accounting Treatment of Purchases
(4). Value Added Tax (VAT) Program Established on April 1, 2006
b. Captive Port Facilities

Credit for the cost of the capital (including interest) to construct the port facilities, which is then applied as an offset to the wharfage charges due Gujarat on cargo shipped through the captive jetty

4. State Government of Jharkhand Programs
a. Grants and Tax Exemptions under the State Industrial Policy of 2001
b. Subsidies for Mega Projects under the JSIP of 2001

5. State Government of Maharashtra Programs
a. Refunds of Octroi Under the PSI of 1993, Maharashtra Industrial Policy of 2001, and Maharashtra Industrial Policy of 2006
b. Infrastructure Assistance for Mega Projects
c. Land for Less than Adequate Remuneration
d. Loan Guarantees Based on Octroi Refunds by the SGM.
e. Investment Subsidy

V. Analysis of Comments

Comment 1: Whether the Failure of the Government of India (GOI) and the Indian State Governments (ISGs) to Respond to the Department's Questions Warrants Application of Adverse Inferences with Respect to Subsidy Programs Essar Claims It Did Not Use
Comment 2: Whether Essar Received Benefits Under the Industrial Policy of the State Government of Chhattisgarh (SGOC)
Comment 3: Whether Essar Received Benefits Under the Industrial Policy of the State Government of Andhra Pradesh (SGOAP)
Comment 4: Whether Essar Received Benefits Under the Captive Port Facilities Program of the State Government of Gujarat (SGOG)
Comment 5: Whether Essar Received Benefits Under the GOI's Special Economic Zone (Act of 2005 (SEZ Act)
Comment 6: Whether the Department Inadvertently Failed to Include Certain Export Promotion Capital Goods Scheme (EPCGS) Licenses in the Benefit Calculation for the Preliminary Results
Comment 7: Whether the Department Should Adjust the EPCGS License Application Fees Reported by Essar
Comment 8: Whether It Was Appropriate to Apply Adverse Inferences With Regard to Certain of Essar's EPCGS Licenses
Comment 9: Whether the Department Erred In Calculating Benefits Conferred Under the Pre–Shipment Export Financing Program
Comment 10: Whether the National Mineral Development Corporation (NMDC) is a Government Authority Capable of Providing a Financial Contribution
Comment 11: Whether There is a Viable In–Country Benchmark Price For Use in the Benefit Calculation of the Provision of High–Grade Iron Ore DR–CLO Lumps (lumps) and Iron Ore Fines (Fines) for Less Than Adequate Remuneration (LTAR) Calculation, and If So, How It Should Be Calculated
Comment 12: Whether the Department Used Comparable Benchmark Prices For Use in the Benefit Calculations of the Provision of Lumps and Fines for LTAR Program
Comment 13: Whether the Department's Inclusion of Freight Costs in the Fines and Lumps Benchmarks Produced a Distorted Result
Comment 14: Whether the Department Should Make Certain Adjustments to the Benchmark Used in the Benefit Calculation of the Provision of lumps and fines and for LTAR Program

VI. Total Net Subsidy Rate

VII. Recommendation

[FR Doc. E9–10496 Filed 5–5–09; 8:45 am]
BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XO21

Endangered Species; File No. 13543

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that South Carolina Department of Natural Resources, 217 Ft. Johnson Rd., Charleston, SC 29412, has been issued a permit to take loggerhead (*Caretta caretta*), green (Chelonia mydas), Kemp's ridley (*Lepidochelys kempii*), leatherback (*Dermochelys coriacea*), olive ridley (*Lepidochelys olivacea*) and hawksbill (*Eretmochelys imbricata*) sea turtles for purposes of scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 427–2521;

Southeast Region, NMFS, 263 13th Ave South, St. Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Patrick Opay or Amy Hapeman, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On August 7, 2008, notice was published in the Federal Register (73 FR 45967) that a request for a scientific research permit to take sea turtles had been submitted by the above-named organization. The requested permit has been issued under the authority of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 et seq.) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The proposed research will further the understanding of the growth, distribution, and life history of sea turtles. The five-year permit will allow researchers to annually handle, measure, weigh, passive integrated transponder tag, flipper tag, and photograph up to 45 loggerhead, 6

green, 15 Kemp's ridley, 6 leatherback, 2 olive ridley, and 2 hawksbill sea turtles. These animals would have already been captured by authorized coastal trawl surveys taking place in waters off of North Carolina to Florida.

Issuance of this permit, as required by the ESA, was based on a finding that such permit (1) was applied for in good faith, (2) will not operate to the disadvantage of such endangered or threatened species, and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: April 30, 2009.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E9–10512 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 19–2009]

Foreign–Trade Zone 20—Hampton Roads, Virginia, Area, Application for Reorganization/Expansion

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Virginia Port Authority, grantee of FTZ 20, requesting authority to reorganize and expand the zone project within the Norfolk Customs and Border Protection port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on April 28, 2009.

FTZ 20 was approved on April 15, 1975 (Board Order 105, 40 FR 17884, 4/23/75); relocated on January 17, 1977 (Board Order 114, 42 FR 4187, 1/24/77), and on March 16, 1981 (Board Order 173, 46 FR 18063, 3/23/81); and, expanded on May 8, 1997 (Board Order 887, 62 FR 28446, 5/23/97), on July 28, 2000 (Board Order 1113, 65 FR 50179, 8/17/00), and on April 5, 2001 (Board Order 1163, 66 FR 20235, 4/20/01).

The zone project consists of eighteen sites (10,119 acres total) in the Hampton Roads area: *Site 1* (22 acres)—located at 215 Suburban Drive, Suffolk; *Site 2* (10 acres)—located at 324 Moore Avenue, Suffolk; *Site 3* (30 acres total, 4 parcels) —within the Greenbrier Industrial Park at 630 Woodlake Drive, 1720 S. Military Highway, 575 Woodlake Circle and 570 Woodlake Circle, Chesapeake; *Site 4* (905 acres)—Norfolk International Terminals, 7737 Hampton Boulevard, Norfolk; *Site 5* (242 acres)—Portsmouth Marine Terminal, 2000 Seaboard Avenue, Portsmouth; *Site 6* (184 acres)—Newport News Marine Terminal, 25th & Warwick Boulevard, Newport News; *Site 7* (490 acres total, 6 parcels)—Warren County Industrial Corridor, Routes 340, 522 and 661, Front Royal; *Site 8* (372 acres)—Bridgeway Commerce Park, Interstate 664, Suffolk; *Site 9* (672 acres)—Cavalier Industrial Park, Interstate 64 and U.S. Route 13, Chesapeake; *Site 10* (26 acres)—D.D. Jones Transfer & Warehouse, Inc., 1920 Campostella Road, Chesapeake; *Site 11* (177 acres)—New Boone Farm Industrial Park, Interstate 664, Chesapeake; *Site 12* (60 acres)—PortCentre Commerce Park, Route 264, Portsmouth; *Site 13* (154 acres)—Suffolk Industrial Park, 595 Carolina Road, Suffolk; *Site 14* (6,187 acres total, 2 parcels)—Goddard Space Flight Center–Wallops Flight Facility, Accomack County; *Site 15* (449 acres)—Accomack Airport Industrial Park, U.S. Highway 13 & Parkway Road, Melfa; *Site 16* (5 acres)— within the Battlefield Lakes Technical Center, 525 & 533 Byron Street, Norfolk; *Site 17* (4 acres)—within the Butts Station Commerce Center, 600, 604 and 608 Greentree Road, Chesapeake; and, *Site 18* (130 acres)—within the 579–acre Port of Cape Charles Sustainable Technologies Industrial Park, two miles from U.S. 13 on SR 1108, Bayshore Drive.

The applicant is now requesting authority for a reorganization and expansion of the zone, which includes both additions and deletions with an overall increase of 639 acres in total zone space as described below:

—Existing Site 3—modify to reinstate acreage at Parcels 1 and 3 removed through administrative actions and expand to include additional acreage at Parcels 2 and 4 and to include two new parcels located at 551 Woodlake Circle (Parcel 5) and 575B Woodlake Circle (Parcel 6) (new total acreage—72 acres);

—Existing Site 8—modify to remove 239 acres due to changed circumstances (new total acreage—133 acres);

—Existing Site 9—modify to reinstate acreage removed through administrative action (new total acreage—689 acres);

—Proposed Site 19 (323 acres)—Shirley T. Holland Commerce Park, 25400 Old Mill Road, Windsor;

—Proposed Site 20 (72 acres)—Commerce Center Hampton Roads, 150 Judkins Court, Suffolk;

—Proposed Site 21 (85 acres)—Virginia Regional Commerce Park, 2930 Pruden Boulevard, Suffolk;

—Proposed Site 22 (18 acres)—Port Norfolk Holdings, LLC, warehouse located at 1157 Production Road, Norfolk, within the Norfolk Industrial Park;

—Proposed Site 23 (101 acres)—Virginia Commerce Center, 351 Kenyon Road, Suffolk; and,

—Proposed Site 24 (220 acres)—Westport Commerce Center located on Manning Bridge Road, Suffolk.

The sites will provide warehousing and distribution services to area businesses. No specific manufacturing authority is being requested at this time. Such requests would be made to the Board on a case–by-case basis.In accordance with the Board's regulations, Camille Evans of the FTZ staff is designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 6, 2009. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 20, 2009.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign–Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's website, which is accessible via www.trade.gov/ftz. For further information, contact Camille Evans at Camille_Evans@ita.doc.gov or (202) 482–2350.

Dated: April 28, 2009.

Andrew McGilvray,

Executive Secretary.

[FR Doc. E9–10495 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XO76

Magnuson–Stevens Act Provisions; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permits

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

ACTION: Notice; request for comments.

SUMMARY: The Assistant Regional Administrator for Sustainable Fisheries,

Northeast Region, NMFS, has made a preliminary determination that the subject exempted fishing permit (EFP) application contains all the required information and warrants further consideration. Therefore, NMFS announces that the Assistant Regional Administrator proposes to recommend that an EFP be issued that would allow one commercial fishing vessel to conduct fishing operations that are otherwise restricted by the regulations governing the fisheries of the Northeastern United States. The EFP, which would enable the applicants to investigate the selectivity of different groundfish trawl codend configurations with a small–mesh cover, would allow for exemptions for one vessel from the Northeast (NE) Multispecies Fishery Management Plan (FMP) as follows: NE multispecies Gulf of Maine (GOM) minimum mesh size. In addition, this EFP would allow temporary exemptions from the NE Multispecies and Monkfish FMPs, per the stipulations detailed in this document, as follows: NE multispecies minimum fish sizes; NE multispecies possession restrictions; monkfish minimum fish sizes; and monkfish possession restrictions.

Regulations under the Magnuson–Stevens Fishery Conservation and Management Act require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

DATES: Comments must be received on or before May 21, 2009.

ADDRESSES: Comments may be submitted by email to *Modified.codend.EFP@noaa.gov*. Written comments should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope ''Comments on the Codend Modification Study.'' Comments may also be sent via facsimile (fax) to (978) 281–9135.

FOR FURTHER INFORMATION CONTACT: Melissa Vasquez, Fishery Management Specialist, (978) 281–9166, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: A complete application for an EFP for this project was submitted on April 6, 2009, by Steve Eayrs of the Gulf of Maine Research Institute (GMRI) for the F/V Skipper (Federal permit #250573). The primary goal of this EFP is to assess the impact of codend modification on reducing catches of undersized groundfish and non–targeted fish by trawl gear. This project builds on the results of an EFP issued for the 2008 fishing year, which tested the efficacy of removing chafing nets from codends to reduce undersized bycatch. This EFP would compare the catch composition and selectivity of three codend configurations to determine which may reduce undersized and non–commercial catch.

This EFP would be issued to GMRI and Captain Glen Libby of the F/V Skipper to conduct 25 at–sea days of experimental fishing in the GOM north of the Cashes Ledge Habitat Closure Area and east of the Jeffery's Bank Habitat Closure Area (see Table 1). Fishing would not overlap with any GOM Rolling Closure Areas.

TABLE 1: COORDINATES FOR THE EXPERIMENTAL FISHING AREA

Point	Latitude	Longitude
1	44°00′ N	68°50′ W
2	44°00′ N	69°40′ W
3	43°20′ N	69°40′ W
4	43°20′ N	68°50′ W

The researchers would conduct sea trials over two 10-day periods in June and August 2009. As a condition of the EFP, this vessel would complete no more than 150 tows overall or six tows per day. Researchers would conduct 1-hour tows using one of three codend configurations: A standard 6.5–inch (16.5–cm) diamond–mesh codend, 7–inch (17.8–cm) square–mesh codend, and a composite codend with a 6.5–inch (16.5–cm) square–mesh upper section and a 6.5–inch (16.5–cm) diamond–mesh lower section. Each codend would be tested at least twice each day, for an estimated six tows per day and a minimum of 120 total tows. A small–mesh cover net (~ 2–inch (5.08–cm) mesh size, depending upon availability) would be fitted around each codend to retain all fish that escape the codend so they may be sampled along with the catch for species count, weight, and length. The species composition and selectivity of each tow would be compared to determine which codend configuration may reduce catch of undersized groundfish and improve trawl selectivity. An additional 5 days, with up to 30 additional 1-hour tows, may be used to film fish interactions with the gears and to accommodate for sampling problems.

The applicants have asked for an exemption from the minimum GOM regulated mesh size specified at 50 CFR 648.80(a)(3)(i) so that they may install a small–mesh cover net around the codend to sample the variability in bycatch released from each of the four codend configurations. The applicants have also asked for temporary exemptions from the following regulations: NE multispecies minimum fish sizes (§ 648.83); NE multispecies possession restrictions (§ 648.86), monkfish minimum fish sizes (§ 648.93); and monkfish possession restrictions (§ 648.94). These exemptions are necessary to allow sampling of undersized fish and fish in excess of the possession limit; however, these exemptions would not permit the landing of fish outside of regular A days–at–sea (DAS) possession limits. These exemptions are only for the time period when trained technicians or crew are measuring, weighing, or sampling fish that would otherwise be immediately discarded.

During the 25 at–sea days of comparative fishing trials, the F/V Skipper would use A DAS and would be subject to all day and trip possession limits, with the exemptions listed above. As a condition of this EFP, all undersized fish or fish that cannot legally be landed (i.e., in excess of possession limits) would be returned to the sea as quickly as possible after sampling. The applicants anticipate a total harvest of 37,500 lb (17,010 kg), and an additional 17,500 lb (7,938 kg) of discards composed of undersized NE multispecies in similar proportions to the anticipated catch, as well as dogfish and skates (Table 2). The estimated GOM cod catch per day for the proposed number of DAS permitted with this EFP would be 32 percent of the current daily possession limit of 800 lb (362.9 kg). All legal–sized fish, within the possession limit, would be landed and sold.

TABLE 2: ESTIMATED TOTAL CATCH AND DISCARDS BY SPECIES

Species	Catch in lb (kg)	Discards in lb (kg)
Haddock	6,250 (2,835)	0
Cod	6,250 (2,835)	0
Grey Sole	6,250 (2,835)	0
American Plaice	6,250 (2,835)	0
Monkfish	6,250 (2,835)	0
Pollock	2,500 (1,134)	0
Hake & other	3,750 (1,701)	0

TABLE 2: ESTIMATED TOTAL CATCH AND DISCARDS BY SPECIES—Continued

Species	Catch in lb (kg)	Discards in lb (kg)
Skate sp.	0	2,500 (1,134)
Dogfish	0	2,500 (1,134)
Undersized NE multispecies	0	12,500 (5,670)

The applicants may request minor modifications and extensions to the EFP throughout the course of research. EFP modifications and extensions may be granted without further public notice if they are deemed essential to facilitate completion of the proposed research and result in only a minimal change in the scope or impacts of the initially approved EFP request.

In accordance with NAO Administrative Order 216–6, a Categorical Exclusion or other appropriate NEPA document would be completed prior to the issuance of the EFP. Further review and consultation may be necessary before a final determination is made to issue the EFP. After publication of this document in the **Federal Register**, the EFP, if approved, may become effective following the public comment period.

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

Dated: May 1, 2009.

Alan D. Risenhoover

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–10511 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XP05

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public committee meeting.

SUMMARY: The North Pacific Fishery Management Council's (Council) Comprehensive Data Collection Committee will meet in Seattle, WA.

DATES: The meeting will be held on May 27, 2009.

ADDRESSES: The meeting will be held at the Alaska Fishery Science Center, 7600 Sand Point Way NE, Building 4, Traynor Room, Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Jeannie Heltzel, North Pacific Fishery Management Council; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The committee will review potential salmon bycatch data collection issues and programs; discuss relationship with the National Voluntary Data Collection Program; and review status on community and comprehensive data collection.

The Agenda for the meeting will be posted at *http://www.fakr.noaa.gov/npfmc/*.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: May 1, 2009.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–10462 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XP06

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public committee meeting.

SUMMARY: The North Pacific Fishery Management Council (Council) announces a workshop on Annual Catch Limits, to be held May 21, 22, 2009 in Seattle, WA.

DATES: The workshop will be held on May 21–22, 2009.

ADDRESSES: The meeting will be held at the Alaska Fishery Science Center, 7600 Sand Point Way, Building 4, Traynor Room, Seattle, WA.

Council address: North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram, North Pacific Fishery Management Council; telephone: (907) 271–2809

SUPPLEMENTARY INFORMATION: The agenda will include the following: Developing methodologies for addressing new National Standard 1 guidelines for Groundfish, Crab and Scallop FMPs including discussion of incorporating uncertainty into catch specifications; Developing annual biological catch limits for crabs and scallops; addressing data quality requirements; and new ecosystem component criteria.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen, (907) 271–2809, at least 5 working days prior to the meeting date.

Dated: May 1, 2009.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–10463 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

National Security Education Board Group of Advisors Meeting

AGENCY: Under Secretary of Defense Personnel and Readiness, DoD.

ACTION: Notice of meeting.

SUMMARY: Pursuant to Public Law 92–463, notice is hereby given of a forthcoming meeting of the National Security Education Board Group of Advisors. The purpose of the meeting is to review and make recommendations to the Board concerning requirements established by the David L. Boren National Security Education Act, Title VIII of Public Law 102–183, as amended.

DATES: May 20–21, 2009.

ADDRESSES: Holiday Inn Pittsburgh at University Center, 100 Lytton Avenue, Pittsburgh, PA 15213.

FOR FURTHER INFORMATION CONTACT: Dr. Kevin Gormley, Program Officer, National Security Education Program, 1101 Wilson Boulevard, Suite 1210, Rosslyn, P.O. Box 20010, Arlington, Virginia 22209–2248; (703) 696–1991. Electronic mail address: *Gormleyk@ndu.edu.*

SUPPLEMENTARY INFORMATION: The National Security Education Board Group of Advisors meeting is open to the public. The public is afforded the opportunity to submit written statements associated with NSEP.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–10412 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2009–OS–0063]

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, DoD.

ACTION: Notice to Amend a System of Records.

SUMMARY: The Office of the Secretary of Defense is amending a system of records notice in its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on June 5, 2009 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Office of Freedom of Information, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301–1155.

FOR FURTHER INFORMATION CONTACT: Mrs. Cindy Allard at (703) 588–6830.

SUPPLEMENTARY INFORMATION: The Office of the Secretary of Defense systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the record systems being amended are set forth below followed by the notice, as amended, published in its entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: May 1, 2009.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

DMDC 10

SYSTEM NAME:

Defense Biometric Identification Data System (DBIDS) (September 11, 2008, 73 FR 52836).

CHANGES:

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with: ''The system includes personal data to include name, grade, Social Security Number (SSN), status, date and place of birth, weight, height, eye color, hair color, gender, passport number, country of citizenship, geographic and electronic home and work addresses and telephone numbers, marital status, index fingerprints and photographs, and identification card issue and expiration dates. The system also includes vehicle information such as manufacturer, model year, color and vehicle type, license plate type and number, decal number, current registration, automobile insurance data, and driver's license data. The system also contains data on government-issued and personal weapons, such as type, serial number, manufacturer, caliber, firearm registration date, and storage location data to include unit, room, building, and phone number.''

* * * * *

PURPOSE(S):

Delete entry and replace with: ''The records are maintained to support DoD physical security and information assurance programs and are used for identity verification purposes, to record personal property registered with the Department, and for producing facility management reports.''

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

Delete entry and replace with: ''In addition to those disclosures generally permitted under 5 U.S.C. 552a (b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a (b) (3) as follows:

To foreign governments for law enforcement investigations that involve physical access to overseas military facilities that use DBIDS.

The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD compilation of systems of records notices apply to this system.''

* * * * *

NOTIFICATION PROCEDURE:

Delete entry and replace with: ''Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Director, Defense Manpower Data Center, 1600 Wilson Blvd, Suite 400, Arlington VA 22209–2593; or Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6771.

Written requests should contain the full name, Social Security Number (SSN), date of birth, and current address and telephone number of the individual.''

RECORD ACCESS PROCEDURES:

Delete entry and replace with ''Individuals seeking access to information about themselves contained in this system should address written inquiries to the OSD/JS FOIA Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests should contain the name and number of this system of records notice along with the full name, Social Security Number (SSN), date of birth, and current address and telephone number of the individual and be signed.''

CONTESTING RECORDS PROCEDURES:

Delete entry and replace with ''The OSD rules for accessing records, for contesting contents and appealing

initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.''

* * * * *

DMDC 10

SYSTEM NAME:

Defense Biometric Identification System (DBIDS).

SYSTEM LOCATION:

Defense Manpower Data Center, 400 Gigling Road, Seaside, CA 93955 6771. For a list of backup locations, contact the system manager.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Active duty, Reserve, and Guard personnel from the Armed Forces and their family members; retired Armed Forces personnel and their families; DoD and non-DoD employees and dependents, U.S. residents abroad, foreign nationals and corporate employees and dependents who have access to U.S. installations in the continental U.S. and overseas.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system includes personal data to include name, grade, Social Security Number (SSN), status, date and place of birth, weight, height, eye color, hair color, gender, passport number, country of citizenship, geographic and electronic home and work addresses and telephone numbers, marital status, index fingerprints and photographs, and identification card issue and expiration dates. The system also includes vehicle information such as manufacturer, model year, color and vehicle type, license plate type and number, decal number, current registration, automobile insurance data, and driver's license data. The system also contains data on government-issued and personal weapons, such as type, serial number, manufacturer, caliber, firearm registration date, and storage location data to include unit, room, building, and phone number.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301 Departmental regulations; 10 U.S.C. 113, Secretary of Defense, Note at Public Law 106–65; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 18 U.S.C. 1029, Fraud and related activity in connection with access devices; 18 U.S.C. 1030, Fraud and related activity in connection with computers; 40 U.S.C. Chapter 25, Information technology management; 50 U.S.C. Chapter 23, Internal Security; Public Law 106–398, Government Information Security Act; Public Law 100–235, Computer Security Act of 1987; Public Law 99–474, Computer Fraud and Abuse Act; E.O. 12958, Classified National Security Information as amended by E.O., 13142 and 13292; E.O. 10450, Security Requirements for Government Employees; and E.O. 9397 (SSN).

PURPOSE(S):

The records are maintained to support DoD physical security and information assurance programs and are used for identity verification purposes, to record personal property registered with the Department, and for producing facility management reports.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a (b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a (b) (3) as follows:

To foreign governments for law enforcement investigations that involve physical access to overseas military facilities that use DBIDS.

The DoD 'Blanket Routine Uses' set forth at the beginning of the OSD compilation of systems of records notices apply to this system.''

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Retrieved primarily by name, Social Security Number (SSN), vehicle identifiers, or weapon identification data. However, data may also be retrieved by other data elements, such as passport number, photograph, fingerprint data, and similar elements in the database.

SAFEGUARDS:

Computerized records are maintained in a controlled area accessible only to authorized personnel. Entry is restricted by the use of locks, guards, and administrative procedures. Access to personal information is limited to those who require the records in the performance of their official duties, and to the individuals who are the subjects of the record or their authorized representatives. Access to personal information is further restricted by the use of unique logon and passwords, which are changed periodically.

RETENTION AND DISPOSAL:

Discontinue records on deactivation or confiscation of card. Delete data when 3–5 years old or when no longer needed for security purposes. Destroyed by shredding or incineration as appropriate.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Defense Manpower Data Center, 1600 Wilson Boulevard, Suite 400, Arlington VA 22209–2593,

Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6771.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Director, Defense Manpower Data Center, 1600 Wilson Blvd, Suite 400, Arlington VA 22209–2593; or Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955–6771.

Written requests should contain the full name, Social Security Number (SSN), date of birth, and current address and telephone number of the individual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Office of the Secretary of Defense/Joint Staff, Freedom of Information Act Requester Service Center, 1155 Defense Pentagon, Washington, DC 20301–1155.

Written requests should contain the name and number of this system of records notice along with the full name, Social Security Number (SSN), date of birth, and current address and telephone number of the individual and be signed.

CONTESTING RECORDS PROCEDURES:

The OSD rules for accessing records, for contesting contents and appealing initial agency determinations are published in OSD Administrative Instruction 81; 32 CFR part 311; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Data is collected from existing DoD databases, the Military Services, DoD Components, and from the individual.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–10413 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2009–OS–0062]

Privacy Act of 1974; Systems of Records

AGENCY: Defense Finance and Accounting Service, DoD.

ACTION: Notice to Add a New System of Records.

SUMMARY: The Defense Finance and Accounting Service (DFAS) is proposing to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This Action will be effective without further notice on June 5, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Freedom of Information Act/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, Defense Finance and Accounting Service, 8899 E. 56th Street, Indianapolis, IN 46249–0150.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Krabbenhoft at (720) 242–6631.

SUPPLEMENTARY INFORMATION: The Defense Finance and Accounting Service notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on April 30, 2009, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated December 12, 2000, 65 FR 239.

Dated: April 30, 2009.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

T7335c

SYSTEM NAME:

Civilian Pay Accounting Bridge Records.

SYSTEM LOCATION:

Defense Finance and Accounting Service, 6760 E. Irvington Place, Denver, CO 80279–8000.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

United States (U.S.) Air Force, Army, Navy, Marine Corps, active, reserve, and guard members, Defense Security Service and National Geospatial-Intelligence Agency civilian employees, Department of Defense (DoD) civilian employees and other Federal civilian employees paid by appropriated funds and whose pay is processed by the Defense Finance and Accounting Service.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name, Social Security Number (SSN), address, telephone number and accounting data.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations, Department of Defense Financial Management Regulation (DoDFMR) 7000.14–R Vol. 4, 31 U.S.C. Sections 3511 and 3513, and E.O. 9397 (SSN).

PURPOSE(S):

To provide a bridge or link between the Defense Civilian Payroll System (DCPS) and the Civilian Pay Accounting Interface System (CPAIS). This system will create pay information files from DCPS. The pay information files will contain civilian payroll costs and manpower data; this data will then be provided to the U.S. Air Force accounting activities for processing. The system contains information on other than U.S. Air Force civilian employees; however, the CPAIS system will not use the non-Air Force data other than to transmit it directly to the General Accounting and Finance System (GAFS).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' published at the beginning of the DFAS compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media and hard copy output products.

RETRIEVABILITY:

Name or Social Security Number (SSN).

SAFEGUARDS:

Records are stored in an office building protected by guards, controlled screening, use of visitor registers, electronic access, and/or locks. Access to records is limited to authorized individuals who are properly screened and cleared on a need-to-know basis in the performance of their duties. Passwords and digital signatures are used to control access to the system data, and procedures are in place to deter and detect browsing and unauthorized access. Physical and electronic access are limited to persons responsible for servicing and authorized to use the system.

RETENTION AND DISPOSAL:

Records may be temporary in nature and deleted when actions are completed, superseded, obsolete, or no longer needed. Pay affecting records may be cut off at the end of the payroll year, and then destroyed up to 6 years and 3 months after cutoff. Records are destroyed by degaussing the electronic media and recycling hardcopy records. The recycled hardcopies are destroyed by shredding, burning, or pulping.

SYSTEM MANAGER(S) AND ADDRESS:

Defense Finance and Accounting Service, Denver, System Management Directorate, Accounting and Cash Systems, 6760 E. Irvington Place, Denver, CO 80279–8000.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

Individuals should furnish full name, Social Security Number, current address, telephone number, and provide a reasonable description of what they are seeking.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

Individuals should furnish full name, Social Security Number, current address, and telephone number.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11–R; 32 CFR part 324; or may be obtained from Defense Finance and Accounting Service, Freedom of Information/Privacy Act Program Manager, Corporate Communications and Legislative Liaison, 8899 East 56th Street, Indianapolis, IN 46249–0150.

RECORD SOURCE CATEGORIES:

From the Defense Civilian Payroll System, the individual concerned, and DoD Components or Federal agencies whose civilian employees are paid by the Defense Civilian Payroll System.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–10417 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is renewing the charter for the Reserve Forces Policy Board (hereafter referred to as the Board).

The Board, pursuant to 10 U.S.C. 175 and 10301 is a non-discretionary federal advisory committee established to provide to the Secretary of Defense, for transmittal to the President and Congress an annual report on the reserve programs of the Department of Defense and any other matters that the Board considers appropriate.

The Board, pursuant to 10 U.S.C. 10301(a) shall be composed of:

1. A civilian chairman appointed by the Secretary of Defense;

2. The Assistant Secretary of the Army for Manpower and Reserve Affairs, the Assistant Secretary of the Navy for Manpower and Reserve Affairs, and the Assistant Secretary of the Air Force for Manpower and Reserve Affairs;

3. An officer of the Regular Army designated by the Secretary of the Army;

4. An officer of the Regular Navy and an officer of the Regular Marine Corps each designated by the Secretary of the Navy;

5. An officer of the Regular Air Force designated by the Secretary of the Air Force;

6. Four reserve officers designated by the Secretary of Defense upon the recommendation of the Secretary of the Army, two of whom must be members of the Army National Guard of the United States, and two of whom must be members of the Army Reserve;

7. Four reserve officers designated by the Secretary of Defense upon the recommendation of the Secretary of the Navy, two of whom must be members of the Navy Reserve, and two of whom must be members of the Marine Corps Reserve;

8. Four reserve officers designated by the Secretary of Defense upon the recommendation of the Secretary of the Air Force, two of whom must be members of the Air National Guard of the United States, and two of whom must be members of the Air Force Reserve;

9. A reserve officer of the Army, Navy, Air Force, or Marine Corps who is a general officer or flag officer designated by the Chairman of the Board with the approval of the Secretary of Defense, and who serves without vote as military adviser to the Chairman and as executive officer of the Board; and

10. An officer of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps serving in a position on the Joint Staff who is designated by the Chairman of the Joint Chiefs of Staff.

In addition to the aforementioned Board members, the Secretary of Homeland Security, whenever the U.S. Coast Guard is not operating as a service in the U.S. Navy, may designate two officers of the U.S. Coast Guard, Regular or Reserve, to serve as voting members of the Board.

Board members appointed by the Secretary of Defense, who are not full-time or permanent part-time federal employees, are appointed as experts and consultants under the authority of 5 U.S.C. § 3109, and shall serve as Special Government employees. Pursuant to 10 U.S.C. 175 and 10301, these members shall serve with the exception of travel and per diem for official travel without compensation.

The Assistant Secretaries of the Military Departments listed above are regular government employees and shall serve based upon their positions in the Department of Defense.

The regular government employees listed in subparagraph 6, 7, 8, and 9 who are designated or appointed by the Secretary of Defense shall be renewed on an annual basis.

The Board is authorized to establish Subcommittees or Working Groups, as necessary and consistent with its mission, and these Subcommittees or Working Groups shall operate under the provisions of the Federal Advisory Committee Act, the Government in the Sunshine Act of 1976, and other appropriate federal regulations.

Such Subcommittees or Working Groups shall not work independently of the chartered Board, and shall report their recommendations and advice to the Board for full deliberation and discussion. Subcommittees or Working Groups have no authority to make decisions on behalf of the chartered Board nor can they report directly to the Department of Defense or any Federal officers or employees who are not Group Members.

FOR FURTHER INFORMATION CONTACT: Contact Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Board's Designated Federal Officer, in consultation with the Board's Chairperson. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Reserve Forces Policy Board membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Reserve Forces Policy Board.

All written statements shall be submitted to the Designated Federal Officer for the Reserve Forces Policy Board, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Reserve Forces Policy Board's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Reserve Forces Policy Board. The

Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–10416 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Renewal of Department of Defense Federal Advisory Committees

AGENCY: Department of Defense.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.65, the Department of Defense gives notice that it is renewing the charter for the Board of Visitors, Marine Corps University (hereafter referred to as the Board of Visitors).

The Board of Visitors, pursuant to 10 U.S.C. 7102(e), is a non-discretionary federal advisory committee established to provide independent advice and recommendation on matters pertaining to all aspects of the academic and administrative policies of the Marine Corps University.

While the statute is silent on the criteria and number of committee members, the Secretary of Defense, in consultation with the Secretary of the Navy, has determined that no more than sixteen members will be appointed to the Board of Visitors. The Department of Defense, to achieve a balanced membership, will include a cross-section of experts and eminent authorities in the field of education and the fields of study at the Marine Corps University.

The terms of office for those members appointed by the Secretary of Defense shall be for four years and their appointments are renewed on an annual basis. The Secretary of Defense authorizes the Board of Visitor's voting membership to select the Board's President. The Board of Visitor's President, subject to annual renewal by the Secretary of Defense, shall serve a two-year term as Board President. Members of the Board of Visitors, who are not full-time or permanent part-time Federal employees, are appointed as experts and consultants under the authority of 5 U.S.C. 3109, and shall serve as Special Government employees. Full-time or permanent part-time employees of the University shall not serve on the Board of Visitors or its Subcommittees. With the exception of travel and per diem for official travel, the members shall serve without compensation.

The Department of Defense authorizes the Board's President, in consultation with the Designated Federal Officer and the Committee Management Officer for the Department of Defense, to establish and maintain temporary or ad hoc subcommittees or working groups, as necessary and consistent with the Board's mission. These subcommittees or working groups, shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976 (5 U.S.C 552b, as amended), and other appropriate federal regulations. In addition, the Department of Defense authorizes the Board to maintain two standing subcommittees—the National Museum of the Marine Corps Subcommittee, and the Executive Subcommittee.

Such Subcommittees or Working Groups shall not work independently of the chartered Board of Visitors, and shall report their recommendations and advice to the Board of Visitors for full deliberation and discussion. Subcommittees or Working Groups have no authority to make decisions on behalf of the chartered Board of Visitors nor can they report directly to the Agency or any Federal officers or employees who are not Board of Visitors members.

FOR FURTHER INFORMATION CONTACT: Contact Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Board's Designated Federal Officer, in consultation with the President of Marine Corps University; the Commanding General, Marine Corps Combat Development Command; and the Chair of the Board. The Board of Visitors shall meet at least once per year but will generally meet twice per year. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Board of Visitors, Marine Corps University membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Board of Visitors, Marine Corps University.

All written statements shall be submitted to the Designated Federal Officer for the Board of Visitors, Marine Corps University, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for Board of Visitors, Marine Corps University's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Board of Visitors, Marine Corps University. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E9–10418 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

FOIA Fee Schedule Update

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice.

SUMMARY: The Defense Nuclear Facilities Safety Board is publishing its annual update to the Freedom of Information Act (FOIA) Fee Schedule pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations.

DATES: *Effective Date:* May 1, 2009.

FOR FURTHER INFORMATION CONTACT: Brian Grosner, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (202) 694–7060.

SUPPLEMENTARY INFORMATION: The FOIA requires each federal agency covered by the Act to specify a schedule of fees applicable to processing of requests for agency records. 5 U.S.C. 552(a)(4)(i). On March 15, 1991, the Board published for

comment in the **Federal Register** its proposed FOIA Fee Schedule. 56 FR 11114. No comments were received in response to that notice, and the Board issued a final Fee Schedule on May 6, 1991.

Pursuant to 10 CFR 1703.107(b)(6) of the Board's regulations, the Board's General Manager will update the FOIA Fee Schedule once every 12 months. Previous Fee Schedule updates were published in the **Federal Register** and went into effect, most recently, on May 6, 2008, 73 FR 24957.

Board Action

Accordingly, the Board issues the following schedule of updated fees for services performed in response to FOIA requests:

DEFENSE NUCLEAR FACILITIES SAFETY BOARD SCHEDULE OF FEES FOR FOIA SERVICES

[Implementing 10 CFR 1703.107(b)(6)]

Search or Review Charge	$76.00 per hour.
Copy Charge (paper)	$.12 per page, if done in-house, or generally available commercial rate (approximately $.10 per page).
Electronic Media	$5.00.
Copy Charge (audio cassette)	$3.00 per cassette.
Duplication of DVD	$25.00 for each individual DVD; $16.50 for each additional individual DVD.
Copy Charge for large documents (e.g., maps, diagrams)	Actual commercial rates.

Dated: April 30, 2009.

Brian Grosner,

General Manager.

[FR Doc. E9–10440 Filed 5–5–09; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2009–0030]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Delete a System of Records.

SUMMARY: The Department of the Air Force proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on June 5, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPI, 1800 Air Force Pentagon, Suite 220, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Swilley at (703) 696–6648.

SUPPLEMENTARY INFORMATION: The Department of the Air Force systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The Department of the Air Force proposes to delete a system of records notice from its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed deletion is not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: May 1, 2009.

Morgan E. Frazier,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

F024 AF USTRANSCOM B DoD

SYSTEM NAME:

DoD Transportation Repository Records (June 12, 2008, 73 FR 33413).

REASON:

These records are now covered under F024 AF USTRANSCOM D DoD, Defense Transportation System Records (November 12, 2008, 73 FR 66872), therefore this notice can be deleted.

[FR Doc. E9–10414 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2009–0029]

Privacy Act of 1974; System of Records

AGENCY: Department of the Air Force, DoD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Department of the Air Force proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The proposed action will be effective on June 5, 2009 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Air Force Privacy Act Officer, Office of Warfighting Integration and Chief Information Officer, SAF/XCPPI, 1800 Air Force Pentagon, Washington, DC 20330–1800.

FOR FURTHER INFORMATION CONTACT: Mr. Ben Swilley at (703) 696–6489.

SUPPLEMENTARY INFORMATION: The Department of the Air Force's notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act, were submitted on April 30, 2009 to the House Committee on Oversight and Government Reform, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated February 8, 1996, (February 20, 1996, 61 FR 6427).

Dated: April 30, 2009.

Morgan E. Frazier,

OSD Federal Register Liaison Officer, Department of Defense.

F036 AFPC R

SYSTEM NAME:

Air Force Personnel Accountability and Assessment System (AFPAAS).

SYSTEM LOCATION:

Space and Naval Warfare Systems Center, 53560 Hull Street, San Diego, CA 92152–5001.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Air Force personnel (military, civilian, National Guard, Reserves) and their family members; non-appropriated fund employees; contractors and their family members who are involved in a natural or other man-made major disaster; catastrophic event; or in support of the Global War on Terrorism.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual's full name; home and duty stations addresses; home, business, and cell telephone numbers; military/civilian status; marital status; Social Security Number (SSN); dates of birth; Unit Identification Code (UIC); date of last contact; insurance company; Federal Emergency Management Agency (FEMA) number; email address; dependent information; father/mother name and address, designated person's name and address; contracting agency and telephone number (if contractor); beneficiary information; witness signature, rank, and grade; travel orders/vouchers; assessment date; needs assessment information; type of event; category classification (employee affiliation *i.e.* active duty, guard, reserve, contractor, family member); and command information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force; DoDI 3001.02, Personnel Accountability in conjunction with Natural or Manmade Disasters; AFI 10–218, Personnel Accountability in conjunction with Natural Disasters or National Emergencies and E.O. 9397 (SSN).

PURPOSE(S):

To assess disaster-related needs (*i.e.,* status of family members, housing, medical, financial assistance, employment, pay and benefits, transportation, child care, pastoral care/counseling, and general legal matters) of Air Force personnel and their families who have been involved in a natural or other man-made major disaster or catastrophic event.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Air Force's compilation of systems of records notices also apply to this system and can be viewed at the Defense Privacy Office Web site.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Name, Social Security Number (SSN) and date of birth.

SAFEGUARDS:

Password controlled system, file, and element access is based on predefined need-to-know. Physical access to terminals, terminal rooms, buildings and activities' grounds are controlled by locked terminals and rooms, guards, personnel screening and visitor registers.

RETENTION AND DISPOSAL:

Event and recovery assistance records are destroyed two years after all actions are completed.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Chief Air Expeditionary Force and Personnel Operations Division, Headquarters Air Force Personnel Center, 550 C. Street West, Randolph Air Force Base, Texas 78150–4733.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Deputy Chief Air Expeditionary Force and Personnel Operations Division, Headquarters Air Force Personnel Center, 550 C. Street West, Randolph Air Force Base, Texas 78150–4733.

The request should include individual's full name, Social Security Number (SSN), address, date of birth, and signature.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the Deputy Chief Air Expeditionary Force and Personnel Operations Division, Headquarters Air Force Personnel Center, 550 C. Street West, Randolph Air Force Base, Texas 78150–4733.

The request should include individual's full name, Social Security Number (SSN), address, date of birth, and signature.

CONTESTING RECORD PROCEDURES:

The Air Force's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Air Force Instruction 33–332; 32 CFR part 806; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual; personnel files; Needs Assessment Survey; Defense Manpower Data Center; Defense Civilian Personnel Data System (DCPDS); command personnel and Defense Enrollment Eligibility Reporting System (DEERS).

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. E9–10415 Filed 5–5–09; 8:45 am]

BILLING CODE 5001–05–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting correction.

On April 17, 2009, the Department of Energy published a notice of open meeting announcing a meeting of the Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation 74 FR 17841. In that notice, the main meeting presentation was to be on the Consortium for Risk Evaluation with Stakeholder Participation. Today's notice is announcing that the main meeting presentation will be on American Recovery and Reinvestment Act Funding for the Department of Energy Oak Ridge Environmental Management Program.

Issued in Washington, DC, on May 1, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–10469 Filed 5–5–09; 8:45 am]

BILLING CODE 6450–01–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 petroleum marketing survey forms listed below:

EIA–14, ''Refiners' Monthly Cost Report;''
EIA–182, ''Domestic Crude Oil First Purchase Report;''
EIA–782A, ''Refiners'/Gas Plant Operators' Monthly Petroleum Product Sales Report;''
EIA–782B, ''Resellers'/Retailers' Monthly Petroleum Product Sales Report;''
EIA–782C, ''Monthly Report of Prime Supplier Sales of Petroleum Products Sold For Local Consumption;''
EIA–821, ''Annual Fuel Oil and Kerosene Sales Report;''
EIA–856, ''Monthly Foreign Crude Oil Acquisition Report;''
EIA–863, ''Petroleum Product Sales Identification Survey;''
EIA–877, ''Winter Heating Fuels Telephone Survey;''
EIA–878, ''Motor Gasoline Price Survey;'' and
EIA–888, ''On-Highway Diesel Fuel Price Survey.''

DATES: Comments must be filed by July 6, 2009. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Elizabeth Scott. To ensure receipt of the comments by due date, submission by FAX (202) 586–9739 or e-mail (*elizabeth.scott@eia.doe.gov*) is recommended. The mailing address is Petroleum Division, EI–42, Forrestal Building, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. Alternatively, Elizabeth Scott can be contacted by telephone at (202) 586–1258.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions for the proposed draft collection of the Petroleum Marketing Surveys should be directed to Elizabeth Scott at the address listed above, or go to *http://www.eia.doe.gov/oil_gas/petroleum/survey_forms/pet_survey_forms.html#marketing*.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*) and the DOE Organization Act (42 U.S.C. 7101 *et seq.*) 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.

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.

EIA's petroleum marketing survey forms collect volumetric and price information needed for determining the supply of and demand for crude oil and refined petroleum products. These surveys provide a basic set of data pertaining to the structure, efficiency, and behavior of petroleum markets. These data are published by the EIA on its Web site, *http://www.eia.doe.gov*, as well as in publications such as the *Monthly Energy Review, Annual Energy Review, Petroleum Marketing Monthly, Petroleum Marketing Annual, Week Petroleum Status Report, and the International Energy Outlook*. EIA also maintains a 24-hour telephone hotline number, (202) 586–6966, for the public to obtain retail price estimates for on-highway diesel fuel and motor gasoline.

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 (including possible nonstatistical uses) of the information. For instructions on obtaining materials, see the ''For Further Information Contact'' section.

II. Current Actions

EIA will be requesting a three-year extension of approval to continue collecting nine petroleum marketing surveys (Forms EIA–14, 182, 782A, 782B, 782C, 821, 856, 863, 877, 878, and 888) with no substantive changes to the survey forms or instructions.

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. Please indicate to which form(s) your comments apply.

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 each of the forms in the collection (burden hours per response) are as follows: EIA–14, ''Refiners' Monthly Cost Report (1.75);''
EIA–182, ''Domestic Crude Oil First Purchase Report—Monthly (4.3);''
EIA–782A, ''Refiners'/Gas Plant Operators' Monthly Petroleum Product Sales Report (15);''
EIA–782B, ''Resellers'/Retailers' Monthly Petroleum Product Sales Report (2.5);''
EIA–782C, ''Monthly Report of Prime Supplier Sales of Petroleum Products Sold For Local Consumption (2.1);''
EIA–821, ''Annual Fuel Oil and Kerosene Sales Report (4.4);''
EIA–856, ''Monthly Foreign Crude Oil Acquisition Report (6.1);''
EIA–863, ''Petroleum Product Sales Identification Survey—Quadrennially (1);''
EIA–877, ''Winter Heating Fuels Telephone Survey—Weekly (October–Mid-April (0.1);''
EIA–878, ''Motor Gasoline Price Survey—Weekly (.05);''
and EIA–888, ''On-Highway Diesel Fuel Price Survey—Weekly (.05).'' 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: Federal Energy Administration Act of 1974 (15 U.S.C. §§ 761 *et seq.*), and the DOE Organization Act (42 U.S.C. 7101 *et seq.*).

Issued in Washington, DC, April 30, 2009.

Stephanie Brown,

Director, Statistics and Methods Group, Energy Information Administration.

[FR Doc. E9–10472 Filed 5–5–09; 8:45 am]

BILLING CODE 6450–01–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 revisions and three-year extension to the following Petroleum Supply Forms: EIA–800, ''Weekly Refinery and Fractionator Report,'' EIA–802, ''Weekly Product Pipeline Report,'' EIA–803, ''Weekly Crude Oil Stocks Report,'' EIA–804, ''Weekly Imports Report,'' EIA–805, ''Weekly Terminal Blenders Report,'' EIA–809, ''Weekly Oxygenate Report,'' EIA–810, ''Monthly Refinery Report,'' EIA–812, ''Monthly Product Pipeline Report,'' EIA–813, ''Monthly Crude Oil Report,'' EIA–814, ''Monthly Imports Report,'' EIA–815, ''Monthly Terminal and Blender Report,'' EIA–816, ''Monthly Natural Gas Liquids Report,'' EIA–817, ''Monthly Tanker and Barge Movement Report,'' EIA–819, ''Monthly Oxygenate Report,'' and EIA–820, ''Annual Refinery Report.''

DATES: Comments must be filed by July 6, 2009. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Sylvia Norris. To ensure receipt of the comments by the due date, submission by FAX (202–586–1076) or e-mail (*sylvia.norris@eia.doe.gov*) is recommended. The mailing address is Petroleum Division, EI–42, Forrestal Building, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585. Alternatively, Sylvia Norris may be contacted by telephone at 202–586–6106.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions should be directed to Sylvia Norris at the address listed above. The proposed forms and changes in definitions and instructions are also available on the Internet at: *http://www.eia.doe.gov/oil_gas/petroleum/survey_forms/pet_survey_forms.html.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. No. 93–275, 15 U.S.C. 761 *et seq.*,) and the DOE Organization Act (Pub. L. No. 95–91, 42 U.S.C. 7101 *et seq.*,) 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.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 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. Any comments received help the EIA prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. 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 weekly petroleum supply surveys (Forms EIA–800, EIA–802, EIA–803, EIA–804, EIA–805 and EIA–809) are designed to highlight information on petroleum refinery operations, inventory levels, and imports of selected petroleum products in a timely manner. The information appears in the publications listed below and is also available electronically through the Internet at *http://www.eia.doe.gov/oil_gas/petroleum/info_glance/petroleum.html.*

Publications: Internet only publications are the *Weekly Petroleum Status Report, Short-Term Energy Outlook,* and *This Week in Petroleum.*

The monthly petroleum supply surveys (Forms EIA–810, EIA–812, EIA–813, EIA–814, EIA–815, EIA–816, EIA–817, and EIA–819) are designed to provide statistically reliable and comprehensive information not available from other sources to EIA, other Federal agencies, and the private sector for use in forecasting, policy making, planning, and analysis activities. The information appears in the publications listed below and is also available electronically through the Internet at *http://www.eia.doe.gov/oil_gas/petroleum/info_glance/petroleum.html.*

Publications: Internet only publications are the *Petroleum Supply Monthly, Petroleum Supply Annual,* and *Short-Term Energy Outlook.* Hardcopy and Internet publications are the *Monthly Energy Review* (DOE/EIA–0035), the *Annual Energy Review* (DOE/EIA–0384), and the *Annual Energy Outlook* (DOE/EIA–0383).

The annual petroleum supply survey (Form EIA–820) provides data on the operations of all operating and idle petroleum refineries (including new refineries under construction), blending plants, refineries shutdown with useable storage capacity, and refineries shutdown during the previous year. The information appears in the *Refinery Capacity Report* and in the *Petroleum Supply Annual, Volume 1* are available electronically through the Internet at *http://www.eia.doe.gov/oil_gas/petroleum/info_glance/petroleum.html.*

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 (including possible nonstatistical uses) of the information. For instructions on

obtaining materials, see the **FOR FURTHER INFORMATION CONTACT** section.

II. Current Actions

The EIA proposes the following changes: EIA–800 (Weekly Refinery Report)—Collect gross inputs and gross production rather than net production for the following products: propane (including propylene), fuel ethanol, finished motor gasoline, (reformulated—blended with fuel ethanol, reformulated—other, conventional—blended with fuel ethanol (Ed55 and lower and greater than Ed55), conventional—other; motor gasoline blending components (reformulated blendstock for oxygenate blending (RBOB), conventional blendstock for oxygenate blending (CBOB), gasoline treated as blendstock (GTAB), all other blending components; kerosene, kerosene-type jet fuel (commercial and military), distillate fuel oil (15 ppm sulfur and under, greater than 15 to 500 ppm sulfur (incl.), greater than 500 ppm sulfur) and residual fuel oil. Collect ending stocks of natural gas liquids and liquefied refinery gases, fuel ethanol, kerosene, and asphalt and road oil.

For the form EIA–801 (Weekly Bulk Terminal Report)—Discontinue collection of this report. All bulk terminal and blender reporting will be reported by site on Form EIA–805 (Weekly Bulk Terminal and Blender Report).

For the form EIA–802 (Weekly Product Pipeline Report)—Collect ending stocks for natural gas liquids and liquefied refinery gases, fuel ethanol and kerosene.

For the form EIA–804 (Weekly Imports Report)—Collect imports for crude oil delivered to U.S. Strategic Petroleum Reserve, natural gas liquids and liquefied petroleum gases, fuel ethanol and kerosene. EIA proposes to modify list of countries for which imports of crude oil are collected by discontinuing the collection of crude imports by country for Argentina, China, Indonesia, Iran, Libya, Norway, Qatar, Trinidad, United Arab Emirates, United Kingdom and adding Brazil and Equatorial Guinea.

For the form EIA–805 (Weekly Bulk Terminal and Blender Report)—Collect inventories for natural gas liquids and liquefied refinery gases, propane (including propylene), propylene (nonfuel use), fuel ethanol, finished motor gasoline (reformulated blended with fuel ethanol, reformulated other, conventional (Ed55 and lower, greater than Ed55), conventional other), motor gasoline blending components (RBOB, CBOB, GTAB and all other), kerosene-type jet fuel, kerosene, distillate fuel oil (15 ppm sulfur and under, greater than 15 ppm to 500 ppm sulfur (incl), greater than 500 ppm sulfur), residual fuel oil and asphalt and road oil. Collect inputs and production for fuel ethanol, jet fuel, distillate fuel oil (15 ppm sulfur and under, greater than 15 ppm to 500 ppm sulfur (incl), greater than 500 ppm sulfur), and residual fuel oil

EIA proposes a new weekly form, EIA–809 (Weekly Oxygenate Report) to collect fuel ethanol production (denatured and undenatured) and end of week inventories.

For the form EIA–810 (Monthly Refinery Report)—Add input to catalytic reformers to the list of downstream unit inputs; combine reporting of natural gas liquids and liquefied refinery gases into one area on EIA–810. Collect receipts and fuel use/losses for hydrogen. Collect full material balance for other hydrocarbons. Eliminate combined total for renewable fuels and oxygenates and collect separate totals.

EIA proposes to discontinue collection of form EIA–811 (Monthly Bulk Terminal Report)—All bulk terminal and blender reporting will be reported by site on form EIA–815 (Monthly Bulk Terminal and Blenders Report).

For the form EIA–813 (Crude Oil Report)—Eliminate reporting of crude oil consumed as fuel. Collect receipts of domestic crude oil into Strategic Petroleum Reserve.

For the form EIA–814 (Monthly Imports Report)—Allow reporting of terminal control numbers in lieu of name, city and state for processing company location.

For the form EIA–815 (Monthly Terminal Blenders Report)—Modify natural gas liquids (NGL) and liquefied refinery gases (LRG) reporting so that full line balance is required for total NGPL and LRG rather than for each NGPL and LRG product. Individual NGPL and LRG products will be reported only for ending stocks and inputs. Modify unfinished oils reporting so that a full line balance is required for total unfinished oils rather than for each unfinished oils product. Individual unfinished oils products will be reported for inputs, production and ending stocks. Discontinue collection of production for ethyl tertiary butyl ether (ETBE), methyl tertiary butyl ether (MTBE) and other oxygenates.

For the form EIA–816 (Monthly Natural Gas Liquids Report)—Discontinue collection of inputs of pentanes plus.

For the form EIA–817 (Monthly Tanker and Barge Movement Report)—Discontinue collection of finished motor gasoline (reformulated—blended with ether and reformulated—non-oxygenated); motor gasoline blending components (RBOB—for blending with ether and RBOB—for blending with fuel ethanol); reformulated and conventional GTAB splits and only collect total GTAB.

For the form EIA–819 (Monthly Oxygenate Report)—Collect annually fuel ethanol production capacity measured as nameplate capacity and the maximum sustainable capacity over a 6 month period. Collect inputs, production and ending stocks for denatured and undenatured fuel ethanol. Split reporting of inputs into two sections: denaturants blended with fuel ethanol and blending to produce finished motor gasoline.

For forms EIA–800, EIA–802, EIA–804, EIA–805, EIA–810, EIA–812, EIA–814, EIA–817, and EIA–819, combine finished motor gasoline (reformulated, non-oxygenated and reformulated, blended with ether) into single category labeled reformulated, other; combine motor gasoline blending components (reformulated, blended with ether and reformulated, blended with alcohol) into single category labeled RBOB. Discontinue motor gasoline blending components reformulated and conventional GTAB splits and only collect total GTAB. Collect additional detail for production of finished motor gasoline, conventional (blended with fuel ethanol) by collecting subcategories for Ed55 and lower and greater than Ed55.

For the form EIA–820 (Annual Refinery Report)—Allow reporting of catalytic reformer capacity in barrels per calendar day.

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. Please indicate to which form(s) your comments apply.

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:

Estimated hours per response: EIA–800, ''Weekly Refinery and Fractionator Report,''—1.58 hours; EIA–802, ''Weekly Product Pipeline Report,''—0.95 hours; EIA–803, ''Weekly Crude Oil Stocks Report,''—0.50 hours; EIA–804, ''Weekly Imports Report,''—1.75 hours; EIA–805, ''Weekly Terminal Blenders Report,''—1.50 hours; EIA–809, ''Weekly Oxygenate Report,''—0.30 hours; EIA–810, ''Monthly Refinery Report,''—5.00 hours; EIA–812, ''Monthly Product Pipeline Report,''—3.00 hours; EIA–813, ''Monthly Crude Oil Report,''—1.50 hours; EIA–814, ''Monthly Imports Report,''—2.55 hours; EIA–815, ''Monthly Terminal Blenders Report,''—3.55 hours; EIA–816, ''Monthly Natural Gas Liquids Report,''—0.95 hours; EIA–817, ''Monthly Tanker and Barge Movement Report,''—2.25 hours; EIA–819, ''Monthly Oxygenate Report,''—1.50 hours; and EIA–820, ''Annual Refinery Report''—2.40 hours. 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 forms. They also will become a matter of public record.

Statutory Authority: Federal Energy Administration Act of 1974 (15 U.S.C. 761 *et seq.*), and the DOE Organization Act (42 U.S.C. 7101).

Issued in Washington, DC, April 30, 2009.

Stephanie Brown,

Director, Statistics and Methods Group, Energy Information Administration.

[FR Doc. E9–10471 Filed 5–5–09; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1940–022]

Wisconsin Public Service Corporation; Notice of Request for Extension of License Term and Soliciting Comments, Motions To Intervene, and Protests

April 29, 2009.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of License.

b. *Project No.:* 1940–022.

c. *Date Filed:* April 22, 2009.

d. *Applicant:* Wisconsin Public Service Corporation.

e. *Name and Location of Project:* Tomahawk Hydroelectric Project is located on the Wisconsin River, near Tomahawk, Lincoln County, Wisconsin.

f. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

g. *Applicant Contacts:* Greg Egtvedt, (920) 433–5713, *gwegtvedt@integrysgroup.com* or Terry P. Jensky, Vice President—Energy Supply Operations, (920) 433–5713, *tpjensky@wisconsinpublicservice.com,* Wisconsin Public Service Corporation, 700 North Adams Street, P.O. Box 19001, Green Bay, WI 54307–9001.

h. *FERC Contact:* Diane M. Murray at (202) 502–8838.

i. *Deadline for filing comments, protests, and motions to intervene:* May 29, 2009.

All documents should be filed with Kimberly Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests, and interventions should be filed electronically via the Internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings; otherwise, submit an original and eight copies of your response to the address above. Please include the Project Number (P–1940) on any comments, protests, or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing a document with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the documents on that resource agency.

j. *Description of Application:* The licensee requests that the Commission amend its license term for the Tomahawk Project by extending it by 15 months, to coincide with the expiration of the license for the Grandfather Falls Project on April 1, 2018.

k. This 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 (P–1940) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or e-mail *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the addresses in item g. above.

l. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

m. *Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

n. *Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'', as

applicable, and the Project Number of the particular application to which the filing refers. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

o. *Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representative.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10404 Filed 5–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Project No. 13234–001

City and Borough of Sitka; Notice of Intent to File License Application, Filing of Pre-Application Document, and Approving Use of the Alternative Licensing Procedures

April 29, 2009.

a. *Type of Filing:* Notice of Intent to File License Application, Filing of Pre-Application Document, and Approving Use of the Alternative Licensing Procedures.

b. *Project No.:* 13234–001.

c. *Date Filed:* March 20, 2009.

d. *Submitted By:* City and Borough of Sitka.

e. *Name of Project:* Takatz Lake Hydroelectric Project.

f. *Location:* On the Takatz Lake and Takatz Creek, approximately 20 miles east of the City of Sitka, Alaska, on the east side of Baranof Island. The project would occupy federal lands within the Tongass National Forest, administered by the U.S. Forest Service.

g. *Filed Pursuant to:* 18 CFR section 5.3 of the Commission's regulations.

h. *Applicant Contact:* Christopher Brewton, Utility Manager, City and Borough of Sitka, Electric Department, 105 Jarvis Street, Sitka, Alaska 99835; (907) 747–1870; e-mail at *chrisb@cityofsitka.com.*

i. *FERC Contact:* Joseph Adamson at (202) 502–8085; or e-mail at *joseph.adamson@ferc.gov.*

j. The City and Borough of Sitka filed its request to use the Alternative Licensing Procedures on March 20, 2009. The City and Borough of Sitka stated it provided public notice of its request on March 20, 2008. In a letter dated April 28, 2009, the Director, Division of Hydropower Licensing approved the City and Borough of Sitka's request to use the Alternative Licensing Procedures.

k. With this notice, we are initiating informal consultation with: (a) The U.S. Fish and Wildlife Service and/or NOAA Fisheries under section 7 of the Endangered Species Act and the joint agency regulations thereunder at 50 CFR Part 402; (b) NOAA Fisheries under section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR section 600.920; and (c) the Alaska State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR section 800.2.

l. With this notice, we are designating the City and Borough of Sitka as the Commission's non-federal representative for carrying out informal consultation, pursuant to section 7 of the Endangered Species Act, section 305 of the Magnuson-Stevens Fishery Conservation and Management Act, and section 106 of the National Historic Preservation Act.

m. The City and Borough of Sitka filed a Pre-Application Document (PAD; including a proposed process plan and schedule) with the Commission, pursuant to 18 CFR section 5.6 of the Commission's regulations.

n. A copy of the PAD is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site 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. A copy is also available for inspection and reproduction at the address in item h.

o. 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.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10403 Filed 5–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER09–1025–000]

New England Gas & Electric, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

April 29, 2009.

This is a supplemental notice in the above-referenced proceeding of New England Gas & Electric, Inc.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC, 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is May 19, 2009.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC, 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a

document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10405 Filed 5–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Filings

April 29, 2009.

Regional Transmission Organizations	RT01–99–000, RT01–99–001, RT01–99–002, and RT01–99–003.
Bangor Hydro-Electric Company, *et al*	RT01–86–000, RT01–86–001, and RT01–86–002.
New York Independent System Operator, Inc., *et al*	RT01–95–000, RT01–95–001, and RT01–95–002.
PJM Interconnection, LLC, *et al*	RT01–2–000, RT01–2–001, RT01–2–002, and RT01–2–003.
PJM Interconnection, LLC, ISO New England, Inc	RT01–98–000.
New York Independent System Operator, Inc.	RT02–3–000.

Take notice that PJM Interconnection, LLC, New York Independent System Operator, Inc. and ISO New England, Inc. have posted on their Internet Web sites information updating their progress on the resolution of Regional Transmission Operator seams.

Any person desiring to file comments on this information should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such comments should be filed on or before the comment date. Comments may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: May 21, 2009.

Kimberly D. Bose,

Secretary.

[FR Doc. E9–10402 Filed 5–5–09; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Biomass Research and Development Technical Advisory Committee

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

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee under Section 9008(d) of the Food, Conservation, and Energy Act of 2008. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that agencies publish these notices in the **Federal Register** to allow for public participation. This notice announces the meeting of the Biomass Research and Development Technical Advisory Committee.

Dates and Times: June 2, 2009 at 12:30 pm to 5:30 pm; June 3, 2009 at 8 am to 3 pm.

ADDRESSES: Four Points by Sheraton—Franklin Room CD, 1201 K Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Valri Lightner, Designated Federal Official for the Committee, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; (202) 586–0937 or T.J. Heibel at (410) 997–7778 ext. 223; E-mail: *theibel@bcs-hq.com*.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance that promotes research and development leading to the production of biobased fuels and biobased products.

Tentative Agenda: Agenda will include the following:

- Update on USDA Biomass R&D Activities;
- Update on DOE Biomass R&D Activities;
- DOE Budget Overview;
- USDA Budget Overview;
- Presentation on the Knowledge Discovery Framework (KDF) from Oak Ridge National Laboratory;
- Presentation on the Biomass Crop Assistance Program from the USDA;
- Presentation from the California Air Resources Board (CARB);
- Subcommittee Report-Outs;
- Annual Ethics Training;
- Update on National Agricultural Research, Extension, Education, and Economics (NAREEE) Committee Activities.

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Biomass Research and Development Technical Advisory Committee. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, you should contact Valri Lightner at 202–586–0937; E-mail: *valri.lightner@ee.doe.gov* or T.J. Heibel at (410) 997–7778 ext. 223; E-mail: *theibel@bcs-hq.com*. You must make your request for an oral statement at least 5 business days before the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chair of the Committee will make every effort to hear the views of all interested parties. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. The Chair will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at *http://www.brdisolutions.com/publications/default.aspx#meetings*.

Issued at Washington, DC on April 30, 2009.

Rachel Samuel,

Deputy Committee Management Officer.

[FR Doc. E9–10470 Filed 5–5–09; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2002–0262; FRL–8411–1]

EPA Impact Assessments on Endosulfan; Request for Comments and Additional Information on Importance of Use

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice requests public comment on the Agency's endosulfan impact assessments for eight crops (potato, tomato, cotton, apple, cucumber, squash, pumpkin and melons) and additional information on the importance of endosulfan use in agriculture.

DATES: Comments must be received on or before July 6, 2009.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2002–0262, by one of the following methods:

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

Instructions: Direct your comments on the Agency's impact assessments and importance of endosulfan use to docket ID number EPA–HQ–OPP–2002–0262. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Melanie Biscoe, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7106; fax number: (703) 308–8090; e-mail address: *biscoe.melanie@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including: environmental, human health, and agricultural advocates; the chemical industry, pesticide users, and members of the public interested in the sale, distribution, or the use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What Action Is the Agency Taking?

The Agency has recently completed impact assessments on endosulfan for the following eight crops: Apple, cotton, cucumber, melon, potato, pumpkin, squash, and tomato.

The impact assessments evaluate the impacts on growers that could result from various risk management options, such as cancellation of uses and longer Restricted Entry Intervals (REIs). All stakeholders are encouraged to comment on these assessments, submit additional information for the Agency to consider, and provide data with which the Agency can better define the likely impacts. The impact assessments are available in the electronic docket at *http://www.regulations.gov* under docket ID number EPA–HQ–OPP–2002–0262.

The Agency chose to assess apple, cotton, cucumber, melon, potato, pumpkin, squash, and tomato because they are crops for which endosulfan use is more prevalent (when compared to other crops on which endosulfan is used), and because the Agency received

public comments on several of these crops in response to its 2007 usage analysis available at regulations.gov under docket ID number EPA–HQ–OPP–2002–0262–0063. With regard to the 2007 usage analysis, the Agency received and considered comments from various stakeholders concerning apple, cherry, cotton, peach, pear, potato, cucurbit, pepper, tomato, Christmas tree, macadamia nut, and pineapple uses of endosulfan. The Agency also received but did not consider comments from stakeholders regarding grape and green bean uses of endosulfan because these uses were cancelled as a result of the 2002 Reregistration Eligibility Decision (RED).

In addition to comments on the eight impact assessments, the Agency requests that stakeholders provide any additional information they may have on the importance of endosulfan use in agriculture. In particular, since publishing the 2007 usage analysis, the Agency has not received any comments suggesting that use of endosulfan is important for the following crops:

- Almond,
- Apricot,
- Blueberry,
- Broccoli,
- Brussels spouts,
- Cabbage,
- Carrots,
- Cauliflower,
- Celery,
- Citrus (nonbearing trees and nursery stock),
- Collard greens,
- Crops grown for seed (alfalfa, cabbage, collard greens, cucumber, kale, kohlrabi, melons, pumpkin, radish, rutabaga, squash, turnip),
- Dry beans,
- Dry peas,
- Eggplant,
- Filbert,
- Kale,
- Lettuce,
- Mustard greens,
- Nectarine,
- Ornamental trees, Shrubs, and Woody plants,
- Plum and Prune,
- Sweet corn,
- Sweet potato,
- Strawberry,
- Tobacco,
- Turnip, and
- Walnut.

When commenting on the eight impact assessments and the importance of endosulfan use on the crops listed above, stakeholders may want to consider the following questions:

1. What additional usage information is available to supplement the 2007 and 2009 analyses?

2. What effect would extended REIs or other risk management measures have on the ability of growers to perform necessary post-application activities?

3. For what crops and against what pests is the use of endosulfan critical, and why?

4. Are there any local or niche uses of endosulfan that are critical, and why?

5. What alternatives are available for control of the pests targeted by endosulfan?

In the April 29, 2009 issue of the **Federal Register**, the Agency published a separate Notice to solicit comments on petitions from the National Resources Defense Council and the Pesticide Action Network North America requesting that EPA cancel all uses of endosulfan. Please see docket ID number EPA–HQ–OPP–2008–0615 (FRL–8410–2) in regulations.gov to access the petitions and related documents, as well as to submit comments on the petitioners' requests to cancel all uses of endosulfan.

The Agency asks that comments on the Agency's eight impact assessments and any additional information on the importance of endosulfan use in agriculture be submitted to docket number EPA–HQ–OPP–2002–0262 within 60 days.

B. What Is the Agency's Authority for Taking This Action?

This action is taken under authority of FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3).

List of Subjects

Environmental protection, Pesticides, and pests.

Dated: April 13, 2009.

Richard P. Keigwin, Jr.,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E9–10149 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0191; FRL–8407–7]

Organic Arsenicals; Amendment to Reregistration Eligibility Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's decision to modify certain provisions of the 2006 Reregistration Eligibility Decision (RED) for the organic arsenical pesticides monosodium methanearsonate (MSMA), disodium methanearsonate (DSMA), calcium acid methanearsonate (CAMA), and cacodylic acid and its sodium salt. EPA has reached an agreement in principle with the technical registrants of these pesticides to implement the 2006 RED, which is being revised in part under the terms of the agreement for these pesticides. The Agency's revisions to the organic arsenicals RED reflect public comments received during the comment period on the RED and new data and information submitted by the registrants and other stakeholders.

FOR FURTHER INFORMATION CONTACT: Tom Myers, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8589; fax number: (703) 308–8005; e-mail address: *myers.tom@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket*. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0191. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

2. *Electronic access*. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*.

II. Background

A. What Action Is the Agency Taking?

Section 4 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) directs EPA to reevaluate existing pesticides to ensure that they meet current scientific and regulatory standards. In 2006, EPA issued a RED for the organic arsenicals MSMA, DSMA, CAMA, and cacodylic acid and its sodium salt under section 4(g)(2)(A) of FIFRA. In response to a notice of availability published in the **Federal Register** on August 9, 2006 (71 FR 45554) (FRL–8085–9), the Agency received substantive comments and new data and information from commenters including the technical registrants. The Agency's response to comments is available for viewing in the public docket. EPA and the technical registrants of these pesticides reached an agreement in principle in January 2009 to implement the RED as revised in part under the terms of the agreement. The RED amendment reflects changes resulting from Agency consideration of the comments and new data and information received, as well as the terms of the agreement in principle. The RED amendment for the organic arsenicals concludes EPA's reregistration eligibility decision-making process for these pesticides.

The label table incorporated into the organic arsenicals RED amendment includes modifications which specify label language for the uses of MSMA.

B. What Is the Agency's Authority for Taking This Action?

Section 4(g)(2) of FIFRA, as amended, directs that, after submission of all data concerning a pesticide active ingredient, ''the Administrator shall determine whether pesticides containing such active ingredient are eligible for reregistration,'' before calling in product specific data on individual end-use products and either reregistering products or taking other ''appropriate regulatory action.''

List of Subjects

Environmental protection, Pesticides and pests.

Dated: March 25, 2009.

Richard P. Keigwin, Jr.,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. E9–10330 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0241; FRL–8410–4]

Pesticide Product Registration Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of an application to register the pesticide product Bull Run Japanese and Oriental Beetle Trap containing an active ingredient not included in any previously registered products pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: Leonard Cole, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5412; e-mail address: *cole.leonard@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

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

B. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0241. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the **Federal Register** listings at *http://www.epa.gov/fedrgstr*.

II. Did EPA Approve the Application?

The Agency approved the application after considering all required data on risks associated with the proposed use of Z-7-Tetradec-2-one, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health and safety determinations which show that use of Z-7-Tetradec-2-one in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

III. Approved Application

EPA issued a notice, published in the **Federal Register** of September 5, 2008 (73 FR 51816) (FRL–8353–5), which announced that Bull Run Scientific, VBT, 7400 Beaufont Springs Drive, Suite 300, Richmond, VA 23225–5519, had submitted an application to register the pesticide product, Bull Run Japanese and Oriental Beetle Trap, arthropod pheromone (EPA File Symbol 84565–R), containing attractants and pheromones. This product was not previously registered.

The application was approved on March 30, 2009, as Bull Run Japanese and Oriental Beetle Trap (EPA Registration Number 84565–1) for the control of Japanese and Oriental beetles.

List of Subjects

Environmental protection, Chemicals, Pests and pesticides.

Dated April 21, 2009.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E9–10075 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0045; FRL–8411–2]

Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before June 5, 2009.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number and the pesticide petition number (PP) for the petition of interest as shown in the body of this document, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Chris Pfeifer, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–0031; e-mail address: *pfeifer.chris@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the

public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have a typical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What Action Is the Agency Taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that is the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerance Exemptions

1. *PP 8F7391.* (EPA–HQ–OPP–2009–0127). Valent BioSciences Corporation, 870 Technology Way, Libertyville, IL 60048, proposes to establish an exemption from the requirement of a tolerance for residues of the biochemical plant regulator, *S*-Abscisic Acid; (*S*)-5-(1-hydroxy-2,6,6-trimethyl-4-oxo-1-cyclohex-2-enyl)-3-methyl-penta-(2*Z*,4*E*)-dienoic acid, in or on all food commodities. The petitioner believes no analytical method is needed because application will not result in detectable residues or residues of toxicological concern.

2. *PP 9F7551.* (EPA–HQ–OPP–2009–0237). AgraQuest, Inc., 1540 Drew Avenue, Davis, California, 95618, proposes to establish an exemption from the requirement of a tolerance for residues of the biochemical insecticide and acaricide, Extract of Chenopodium ambrosioides near ambrosioides Mimic (A blend of compounds simulating the already registered active ingredient Extract of Chenopodium ambrosioides near ambrosioides), in or on all food commodities. The petitioner believes no analytical method is needed because an analytical method for residues is not applicable. It is expected that Extract of Chenopodium ambrosioides near ambrosioides Mimic would not result in detectable residues or residues that are of toxicological concern.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 28, 2009.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E9–10505 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0045; FRL–8412–7]

Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before June 5, 2009.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided,

unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

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

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice*. EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have a typical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What Action Is the Agency Taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to

comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerances

1. *PP 8F7455.* (EPA–HQ–OPP–2009–0141). Dow AgroSciences, 9330 Zionsville Road, Indianapolis, IN 46268, proposes to establish a tolerance in 40 CFR part 180 for the combined residues of the herbicide aminopyralid (XDE–750: 4-amino-3,6-dichloropyridine-2-carboxylic acid) and its glucose conjugate, expressed as total parent in or on corn, forage at 0.30 parts per million (ppm); corn, grain at 0.20 ppm; corn, stover at 0.20 ppm. Adequate analytical methods for enforcement purposes are available to monitor residues of aminopyralid in corn commodities, milk, meat and meat by-products. The analytical method uses liquid chromatography and positive ion electrospray tandem spectrometry (LC/MS/MS) with limits of quantitation (LOQ) of 0.01 ppm. The methods had been successfully validated independently by outside laboratories. Aminopyralid had also been tested through the Food and Drug Administration (FDA), Multi-Residue Methodology, Protocols C, D, and E. Contact: Kathyrn Montague, (703) 305–1243, *montague.kathyrn@epa.gov*.

2. *PP 9F7513.* (EPA–HQ–OPP–2009–0261). E. I. DuPont de Nemours and Company, Inc., DuPont Crop Protection (S300/427), Stine-Haskell Research Ctr., 1090 Elkton Rd., P.O. Box 30, Newark, DE 19714–0030, proposes to establish a tolerance in 40 CFR part 180 for residues of the insecticide chlorantraniliprole, 3-bromo-*N*-[4-chloro-2-methyl-6-[(methylamino)carbonyl]phenyl]-1-(3-chloro-2-pyridinyl)-1*H*-pyrazole-5-carboxamide in or on vegetables, tuberous and roots corm, subgroup 1C at 0.01 ppm; corn, sweet; poultry, fat; poultry, meat; and poultry, meat byproducts at 0.02 ppm; corn, field, grain; corn, pop; nut, tree, group 14; and pistachio at 0.04 ppm; cattle, meat; goat, meat; horse, meat; milk; and sheep, meat at 0.05 ppm; corn, processed commodities; egg; peanut; and Ti palm, roots at 0.1 ppm; cacao bean, bean; and rice, grain at 0.15 ppm; cattle, meat byproducts, except liver; goat, meat byproducts, except liver; horse, meat byproducts, except liver; and sheep, meat byproducts, except liver at 0.2 ppm; cattle, fat; cattle, liver; crambe; goat, fat; goat, liver; hare's ear mustard; horse, fat; horse, liver; jojoba; lesquerella; lunaria; milkweed; mustard; oil radish; poppy seed; rapeseed/canola; rice, hulls; rice, straw; rose hip; sesame; sheep, fat; sheep; liver; tallowwood; and tea oil plant at 0.3 ppm; cattle, meat; coffee, bean, green at 0.5 ppm; okra at 0.7 ppm; strawberry at 1 ppm; fruit, pome, group 11 at 1.2 ppm; cacao, roasted beans; and fruit, citrus, group 10 at 1.4 ppm; pineapple at 1.5 ppm; fruit, caneberry, subgroup 13–07A at 1.8 ppm; acerola; corn, aspirated grain fractions; jaboticaba; lychee; papaya; passionfruit; and vegetables, legume, group 6, except soybeans at 2 ppm; apple, wet pomace; coffee, instant; fruit, small vine climbing, subgroup 13–07D at 2.5 ppm; chocolate; cocoa powder; and pineapple process residue at 3 ppm; non-grass animal feeds, group 18, seeds at 3.5 ppm; artichoke; atemoya; avocado; banana; biriba; black sapote; canistel; cherimoya; custard apple; feijoa; figs; fruit, stone, group 12; guava; llama; longan; mango; olive; persimmon; pomegranate; pulasan; rambutan; sapodilla; sapote, mamey; soursop; spanish lime; star apple; starfruit; sugar apple; wax jambu; white sapote (casimiroa) and other cultivars and/or hybrids at 4 ppm; almond, hull; and raisins at 5 ppm; herbs and spices, subgroup 19B, spices at 7 ppm; crayfish at 8 ppm; mint at 9 ppm; vegetables, *Brassica* leafy, group 5 at 11 ppm; asparagus; non-grass animal feeds, group 18, forage and fodder; prickly pear cactus; and Ti palm, leaves at 13 ppm; citrus, dried pulp; and sugarcane, cane at 14 ppm; cereal grains (forage, fodder, and straw), group 16, forage and fodder; grass (forage, fodder, and hay), group 17, forage and fodder; and herbs and spices, subgroup 19A, fresh at 25 ppm; vegetable, foliage of legume, group 7, forage/vines at 30 ppm; olive, oil at 40 ppm; non-grass animal feeds, group 18, hay and straw at 45 ppm; cereal grains (forage, fodder, and straw), group 16, hay and straw; grass (forage, fodder, and hay), group 17, hay and straw; herbs and spices, subgroup 19A, dried; hops; peanut, hay; and vegetables, foliage of legume, group 7, hay at 90 ppm; and sugarcane molasses at 420 ppm. Analytical methods were previously submitted which permit determination of chlorantraniliprole residues in meat, milk, poultry and eggs at appropriate detection levels. Contact: Kable Bo Davis, (703) 306–0415, *davis.kable@epa.gov*.

3. *PP 9F7530.* (EPA–HQ–OPP–2009–0262). Valent U.S.A. Corporation, P.O. Box 8025, Walnut Creek, CA 94596 (as Agent for Sumitomo Chemical Company, Ltd.), proposes to establish a tolerance in 40 CFR part 180 for residues of the insecticide clothianidin (*E*)-1-(2-chloro-1,3-thiazol-5-ylmethyl)-3-methyl-2-nitroguanidine in or on fig at 0.05 ppm and pomegranate at 0.2 ppm. Adequate enforcement methodology (liquid chromatography/mass spectroscopy/mass spectroscopy, LC/MS/MS analysis) is available to enforce the tolerance expression. Contact: Kable Bo Davis, (703) 306–0415, *davis.kable@epa.gov*.

4. *PP 9F7535.* (EPA–HQ–OPP–2009–0205). Valent U.S.A. Corporation, 1600 Riviera Ave., Suite 200, Walnut Creek, CA 94596, proposes to establish a tolerance in 40 CFR part 180 for residues of the herbicide imazosulfuron, (2-chloro-*N*-[[(4,6-dimethoxy-2-pyrimidinyl)amino]carbonyl] imidazo-[1,2-a]pyridine-3-sulfonamide in or on pepper, bell, fruit at 0.02 ppm; pepper, non-bell, fruit at 0.02 ppm; rice, grain at 0.02 ppm; and tomato, fruit at 0.02 ppm. An independently validated analytical method has been submitted for analyzing parent imazosulfuron residues with appropriate sensitivity in all crop commodities for which tolerances are being requested. Contact: Bethany Dalrymple, (703) 347–8072, *dalrymple.bethany@epa.gov*.

New Tolerance Exemptions

1. *PP 8E7354.* (EPA–HQ–OPP–2009–0213). Valent BioSciences Corporation, 870 Technology Way, Libertyville, IL 60048, proposes to establish an exemption from the requirement of a tolerance for residues of 1,2,3-propanetriol, homopolymer, diisooctadecanoate (CAS No. 63705–03–3) in or on animals used for food when used as a pesticide inert ingredient emulsifier in pesticide formulations under 40 CFR 180.930. The petitioner believes no analytical method is needed because this petition is a request for an exemption from the requirement of a tolerance and no analytical method is required. Contact: Elizabeth Fertich, (703) 347–8560, *fertich.elizabeth@epa.gov*.

2. *PP 8E7484.* (EPA–HQ–OPP–2009–0129). Becker Underwood, Inc., 801 Dayton Avenue, Ames, IA 50010, proposes to establish an exemption from the requirement of a tolerance for residues of Carbon Black (CAS No. 1333–86–4) in or on raw agricultural commodity seeds used to grow agricultural crops when used as a pesticide inert ingredient as a seed colorant in pesticide formulations. The petitioner believes no analytical method is needed because this petition is a request for an exemption from the requirement of a tolerance and no analytical method is required. Contact:

Elizabeth Fertich, (703) 347–8560, *fertich.elizabeth@epa.gov*.

3. *PP 9E7541.* (EPA–HQ–OPP–2009–0256). BASF Corporation, 100 Campus Dr., Florham Park, NJ 07932, proposes to establish an exemption from the requirement of a tolerance for residues of 2–Propenoic acid, 2–methyl-, polymers with Bu acrylate, Et acrylate, Me methacrylate and polyethylene glycol methacrylate C16-18-alkyl ethers (CAS No. 890051–63–5) under 40 CFR 180.960 when used as a pesticide inert ingredient as a surfactant in pesticide formulations without limitation. The petitioner believes no analytical method is needed because this petition is a request for an exemption from the requirement of a tolerance and no analytical method is required. Contact: Alganesh Debesai, (703) 308–8353, *debesai.alganesh@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 23, 2009.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E9–10503 Filed 5–5–09; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 012044–002.

Title: MOL/CMA CGM Slot Charter Agreement.

Parties: CMA CGM S.A. and Mitsui O.S.K. Lines, Ltd.

Filing Party: Robert B. Yoshitomi, Esq.; Nixon Peabody LLP; Gas Company Tower; 555 West Fifth Street, 46th Floor, Los Angeles, CA 90013.

Synopsis: The amendment revises the number of slots MOL is authorized to sell to CMA CGM.

Agreement No.: 201196–003.

Title: Los Angeles and Long Beach Marine Terminal Agreement.

Parties: City of Los Angeles and City of Long Beach.

Filing Party: Matthew J. Thomas, Esq.; Troutman Sanders LLP; 401 9th Street, NW., Suite 1000, Washington, DC 20004.

Synopsis: The amendment revises the dates for collection and the amount of certain fees.

By Order of the Federal Maritime Commission.

Dated: May 1, 2009.

Karen V. Gregory,

Secretary.

[FR Doc. E9–10501 Filed 5–5–09; 8:45 am]

BILLING CODE 6730–01–P

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 June 1, 2009.

A. Federal Reserve Bank of Atlanta (Steve Foley, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. FCB Florida Bancorporation, Inc., Orlando, Florida; to merge with Anderen Financial, Inc., and thereby acquire its subsidiary, Anderen Bank, both of Palm Harbor, Florida.

Board of Governors of the Federal Reserve System, May 1, 2009.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E9–10435 Filed 5–5–09; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Standards Committee Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the first meeting of the HIT Standards Committee in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: May 15, 2009, from 9 a.m. to 12 p.m. [Eastern]

ADDRESSES: Mary C. Switzer Building (330 C Street, SW., Washington, DC 20201), Conference Room 1114. Please use the C Street entrance closest to 3rd Street and bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://healthit.hhs.gov*

SUPPLEMENTARY INFORMATION: This is the inaugural meeting of the HIT Standards Committee. Members will be introduced, and a schedule developed for the assessment of policy recommendations from the HIT Policy Committee. Space is limited, seating on a first-come, first-served basis. The meeting will be available via webcast. Because of initial delays in processing members' nominations, the 15 day deadline for notification was not met.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E9–10642 Filed 5–4–09; 4:15 pm]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Policy Committee Meeting

ACTION: Announcement of meeting.

SUMMARY: This notice announces the first meeting of the HIT Policy

Committee in accordance with the Federal Advisory Committee Act (Pub. L. No. 92–463, 5 U.S.C., App.).

DATES: May 11, 2009, from 8:30 a.m. to 11:30 a.m. [Eastern]

ADDRESSES: Hubert H. Humphrey Building (200 Independence Avenue, SW., Washington, DC 20201), Conference Room 505A. Please bring photo ID for entry to a Federal building.

FOR FURTHER INFORMATION CONTACT: *http://healthit.hhs.gov.*

SUPPLEMENTARY INFORMATION: This is the inaugural meeting of the HIT Policy Committee. Members will be introduced. Space is limited, seating on a first-come, first-served basis.

The meeting will be available via webcast. Because of initial delays in processing members' nominations, the 15 day deadline for notification was not met.

Judith Sparrow,

Office of Programs and Coordination, Office of the National Coordinator for Health Information Technology.

[FR Doc. E9–10643 Filed 5–4–09; 4:15 pm]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Understanding Patients' Knowledge and Use of Acetaminophen.'' In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), AHRQ invites the public to comment on this proposed information collection.

This proposed information collection was previously published in the **Federal Register** on February 26th, 2009 and allowed 60 days for public comment. One comment was received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by June 5, 2009.

ADDRESSES: Written comments should be submitted to: AHRQ's OMB Desk Officer by fax at (202) 395–6974 (attention: AHRQ's desk officer) or by e-mail at *OIRA_submission@omb.eop.gov* (attention: AHRQ's desk officer).

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

''Understanding Patients' Knowledge and Use of Acetaminophen''.

This proposed data collection is a qualitative study to preliminarily identify issues that relate to the misuse and overdosing of over-the-counter (OTC) acetaminophen. Toxicity from acetaminophen has been on the rise in the past 3 decades, and is now the most common cause of acute liver failure in the U.S., surpassing viral hepatitis. This data collection has two aims. Aim 1 is to qualitatively explore knowledge, attitudes, beliefs, and practices regarding adult and adolescent self-administration of OTC acetaminophen, and parental administration of OTC acetaminophen to children. To meet Aim 1 focus groups will be conducted with adults and semi-structured interviews will be conducted with adolescents. Aim 2 is to qualitatively explore experiences and practices of key professional informants, including physician and pharmacists, with respect to communicating information on the administration and risks of OTC acetaminophen to consumers and patients. Semi-structured interviews will be conducted with target key informants. The results of this qualitative study will provide an understanding of the relevant issues and will be used to develop a comprehensive survey. A second OMB clearance package will be developed once the questionnaire for the survey is available.

This project is being funded by AHRQ pursuant to a cooperative agreement with the University of Pennsylvania (Award 1 U18HS017991) as part of the Centers for Education and Research on Therapeutics (CERTs) program. The CERTs program is a national initiative, administered by AHRQ in consultation with the Food and Drug Administration, to increase awareness of the benefits and risks of new, existing, or combined uses of therapeutics through education and research. See 42 U.S.C. 299b.–1(b).

Method of Collection

Aim I—Focus Groups and Individual Interviews

Four focus groups will be conducted with parents of young children to examine administration of acetaminophen to children. Four focus groups will also be conducted with adults to identify the issues, barriers, and psychosocial factors surrounding how, when, and why OTC acetaminophen is used. Focus groups will each have 6 to 8 participants. Semi-structured interviews will be conducted with adolescents to examine self-administration of acetaminophen among this group. Content areas to be explored are: a. knowledge about acetaminophen: brands, terms, combinations, dosage, administration, indications; b. beliefs about benefits and risks, including thresholds for toxicity and death; c. patterns and frequency of use; d. sources of information (e.g., physicians, pharmacists, media); e. related experiences in peers (e.g., advice, reports of toxicity); and f. views about labeling, packaging and legislation (e.g., restrictions in sales).

Aim 2—Semi-Structured Interviews With Physicians and Pharmacists

Twenty primary care physicians and 20 pharmacists will be interviewed. Primary care physicians will be recruited through a primary care research network of physicians from both private and public clinics. Pharmacists will be recruited at pharmacy facilities from hospitals and clinics. Interviews will be conducted over the phone or in person, according to the participant's preference, and will last approximately 20 minutes. All interviews will be audio-taped and transcribed. Participants will be asked about the following: a. frequency and patterns of interaction with consumers and patients with respect to acetaminophen; b. types of information provided to consumers; c. availability of education materials; and d. views about labeling, packaging and legislation.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in this project. The screening form will be completed by all participants and is expected to take approximately 3 minutes to complete. Focus groups will include populations: parents of children ó8 years of age and adults, and will last about 1½ hours. Semi-structured interviews will be conducted with 20 adolescents, 20 primary care physicians, and 20 pharmacists and will last 20 to

30 minutes. The self-administered questionnaire will be completed by the focus group participants and the adolescent participants of the semi-structured interviews, and will take about 6 minutes to complete. The total burden for all participants is estimated to be 134 hours.

Exhibit 2 shows the estimated annualized cost burden for the respondent's time to participate in the project. The total cost is estimated to be $2,001.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Data collection mode	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Screening form	124	1	3/60	6
Self-administered questionnaire	84	1	6/60	8
Focus group with parents of children ó8 years of age (4 groups of 8 participants)	32	1	1.5	48
Focus group with adults (4 groups of 8 participants)	32	1	1.5	48
Semi-structured interviews with adolescents (13 to 20 years of age)	20	1	30/60	10
Semi-structured interview with primary care physicians	20	1	20/60	7
Semi-structured interviews with pharmacists	20	1	20/60	7
Total	332			134

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Data collection mode	Number of respondents	Total burden hours	Average hourly wage rate*	Total cost burden
Screening form	124	6	$10.30	$62
Self-administered questionnaire	84	8	10.30	82
Focus groups with parents of children ó8 years of age (4 groups of 8 participants)	32	48	10.30	494
Focus groups with adults (4 groups of 8 participants)	32	48	10.30	494
Semi-structured interviews with adolescents (13 to 20 years of age)	20	10	10.30	103
Semi-structured interviews with primary care physicians	20	7	61.10	428
Semi-structured interviews with pharmacists	20	7	48.22	338
Total	332	134		2,001

* Patient average hourly wage based on the average per capita income of $21,435 (computed into an hourly wage rate of $10.30) in Harris County, Texas where the study will take place. Provider hourly wage based on the following estimates from National Compensation Survey: Occupational wages in the United States 2006, U.S. Department of Labor, Bureau of Labor Statistics: primary care physician = $61.10/hour; pharmacist = $48.22/hour.

Estimates of Annualized Cost to the Government

Exhibit 3 shows the estimated cost to the Federal government for this six-month project. The total cost is $164,440. This amount includes all direct and indirect costs of the design, data collection, analysis, and reporting phase of the study.

EXHIBIT 3—ESTIMATED COST

Cost component	Total cost
Project Development	$13,250
Data Collection Activities	61,699
Data Processing and Analysis	14,080
Publication of Results	750
Project Management	17,000
Overhead	57,661
Total	164,440

Request for Comments

In accordance with the above-cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research, quality improvement and information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: April 23, 2009.

Carolyn M. Clancy,

Director.

[FR Doc. E9–10407 Filed 5–5–09; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project: ''Medical

Expenditure Panel Survey (MEPS) Household Component and the MEPS Medical Provider Component Through 2012.'' In accordance with the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)), AHRQ invites the public to comment on this proposed information collection.

DATES: Comments on this notice must be received by July 6, 2009.

ADDRESSES: Written comments should be submitted to: Doris Lefkowitz, Reports Clearance Officer, AHRQ, by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

Copies of the proposed collection plans, data collection instruments, and specific details on the estimated burden can be obtained from the AHRQ Reports Clearance Officer.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by e-mail at *doris.lefkowitz@ahrq.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Project

''Medical Expenditure Panel Survey (MEPS) Household Component and the MEPS Medical Provider Component Through 2012''

AHRQ seeks to renew the Medical Expenditure Panel Survey Household Component (MEPS–HC) and the MEPS Medical Provider Component (MEPS–MPC) through the year 2012. For over thirty years, the results of the MEPS and its predecessor surveys (the 1977 National Medical Care Expenditure Survey, the 1980 National Medical Care Utilization and Expenditure Survey and the 1987 National Medical Expenditure Survey) have been used by OMB, DHHS, Congress and a wide number of health services researchers to analyze health care use, expenses and health policy. AHRQ is authorized to conduct the MEPS pursuant to 42 U.S.C. 299b–2.

Major changes continue to take place in the health care delivery system. The MEPS is needed to provide information about the current state of the health care system as well as to track changes over time. The current MEPS design, unlike the previous periodic surveys, permits annual estimates of use of health care and expenditures and sources of payment for that health care. It also permits tracking individual change in employment, income, health insurance and health status over two years. The use of the National Health Interview Survey (NHIS) as a sampling frame expands the surveys' analytic capacity by providing another data point for comparisons over time.

The MEPS–HC and MEPS–MPC are two of three components of the MEPS:

MEPS–HC is a sample of households participating in the National Health Interview Survey (NHIS) in the prior calendar year that are interviewed 5 times over a 2½ year period. These 5 interviews yield two years of information on use of and expenditures for health care, sources of payment for that health care, insurance status, employment, health status and health care quality.

MEPS–MPC collects information from medical and financial records maintained by hospitals, physicians, pharmacies, health care institutions, and home health agencies named as sources of care by household respondents.

Insurance Component (MEPS–IC): The MEPS–IC collects information on establishment characteristics, insurance offerings and premiums from employers. The MEPS–IC is conducted by the Census Bureau for AHRQ and is cleared separately.

This request is for the MEPS–HC and MEPS–MPC only.

Method of Collection

The MEPS is designed to meet the need for information to estimate health expenses, insurance coverage, access, use and quality. Households selected for participation in the MEPS are interviewed five times in person. These rounds of interviewing are spaced about 5 months apart. The interview will take place with a family respondent who will report for him/herself and for other family members.

After a preliminary mail contact containing an advance letter, households will be mailed MEPS record keeping materials (a calendar) and a DVD and brochure. After the advance contact, households will be contacted for the first of five in-person interviews. The interviews are conducted as a computer assisted personal interview (CAPI). The CAPI instrument is organized as a core instrument that will repeat unchanged in each of the rounds. Additional sections are asked only once a year and provide greater depth. Dependent interviewing methods in which respondents are asked to confirm or revise data provided in earlier interviews will be used to update information such as employment and health insurance data after the round in which such data are usually collected. The main data collection modules for the MEPS–HC are as follows:

Household Component Core Instrument. The core instrument collects data about persons in sample households. Topical areas asked in each round of interviewing include condition enumeration, health status, health care utilization including prescribed medicines, expense and payment, employment, and health insurance. Other topical areas that are asked only once a year include access to care, priority conditions, income, assets, satisfaction with health plans and providers, childrens health, adult preventive care. While many of the questions are asked about the entire reporting unit (RU), which is typically a family, only one person normally provides this information.

Adult Self Administered Questionnaire. A brief self-administered questionnaire (SAQ), administered once a year in rounds 2 and 4, will be used to collect self-reported (rather than through household proxy) information on health status, health opinions and satisfaction with health care for adults 18 and older.

Diabetes Care SAQ. A brief self administered questionnaire on the quality of diabetes care is administered once a year in rounds 3 and 5 to persons identified as having diabetes.

Permission forms for the MEPS–MPC. As in previous panels of the MEPS, we will ask respondents for permission to obtain supplemental information from their medical providers (hospitals, physicians, health care institutions, home health agencies and pharmacies).

MEPS–MPC Instruments

The main objective of the MEPS–MPC is a collection of data from medical providers that will serve as an imputation source of medical expenditure and source of payment data reported by household respondents. This data will supplement, replace and verify information provided by household respondents about the charges, payments, and sources of payment associated with specific health care encounters. The questionnaires used in the MEPS–MPC vary according to type of provider. The data collection instruments are as follows:

Home Care for Health Care Providers Questionnaire. This questionnaire is used to collect data from home health care agencies which provide medical care services to household respondents. Information collected includes type of personnel providing care, hours or visits provided per month, and the charges and payments for services received.

Home Care Provider Questionnaire for Non-Health Care Providers. This is used to collect information about services provided in the home by non-health care workers to household respondents because of a medical condition; for example, cleaning or yard work, transportation, shopping, or child care.

Office-based Providers Questionnaire. This questionnaire is for the office-based physician sample, including doctors of medicine (MD5) and osteopathy (DOs), as well as providers practicing under the direction or supervision of an MO or DO (*e.g.,* physician assistants and nurse practitioners working in clinics). Providers of care in private offices as well as staff model HMOs are included.

Separately Billing Doctors Questionnaire. Information from physicians identified by hospitals as providing care to sampled persons during the course of inpatient stays, outpatient department or emergency room care, but who bill separately from the hospital, is collected in this questionnaire.

Hospitals Questionnaire. This questionnaire is used to collect information about hospital events, including inpatient stays, outpatient department, and emergency room visits. Hospital data are collected not only from the billing department, but from medical records and administrative records departments as well. Medical records departments are contacted to determine the names of all the doctors who treated the patient during a stay or visit. In many cases, the hospital administrative office also has to be contacted to determine whether the doctors identified by medical records billed separately from the hospital itself.

Institutions Questionnaire. This questionnaire is used to collect data from health care institutions providing care to sampled persons and includes nursing homes, assisted living facilities, rehabilitation facilities, as well as any other health care facilities providing health care to a sampled person.

Pharmacies Questionnaire. This questionnaire requests the prescription name, NDC code, date prescription was filled, payments by source, prescription strength, form and quantity, and person for whom the prescription was filled. Most pharmacies have the requested information available in electronic format and respond by providing a computer generated printout of the patient's prescription information. If the computerized form is unavailable, the pharmacy can report their data to a telephone interviewer.

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated annualized burden hours for the respondents' time to participate in the MEPS–HC and MEPS–MPC. The MEPS–HC Core Interview will be completed by 15,000 ''family level'' respondents, also referred to as RU respondents. Since the MEPS–HC consists of 5 rounds of interviewing covering a full two years of data, the annual average number of responses per respondent is 2.5 responses per year. The MEPS–HC core requires an average response time of 1 and Y2 hours to administer. The Adult SAQ will be completed once a year by each person in the RU that is 18 years old and older, an estimated 21,000 persons. The Adult SAQ requires an average of 7 minutes to complete. The Diabetes care SAQ will be completed once a year by each person in the RU identified as having diabetes, an estimated 1,800 persons and takes about 3 minutes to complete. Permission forms for the MEPS–MPC will be completed once for each medical provider seen by any RU member. Each of the 15,000 RUs in the MEPS–HC will complete an average of 5.2 forms, which require about 3 minutes each to complete. The total annual burden hours for the MEPS–HC is estimated to be 62,690 hours.

The MEPS–MPC uses 7 different questionnaires; 6 for medical providers and 1 for pharmacies. Each questionnaire is relatively short and requires 3 to 5 minutes to complete. The total annual burden hours for the MEPS–HC and MPC is estimated to be 82,767 hours.

Exhibit 2 shows the estimated annual cost burden associated with the respondents' time to participate in this information collection. The annual cost burden for the MEPS–HC is estimated to be $1,226,216; the annual cost burden for the MEPS–MPC is estimated to be $285,965.

EXHIBIT 1—ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
MEPS–HC:				
MEPS–HC Core Interview	15,000	2.5	1.5	56,250
Adult SAQ	21,000	1	7/60	2,450
Diabetes care SAQ	1,800	1	3/60	90
Permission forms for the MEPS–MPC	15,000	5.2	3/60	3,900
Subtotal for the MEPS–HC	52,800	na	na	62,690
MEPS–MPC:				
Home care for health care providers questionnaire	441	6.5	5/60	239
Home care for non-health care providers questionnaire	23	6.6	5/60	13
Office-based providers questionnaire	13,665	5.8	5/60	6,605
Separately billing doctors questionnaire	12,450	2	3/60	1,245
Hospitals questionnaire	5,402	6.5	5/60	2,926
Institutions (non-hospital) questionnaire	72	1.5	5/60	9
Pharmacies questionnaire	7,760	23.3	3/60	9,040
Subtotal for the MEPS–MPC	39,813	na	ia	20,077
Grand Total	92,613	na	ia	82,767

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN

Form mode	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
MEPS–HC:				
MEPS–HC Core Interview	15,000	56,250	$19.56	$1,100,250

EXHIBIT 2—ESTIMATED ANNUALIZED COST BURDEN—Continued

Form mode	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Adult SAQ	21,000	2,450	19.56	47,922
Diabetes care SAQ	1,800	90	19.56	1,760
Permission forms for the MEPS–MPC	15,000	3,900	19.56	76,284
Subtotal for the MEPS–HC	52,800	62,690	na	1,226,216
MEPS–MPC:				
Home care for health care providers questionnaire	441	239	14.24	3,403
Home care for non-health care providers questionnaire	23	13	19.56	254
Office-based providers questionnaire	13,665	6,605	14.24	94,055
Separately billing doctors questionnaire	12,450	1,245	14.24	17,729
Hospitals questionnaire	5,402	2,926	14.24	41,666
Institutions (non-hospital) questionnaire	72	9	14.24	128
Pharmacies questionnaire	7,760	9,040	14.24	128,730
Subtotal for the MEPS–MPC	39,813	20,077	na	285,965
Grand Total	92,613	82,767	na	1,512,181

*Based upon the mean of the average wages for Healthcare Support Workers, All Other (31–9099) and All Occupations (00–0000), Occupational Employment Statistics, May 2007 National Occupational Employment and Wage Estimates United States, U.S. Department of Labor, Bureau of Labor Statistics. *http://www.bls.gov/oes/current/oes_nat.htm#b29-0000.*

Estimated Annual Costs to the Federal Government

Exhibit 3 shows the total and annualized cost of this information collection. The cost associated with the design and data collection of the MEPS–HC and MEPS–MPC is estimated to be $47.6 million in each of the next three fiscal years.

EXHIBIT 3—ESTIMATED TOTAL AND ANNUALIZED COST

Cost component	Total cost (in million)	Annualized cost (in million)
Sampling Activities	$2.79	$0.93
Interviewer Recruitment and Training	8.52	2.84
Data Collection Activities	86.7	28.9
Data Processing	21.39	7.13
Production of Public Use Data Files	19.53	6.51
Project Management	3.93	1.31
Total	142.8	47.6

Request for Comments

In accordance with the above-cited Paperwork Reduction Act legislation, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed collection(s) 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 upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: April 27, 2009.

Carolyn M. Clancy,

Director.

[FR Doc. E9–10406 Filed 5–5–09; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0487] (formerly Docket No. 2007D–0260)

Compliance Policy Guide; ''Sec. 110.310 Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002;'' Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a Compliance Policy Guide (CPG) entitled ''Sec. 110.310 Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.'' The CPG provides written guidance to FDA's and

Customs and Border Protection's (CBP's) staff on enforcement of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) and the agency's implementing regulations, which require prior notice for food imported or offered for import into the United States.

DATES: Submit written or electronic comments concerning the CPG at any time.

ADDRESSES: Submit written comments on the CPG to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the CPG.

Submit written requests for single copies of the CPG to the Division of Compliance Policy (HFC–230), Office of Enforcement, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Send two self-addressed adhesive labels to assist that office in processing your request, or fax your request to 240–632–6861.

FOR FURTHER INFORMATION CONTACT: Laura Draski, Office of Regulatory Affairs (HFC–100), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 866–521–2297.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of November 7, 2008 (73 FR 66411), FDA announced the availability of a draft CPG entitled ''Sec. 110.310 Prior Notice of Imported Food Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002.'' After considering the one comment received, FDA revised the CPG, with CBP concurrence, where appropriate. The revised CPG provides written guidance to FDA's and CBP's staff on enforcement of section 307 of the Bioterrorism Act and the agency's implementing regulations, which require prior notice for food imported or offered for import into the United States.

FDA is issuing this CPG as level 1 guidance consistent with FDA's good guidance practices regulation (21 CFR 10.115). The CPG represents the agency's current thinking on its enforcement policy concerning prior notice. It does not create or confer any rights for or on any person and does not operate to bind FDA, or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic copies or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The CPG and received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

III. Electronic Access

An electronic version of the CPG is available on the Internet at *http://www.fda.gov/ora* under ''Compliance References.''

Dated: April 29, 2009.

Michael A. Chappell,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. E9–10556 Filed 5–4–09; 4:15 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Small Molecule Activators of Human Pyruvate Kinase for Treatment of Cancer and Enzyme-Deficient Hemolytic Anemia

Description of Technology: NIH investigators have discovered a series of small compounds with the potential to treat a variety of cancers as well as hemolytic anemia. Contrary to most cancer medications, these molecules can be non-toxic to normal cells because they target a protein specific to the metabolic pathways in tumors, thus representing a significant clinical advantage over less-specific chemotherapeutics.

The invention described here is a series of small molecules that activate pyruvate kinase (PK) isoform M2. PK–M2 is a critical metabolic enzyme that is affected in all forms of cancer. Inactivation of PK–M2 leads to a buildup of metabolic intermediates inside the cell. Tumor cells require a buildup of metabolic intermediates in order to undergo rapid cell growth and proliferation. Hence, activation of PK–M2 in tumor cells may prevent the buildup of metabolic intermediates and thereby stall tumor cell proliferation or destroy the tumor cells. Further, while in normal adult cells only PK isoforms R, L, or M1 are active, in all tumors only PK–M2 is active. Therefore, PK–M2 activation would affect only tumor cells, and small-molecule PK–M2 activators are not expected to be toxic to healthy cells.

In addition, in patients with PK–R deficiency the buildup of metabolic intermediates in red blood cells ultimately leads to the loss of water from the cells and cell death. Small-molecule induced activation of PK–R in PK-deficient red blood cells may enhance vitality of these cells and decrease or eliminate enzyme-deficient hemolytic anemia in a patient.

Applications: Therapeutic for cancer; Therapeutic for enzyme-deficient hemolytic anemia.

Development Status: Early stage.

Market: In the United States in 2008, approximately 1.4 million people were diagnosed with cancer. In addition, approximately 12,000 people in the United States are chronically affected by PK-deficient hemolytic anemia.

Inventors: Craig J. Thomas et al. (NHGRI).

Publications: In preparation.

Patent Status: U.S. Provisional Application No. 61/104,091 filed 09 Oct 2008 (HHS Reference No. E–326–2008/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Steve Standley, PhD; 301–435–4074; *sstand@od.nih.gov.*

Collaborative Research Opportunity: The NIH Chemical Genomics Center is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize appropriate lead compounds described in U.S. Provisional Application No. 61/199,763. Please contact Dr. Craig J. Thomas via e-mail (*craigt@nhgri.nih.gov*) for more information.

Polyclonal Antibodies to the Kidney Protein Sodium-Hydrogen Exchanger 3 (NHE3)

Description of Technology: Antibodies to NHE3, useful for immunoblotting and immunocytochemistry, are available to resell for research purposes. NHE3 is a membrane Na+/H+ exchanger involved in maintenance of fluid volume homeostasis in the kidney. It is expressed on the apical membrane of the renal proximal tubule and plays a major role in NaCl and HCO_3 absorption. The inventor has developed rabbit polyclonal antibodies directed against a peptide sequence common to human, rat and mouse NHE3.

Applications: Western blotting and immunocytochemistry.

Inventor: Mark A. Knepper (NHLBI).

Related Publication: Unpublished.

Patent Status: HHS Reference No. E–253–2008/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Status: This technology is available as a research tool under a Biological Materials License.

Licensing Contact: Steve Standley, Ph.D.; 301–435–4074; *sstand@od.nih.gov*.

Polyclonal Antibodies to Thiazide-Sensitive Sodium-Chloride Cotransporter (NCC)

Description of Technology: Antibodies to thiazide-sensitive sodium-chloride cotransporter (NCC), useful for immunoblotting and immunocytochemistry, are available to resell for research purposes. NCC is found on the apical membrane of the distal convoluted tubule, where it is the principal mediator of Na+ and CI reabsorption in this segment of the nephron. NCC is the target of thiazide diuretics used in the treatment of hypertension. The inventors have developed rabbit polyclonal antibodies directed against a peptide sequence in the C-terminal region of NCC.

Applications: Western blotting and immunohistochemistry.

Inventor: Mark A. Knepper (NHLBI).

Related Publication: HL Biner, MP Arpin-Bott, J Loffing, X Wang, M Knepper, SC Hebert, B Kaissling. Human cortical distal nephron: distribution of electrolyte and water transport pathways. J Am Soc Nephrol. 2002 Apr;13(4):836–847.

Patent Status: HHS Reference No. E–254–2008/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Status: This technology is available as a research tool under a Biological Materials License.

Licensing Contact: Steve Standley, Ph.D.; 301–435–4074; *sstand@od.nih.gov*.

Polyclonal Antibodies to NKCC2, a Kidney-Specific Member of the Cation Chloride Co-transporter Family, SLC12A1

Description of Technology: Antibodies to NKCC2, useful for immunoblotting and immunocytochemistry, are available to resell for research purposes. NKCC2 is found on the apical surface of the thick ascending limb of the loop of Henle, where it facilitates transport of sodium, potassium, and chloride ions from the lumen of the renal thick ascending limb into the cell. Transport of sodium dilutes the luminal fluid, decreasing its osmolality creating an osmotic driving force for water reabsorption in the connecting tubule and cortical collecting duct under the influence of the hormone vasopressin. NKCC2 is blocked by loop diuretics such as furosemide. The inventor has developed rabbit polyclonal antibodies directed against a peptide sequence in the N-terminal tail of NKCC2.

Applications: Western blotting and immunocytochemistry.

Inventor: Mark A. Knepper (NHLBI).

Related Publications:

1. GH Kim, CA Ecelbarger, C Mitchell, RK Packer, JB Wade, MA Knepper. Vasopressin increases Na-K–2CI cotransporter expression in thick ascending limb of Henle's loop. Am J Physiol. 1999 Jan;276(1 Pt 2):F96–F103.

2. HL Brooks, AJ Allred, KT Beutler, TM Cofiman, MA Knepper. Targeted proteomic profiling of renal Na+ transporter and channel abundances in angiotensin II type 1a receptor knockout mice. Hypertension. 2002 Feb;39(2 Pt 2):470–473.

Patent Status: HHS Reference No. E–255–2008/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Status: This technology is available as a research tool under a Biological Materials License.

Licensing Contact: Steve Standley, Ph.D.; 301–435–4074; *sstand@od.nih.gov*.

Polyclonal Antibodies to the Kidney Protein Urea Transporter 1 (UTA1)

Description of Technology: Antibodies to UTA1, useful for immunoblotting and immunocytochemistry, are available to resell for research purposes. Urea Transporter 1 (UTA1) is activated by vasopressin and is responsible for urea transport across the apical membrane into the intracellular space within the renal inner medullary collecting duct. The inventor has developed rabbit polyclonal antibodies directed against a peptide sequence in human UTA1. Antibody also recognizes UTA3, another product of the same gene.

Applications: Western blotting and immunocytochemistry.

Inventor: Mark A. Knepper (NHLBI).

Related Publication: S Nielsen, J Terris, CP Smith, MA Hediger, CA Ecelbarger, MA Knepper. Cellular and subcellular localization of the vasopressin-regulated urea transporter in rat kidney. Proc Natl Acad Sci USA. 1996 May 28;93(11):5495–500.

Patent Status: HHS Reference No. E–268–2008/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Status: This technology is available as a research tool under a Biological Materials License.

Licensing Contact: Steve Standley, Ph.D.; 301–435–4074; *sstand@od.nih.gov*.

Dated: April 28, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–10452 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and

development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; *telephone:* 301/496–7057; *fax:* 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Genetic Mutations Associated With Stuttering

Description of Technology: NIH investigators, for the first time, identified specific mutations associated with stuttering. These mutations are located within the genes encoding three enzymes, Glc-NAc phosphotransferase catalytic subunit [GNPTAB], Glc-NAc phosphotransferase recognition subunit [GNPTG], and N-acetylglucosamine-1-phosphodiester alpha-N-acetylglucosaminidase [NAGPA]. Together these constitute the pathway that targets lysosomal enzymes to their proper location. This pathway is associated with lysosomal storage disorders, and thereby this discovery provides potential novel therapeutic targets for amelioration of stuttering. This discovery has the potential to facilitate DNA-based (micro-array) testing among individuals who stutter, as well as enzyme-replacement therapy and small-molecule chaperone therapy for treatment of stuttering. The mutations described in this invention may account for up to 5–10% of this disorder in individuals who stutter, estimated to represent 60,000–120,000 individuals in the United States.

Applications: Genetic diagnosis of stuttering disorder; Therapeutics for stuttering disorder.

Development Status: Early stage.

Market: According to the Stuttering Foundation of America, stuttering affects over 3 million individuals in the United States.

Inventors: Dennis T. Drayna (NIDCD), Changsoo P. Kang (NIDCD), et al.

Patent Status: U.S. Provisional Application No. 61/150,954 filed 02 Feb 2009 (HHS Reference No. E–084–2009/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Suryanarayana (Sury) Vepa, Ph.D., J.D.; 301–435–5020; *vepas@mail.nih.gov*.

Mast Cells Defective in the Syk Protein Tyrosine Kinase

Description of Technology: NIH investigators, through screening for variants of RBL–2H3 cells, have identified and developed TB1A2 mast cells that are defective in the expression of the Syk protein tyrosine kinase. These cells had no detectable Syk protein by immunoblotting or in vitro kinase reaction, and no detectable Syk mRNA by Northern hybridization. These TB1A2 cells failed to secrete or generate cytokines after high affinity receptor for immunoglobulin E (Fc epsilon RI) stimulation. In these Syk-deficient TB1A2 cells, aggregation of these receptors did not induce histamine release and there was no detectable increase in total cellular protein tyrosine phosphorylation. However, stimulation of these cells with the calcium ionophore did induce degranulation. These cells provide a useful experimental model to study the role of Syk tyrosine kinase in signal transduction pathways in immune cells.

Inventors: Juan Zhang, Elsa H. Berenstein, and Reuben P. Siraganian (NIDCR).

Publication: J Zhang, EH Berenstein, RL Evans, RP Siraganian. Transfection of Syk protein tyrosine kinase reconstitutes high affinity IgE receptor-mediated degranulation in a Syk-negative variant of rat basophilic leukemia RBL–2H3 cells. J Exp Med. 1996 July 1;184(1):71–79.

Patent Status: HHS Reference No. E–342–2008/0—Research Tool. Patent protection is not being pursued for this technology.

Licensing Status: Available for licensing under a Biological Materials License Agreement.

Licensing Contact: Suryanarayana (Sury) Vepa, Ph.D., J.D.; 301–435–5020; *vepas@mail.nih.gov*.

Collaborative Research Opportunity: The National Institute of Dental and Craniofacial Research, Oral Infection and Immunity Branch, Receptors and Signal Transduction Section, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this technology. Please contact David W. Bradley, Ph.D. at 301–402–0540 or *bradleyda@nidcr.nih.gov* for more information.

Novel Means of Regulation of Gene Expression: Modular and Artificial Splicing Factors

Description of Technology: This discovery provides a new therapeutic approach for treatment of diseases caused by altered gene regulation resulting from defective alternative splicing of genes. This technology offers the following advantages over currently available methods for regulating splicing: (a) Delivery can be through standard gene therapy methods, such as viral vectors, (b) site of delivery of the artificial splicing factors can be controlled, which enables targeted expression and limited side effects, and (c) the artificial splicing factors described here can be readily adapted to a variety of splicing effector modules. This invention provides proteins that combine an RNA recognition module that can specifically target an endogenous pre-mRNA with splicing effector modules that alter splicing to favor a particular isoform of a mature mRNA.

The artificial splicing factors disclosed here can be used to treat conditions requiring directed alternative splicing. For example, the artificial splicing factors described here can be used in combination with other anti-tumor drugs as a cancer treatment. Other examples where this technology may find use include diabetes (insulin receptor), psoriasis (fibronectin), polycystic kidney disease (PKD2), and prostate cancer (fibroblast growth factor receptor 2).

Applications: Therapeutics for diabetes, psoriasis, polycystic kidney disease, and prostate cancer; Research Tools.

Development Status: Early stage.

Inventors: Traci M. T. Hall (NIEHS), et al.

Patent Status: U.S. Provisional Application No. 61/140,326 filed 23 Dec 2008 (HHS Reference No. E–334–2008/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Suryanarayana (Sury) Vepa, Ph.D., J.D.; 301–435–5020; *vepas@mail.nih.gov*.

Collaborative Research Opportunity: The NIEHS Division of Intramural Research is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize Modular and Artificial Splicing Factors. Please contact Elizabeth M. Denholm, Ph.D. at 919–541–0981 or *denholme@niehs.nih.gov* or Traci Hall, Ph.D. at *hall4@niehs.nih.gov* for more information.

Dated: April 29, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–10450 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Method of Detecting and Quantifying Contaminants in Heparin Preparations

Description of Technology: Heparin is a naturally occurring acidic carbohydrate produced commercially from extracts of animal tissues (such as bovine lung or porcine intestine) and is used in the treatment of a wide range of diseases in addition to their classic anticoagulant activity. Heparin is also used to coat many medical devices, such as catheters, syringes, stents and filters. Recently, certain lots of heparin were associated with serious side effects and adverse events. Recalls were issued in multiple countries and it became evident that there was an extensive problem with heparin manufacture.

Traditional tests may not be able to determine the presence of contaminant(s) without lyophilizing and concentrating each sample and may not be suitable for testing finished medical devices. Therefore, there is a demonstrated need to develop other assay methods for detecting contaminating oversulfated compounds of any source in heparin and heparin-derived products.

This technology relates to methods for detecting and/or quantifying oversulfated glycosaminoglycans based on inhibition of nucleic acid polymerases and resistance to enzymatic degradation. It also relates to the use of these methods to screen and quantify pharmaceutical preparations such as heparin preparations for oversulfated contaminants.

Potential Applications: Robust, simple and effective method for detecting and optionally quantifying oversulfated contaminants in heparin preparations.

Development Status: The method has been developed and qualified for sensitivity and identity, but full validation and commercialization have not been undertaken.

Inventor: Daniela Verthelyi et al. (FDA).

Publication: C Tami, M Puig, JC Reepmeyer, H Ye, DA D'Avignon, L Buhse, D Verthelyi. Inhibition of Taq polymerase as a method for screening heparin for oversulfated contaminants. Biomaterials 2008 Dec;29(36):4808–4814.

Patent Status: U.S. Provisional Application No. 61/095,562 filed 09 Sep 2008 (HHS Reference No. E–227–2008/0–US–01).

Licensing Status: Available for licensing.

Licensing Contact: Fatima Sayyid, M.H.P.M.; 301–435–4521; *Fatima.Sayyid@hhs.nih.gov.*

Collaborative Research Opportunity: The FDA, Division of Therapeutic Proteins, Laboratory of Immunology, is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate, or commercialize this high throughput screening test for oversulfated glycosamineglycan contaminants in heparin. Please contact Daniela Verthelyi at *daniela.verthelyi@fda.hhs.gov* or Alice Welch at *alice.welch@fda.hhs.gov* for more information.

Immunogenic West Nile Virus-Like Particles

Description of Technology: Currently, no specific vaccine or therapy for West Nile Virus (WNV) is available for human use; a killed-virus vaccine and booster is in use for horses (efficacy not yet reported). Virus-like particles (VLPs) are an exciting new strategy, as it combines the safety of killed-virus and DNA-based vaccines with the potential for immunogenicity of live-attenuated virus. VLPs have been used in approved vaccine for humans, including human papilloma virus (HPV). Generating VLPs for West Nile Virus, however, has proven difficult.

The inventors have successfully generated West Nile VLPs in insect cells by using recombinant baculoviruses expressing the WNV structural proteins prME or CprME. Mice immunized with purified West Nile VLPs developed antibodies specific to WNV with potent neutralizing activities; moreover, the mice showed no morbidity or mortality after a subsequent challenge with live WNV and showed no evidence of viremia or viral RNA in the spleen or brain.

The patent application covers applications ranging from pharmaceutical/vaccine preparations for WNV–LPs to methods for making and using them.

Applications: Antiviral therapies, vaccines, and diagnostic kits based on West Nile VLPs.

Advantages:

- Demonstrated efficacy in mice.
- Noninfectious.
- Manufacture using insect cells is simple and inexpensive.
- Vaccines or therapeutics are a preferable means to control infection versus the current method (reduce mosquito populations using toxic pesticides).
- First successful generation of West Nile VLPs.

Development Status: Successful completion of proof-of-principle tests in mice.

Market: For the last few years, the CDC has reported between 2,000–3,000 human cases of WNV in the United States each year, typically with a mortality rate of about 5–6% (cumulatively since 1999, 27,000 cases and approaching 2,000 deaths). People over age 50 are at greatest risk for severe illness. Birds and horses are also vulnerable, with up to about 15,000 horse cases reported per year.

Inventors: T. Jake Liang (NIDDK) et al.

Relevant Publication: M Qiao et al. Induction of sterilizing immunity against West Nile Virus (WNV), by immunization with WNV-like particles produced in insect cells. J Infect Dis. 2004 Dec 15;190(12):2104–2108.

Patent Status: HHS Reference No. E–352–2003/0—U.S. Patent Application No. 11/579,459 (2008/0118528) and European Patent Application 05746277.2, both filed 03 Nov 2006 (from PCT publication WO 2005/018560) and claiming priority to 4 May 2004.

Licensing Status: Available for licensing.

Licensing Contact: Bruce Goldstein, J.D., M.S.; 301–435–5470; *goldsteb@mail.nih.gov.*

Collaborative Research Opportunity: The National Institute of Diabetes and Digestive and Kidney Diseases, Liver Diseases Branch, is seeking parties

interested in collaborative research directed toward molecular strategies for vaccine and antiviral development, and animal models of viral hepatitis C. For more information, please contact Dr. T. Jake Liang at 301–496–1721, *jliang@nih.gov*, or Ms. Patricia Lake at 301–594–6762, *lakep@mail.nih.gov*.

Dated: April 29, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–10410 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Implementation of Post-Approval Studies for Medical Devices; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled ''Implementation of Post-Approval Studies for Medical Devices.'' The purpose of the workshop is to facilitate discussion among FDA and other interested parties on issues related to the implementation of Post-Approval Studies for medical devices.

Date and Time: The workshop will be held on June 4, 2009, from 9 a.m. to 5 p.m. and June 5, 2009, from 9 a.m. to 12 p.m. Participants are encouraged to arrive early to ensure time for parking and security screening before the meeting. Security screening will begin at 8 a.m., and registration will begin at 8:30 a.m. Please pre-register by May 28, 2009, using the instructions in this document.

Location: The workshop will be held at the FDA White Oak Campus, 10903 New Hampshire Ave., Silver Spring, MD 20993.

Contact Persons: Ellen Pinnow, Center for Devices and Radiological Health (HFZ–541), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 240–276–2373, e-mail: *ellen.pinnow@fda.hhs.gov*; or Daniel Canos, Center for Devices and Radiological Health (HFZ–450), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 240–276–2369, *daniel.canos@fda.hhs.gov*.

Registration: E-mail your name, title, organization affiliation, address, and e-mail contact information to Stephanie Zafonte at *SZafonte@s-3.com*. There is no fee to attend the workshop, but attendees must register in advance. The registration process will be handled by Social and Scientific Systems, which has extensive experience in planning, executing, and organizing educational meetings. Although the facility is spacious, registration will be on a first-come, first-served basis. Non-U.S. citizens are subject to additional security screening, and they should register as soon as possible.

If you need special accommodations because of a disability, please contact Ellen Pinnow (see *Contact Persons*) at least 7 days before the public workshop.

SUPPLEMENTARY INFORMATION:

I. Why Are We Holding This Public Workshop?

The purpose of the public workshop is to facilitate discussion among FDA and other interested parties on issues related to the conduct of Post-Approval Studies for medical devices.

II. What Are the Topics We Intend To Address at the Public Workshop?

We hope to discuss a large number of issues at the workshop, including, but not limited to:

- Regulatory requirements for implementing a Post-Approval Study for medical devices;
- Challenges and successful strategies for the recruitment of participants for Post-Approval Studies;
- Challenges and successful strategies for the retention and compliance with follow-up requirements of participants for Post-Approval Studies;
- Using existing infrastructure (e.g., national registries) to facilitate Post-Approval Studies; Using innovative strategies to facilitate Post-Approval Studies;
- Clinical research organizations, industry, academia, and other clinical trial consultant's perspectives on all of the previous issues related to implementing Post-Approval Studies for medical devices.

III. Where Can I Find Out More About This Public Workshop?

Background information on the public workshop, registration information, the agenda, information about lodging, and other relevant information will be posted, as it becomes available, on the Internet at *http://www.fda.gov/cdrh/meetings.html*.

Dated: April 29, 2009.

Daniel G. Schultz,

Director, Center for Devices and Radiological Health.

[FR Doc. E9–10426 Filed 5–5–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Unsolicited Multi-Project Application.

Date: May 22, 2009.

Time: 11 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817. (Telephone Conference Call).

Contact Person: Peter R Jackson, Ph.D., Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIH/NIAID/DHHS, 6700–B Rockledge Drive, MSC 7616 Room 2220, Bethesda, MD 20892–7616. 301–496–2550.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Ancillary Studies in Immunomodulation Clinical Trials.

Date: May 29, 2009.

Time: 2 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Paul A. Amstad, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616. 301–402–7098. *pamstad@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: April 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10422 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Public Teleconference Regarding Licensing and Collaborative Research Opportunities for: TRICOM—A Synergistic Triad of Costimulatory Molecules Used in Cancer Vaccines for the Prevention and Treatment of Cancer

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUPPLEMENTARY INFORMATION: Note that this teleconference, licensing and CRADA opportunity will address the treatment of all cancers excluding colorectal, melanoma and prostate cancer.

Technology Summary

TRICOM is a triad of costimulatory molecules used in vector-based cancer vaccines that employ a combination of T-cell costimulatory signals together with tumor associated antigens (TAAs) to greatly enhance the immune response against a variety of cancers. Already several TRICOM-based cancer vaccines incorporating TAAs have shown promising results during clinical stage development. Pre-clinical development of other TRICOM-based vaccines continues, which makes use of newly discovered TAAs and T-cell activating peptides derived from TAAs that would allow targeting cancers expressing poorly immunogenic TAA. Certainly, this cancer vaccine technology has a high potential for leading to a new approach in the prevention and/or treatment of cancer.

Competitive Advantage of Our Technology

- The technology is beyond proof-of concept, supported by laboratory and clinical trial results and numerous publications.
- Recent Phase II clinical data are also available (to qualified licensees) employing TRICOM based vaccines.
- Further clinical studies are ongoing.
- Given the relatively more advanced stage of development of this technology, fewer validation studies are required compared to other immunotherapy related technologies.

Technology Description

Cancer immunotherapy is an approach where tumor associated antigens (TAAs), which are primarily expressed in human tumor cells, and not expressed or minimally expressed in normal tissues, are employed to generate a tumor-specific immune response. Specifically, these antigens serve as targets for the host immune system and elicit responses that results in tumor destruction. The initiation of an effective T-cell immune response to relatively weak antigens requires two signals. The first one is antigen-specific via the peptide/major histocompatibility complex and the second or ''costimulatory'' signal is required for cytokine production, proliferation, and other aspects of T-cell activation.

The TRICOM technology employs avirulent poxviruses to present a combination of costimulatory signaling molecules with tumor-associated antigens (TAAs) to activate T-cells and break the immune systems tolerance towards cancer cells. This is achieved using recombinant poxvirus DNA vectors that encode both T-cell costimulatory molecules and TAAs. The combination of the three costimulatory molecules B7.1, ICAM–1 and LFA–3, hence the name TRICOM, has been shown to have more than the additive effect of each costimulatory molecule when used individually to optimally activate both CD4+ and CD8+ T cells. The result is that when a TRICOM based vaccine expressing TAAs is administered it greatly enhances the immune response against the malignant cells expressing those TAAs. By changing the TAAs used for immunization with TRICOM vaccines immune responses can be generated to diverse types of cancers. The versatility of the vector-based TRICOM based vaccine is that it allows including several TAAs to help maximize the effectiveness. Transgenes reflecting alterations of TAAs can also be inserted into TRICOM based vaccines to further enhance immunogenicity.

The addition of the two well-known TAAs, carcinoembryonic antigen (CEA) and MUC–1, to the TRICOM vector results in the PANVAC vaccine, which is used in a prime and boost vaccine strategy. It is well established that the overexpression of these two TAAs is associated with the presence of a variety of carcinomas; therefore PANVAC is potentially effective against a range of tumor types.

New TAAs are being continually identified. One such example is Brachyury. Although Brachyury has been well known for its role in developmental cell biology, it has now been implicated in tumor cell invasion and metastasis. Pre-clinical data indicates that Brachyury is aberrantly expressed on tumors of lung, intestine, stomach, kidney, bladder, uterus, ovary, and testis, and in chronic lymphocytic leukemia. Additionally, in combination with costimulatory molecules, it can effectively activate T-cells to kill cells that originated from these tumors. Therefore, as one example, Brachyury combined with TRICOM also has potential as a cancer immunotherapy for the treatment of several tumors.

Availability

The technology is available for exclusive and non-exclusive license. Some potential licensing opportunities involving recombinant poxviral vectors containing transgenes are as follows:

- TRICOM (alone or with a transgene or transgenes for a tumor antigen(s) and/or an immunostimulatory molecule).
- PANVAC (CEA–Muc1–TRICOM), with CEA and Muc1 transgenes also containing enhancer agonist epitopes.
- Recombinant fowlpox–GM–CSF.
- Brachyury and/or other TAAs with TRICOM.

Applications and Modality

Vector-based TRICOM (alone or with a transgene(s) for a tumor antigen and/or an immunostimulatory molecule(s)), PANVAC and combinations thereof can be a potential novel approach for the prevention or treatment of cancer (with the exclusion of prostate cancer, prostatic diseases, melanoma, and colorectal cancer) and infectious diseases.

Market

With the identification of molecular targets associated with cancer, the focus of drug development has shifted from broadly acting cytotoxic drugs to targeted therapeutics in the hope of finding drugs that selectively kill cancer cells and do not harm normal cells. Historically, because the expertise of pharmaceutical companies has been in the domain of small molecule therapeutics, several compounds have been developed that inhibit the abnormal biochemical activity of cancer cells. This approach has been successful to an extent as illustrated by the kinase inhibitors and EGFR inhibitors. However, as for chemotherapeutics, cancer cells frequently acquire drug resistance to targeted small-molecule therapeutics rendering them ineffective in the long run. In addition, these small-molecules produce adverse side effects which can prevent the administration of the maximum effective dose. An alternative approach to overcome these problems relies on the use of biologics such as antibodies and vaccines.

The biotechnology industry has principally focused on an immunotherapy approach using monoclonal antibodies (mAb) to enlist the help of the patient's own immune

system. This approach has successfully led to several FDA approved and marketed mAbs. Typically, cancer cells are less susceptible to acquiring resistance to antibodies; however, as seen for trastuzumab, resistance can occur. Another limitation of mAbs is that they activate only part of the immune system and do not produce future immunity against the cancer. Currently, monoclonal antibodies are the only immunotherapy available for treating cancer. More recently, cancer vaccines are being developed as an improvement on the immunotherapy approach. It is expected that activating the cells of the immune system should be greatly more effective in killing cancer cells with the added benefit that it would lead to a sustained surveillance by the patient's own body that prevents the tumor from reemerging in the future.

Vaccines have been very successful in the prevention of infectious diseases, and are now being evaluated for the treatment of cancer. The development of a cancer vaccine could result in a paradigm shift in the treatment and clinical management of cancer. Currently, there are no cancer vaccines approved for the U.S. market but this could change with the development of the TRICOM-based technology of costimulatory vaccines that is designed to magnify the immune response against cancer cells and lead to prolonged cancer immunity.

PANVAC, using TRICOM, has much potential for becoming a therapeutically effective cancer vaccine. It has been successful in Phase I and II clinical studies demonstrating a high safety profile and that it is a good candidate for initiating pivotal efficacy studies. Recently, very encouraging results were announced for prostate cancer therapy using PROSTVAC™ which is a vaccine based on the same technology platform as PANVAC, which further validates this technology platform. PANVAC is a decidedly mature technology that holds promise to transform the treatment of cancer.

Patent Estate

The portfolio includes the following issued patents and pending patent applications:

1. U.S. Patent No. 6,969,609 issued 29 Nov. 2005 as well as issued and pending foreign counterparts [HHS Ref. No. E–256–1998/0];

2. U.S. Patent Application No. 11/321,868 filed 30 Dec. 2005 [HHS Ref. No. E–256–1998/1]; and

3. U.S. Patent No. 6,756,038 issued 29 Jun. 2004 as well as issued and pending foreign counterparts [HHS Ref. No. E–099–1996/0];

4. U.S. Patent No. 6,001,349 issued 14 Dec. 1999 as well as issued and pending foreign counterparts [HHS Ref. No. E–200–1990/3–US–01];

5. U.S. Patent No. 6,165,460 issued 26 Dec. 2000 as well as issued and pending foreign counterparts [HHS Ref. No. E–200–1990/4–US–01];

6. U.S. Patent No. 7,118,738 issued 10 Oct. 2006 as well as issued and pending foreign counterparts [HHS Ref. No. E–154–1998/0–US–07];

7. PCT Application No. PCT/US97/12203 filed 15 Jul. 1997 [HHS Ref. No. E–259–1994/3–PCT–02];

8. U.S. Patent Nos. 7,410,644 issued 12 Aug. 2008 and U.S. Patent Application No. 08/686,280 filed 25 Jul. 1996 [HHS Ref. No. E–259–1994/3–US–08 and/4–US–01];

9. U.S. Patent No. 6,946,133 issued 20 Sep. 2005 as well as issued and pending foreign counterparts [HHS Ref. No. E–062–1996/0–US–01];

10. U.S. Patent Application No. 11/606,929 filed 1 Dec. 2006 [HHS Ref. No. E–062–1996/0–US–11];

11. U.S. Patent Nos. 6,893,869, 6,548,068 and 6,045,802 issued 17 May 2005, 15 Apr. 2003 and 4 Apr. 2000 respectively, as well as issued and pending foreign counterparts [HHS Ref. Nos. E–260–1994/1–US–03, US–02, US–01]; and

12. U.S. Patent No. 7,368,116 issued 6 May 2008 [HHS Ref. No. E–260–1994/1–US–04];

13. U.S. Patent Application No. 12/280,534 filed 21 Feb. 2007, which published as US–2009–0035266 on 5 Feb. 2009, as well as pending foreign counterparts [HHS Ref. No. E–104–2006/0–US–06];

14. PCT Application No. PCT/US2008/055185 filed 27 Feb. 2008, which published as WO 2008/106551 on 4 Sep. 2008 [HHS Ref. No. E–074–2007/0–PCT–02].

Note that some of the patent estate above is available for non-exclusive licensing only.

Cooperative Research and Development Agreement (CRADA) Opportunities

A CRADA partner for the further codevelopment of this technology in all cancers with the exception of prostate, melanoma and colorectal cancer is currently being sought by the Laboratory of Tumor Immunology and Biology, Center for Cancer Research, NCI. The CRADA partner will (a) generate recombinant poxviruses expressing specific tumor-associated antigens, cytokines, and/or T-cell costimulatory factors, (b) cooperate to analyze the recombinant poxviruses containing these genes with respect to appropriate expression of the encoded gene product(s), (c) supply adequate amounts of recombinant virus stocks for preclinical testing, (d) manufacture selected recombinant vaccines for use in human clinical trials (with the exception of trials for prostatic diseases, melanoma, and colorectal cancer), (e) submit Drug Master Files detailing the development, manufacture, and testing of live recombinant vaccines to support the NCI-sponsored IND and/or company-sponsored IND, (f) supply adequate amounts of clinical grade recombinant poxvirus vaccines for clinical trials conducted at the NCI Center for Cancer Research (CCR), and (g) provide adequate amounts of vaccines for extramural clinical trials, if agreed upon by the parties, and conduct clinical trials under company-sponsored or NCI-sponsored INDs. NCI will (a) provide genes of tumor-associated antigens, cytokines and other immunostimulatory molecules for incorporation into poxvirus vectors, (b) evaluate recombinant vectors in preclinical models alone and in combination therapies, and (c) conduct clinical trials (with the exception of trials for prostatic diseases, melanoma, and colorectal cancer) of recombinant vaccines alone and in combination therapies.

Next Step: Teleconference

There will be a teleconference where the principal investigator, Dr. Jeffrey Schlom, will discuss this technology. Licensing and collaborative research opportunities will also be discussed. If you are interested in participating in this teleconference, please call or e-mail Sabarni Chatterjee; 301–435–5587; *chatterjeesa@mail.nih.gov*. OTT will then e-mail you the date, time, and number for the teleconference.

Dated: April 29, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–10479 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of 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 on Alcohol Abuse and Alcoholism Initial Review Group; Epidemiology, Prevention and Behavior Research Review Subcommittee.

Date: July 14–15, 2009.

Time: 8:30 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Crowne Plaza—Tyson Corner, 1960 Chain Bridge Road, McLean, VA 22102.

Contact Person: Lorraine Gunzerath, PhD, MBA Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, Office of Extramural Activities, Extramural Project Review Branch, 5635 Fishers Lane, Room 2121, Bethesda, MD 20892–9304, 301–443–2369, *lgunzera@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: April 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10409 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; 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 on Alcohol Abuse and Alcoholism Initial Review Group Neuroscience Review Subcommittee.

Date: July 13–14, 2009.

Time: 8:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Beata Buzas, PhD, Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Rm 2081, Rockville, MD 20852, 301–443–0800, *bbuzas@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: April 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10408 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Board of Scientific Counselors, Coordinating Center for Infectious Diseases (CCID)

Notice of Cancellation: This notice was published in the **Federal Register** on April 13, 2009, Volume 74, Number 69, page 16877. The meeting previously scheduled to convene on May 14, 2009 has been cancelled due to the public health emergency.

Contact Person for More Information: Harriette Lynch, Office of the Director, CCID, CDC, Mailstop E–77, 1600 Clifton Road, NE., Atlanta, Georgia 30333, e-mail *hlynch@cdc.gov,* telephone (404) 498–2726.

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 the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: May 1, 2009.

Andre Tyler,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. E9–10554 Filed 5–4–09; 11:15 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0664]

Transmissible Spongiform Encephalopathies Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Transmissible Spongiform Encephalopathies Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 12, 2009, from 8 a.m. to 5:45 p.m.

Location: Holiday Inn Gaithersburg, Grand Ballroom, 2 Montgomery Village Ave., Gaithersburg, MD.

Contact Person: William Freas or Rosanna Harvey, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448, 301–827–0314, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 301–451–2392. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On June 12, 2009, the Committee will review and discuss a recent report from the UK Health Protection Agency attributing a case of variant Creutzfeldt-Jakob (vCJD) disease infection to treatment 11 years earlier

with a ''vCJD-implicated'' plasma-derived coagulation factor VIII (pdFVIII) and whether this information or any other recent scientific information about the vCJD epidemic substantially alters FDA's risk assessment for U.S.-licensed preparations of pdFVIII products. In the afternoon the committee will hear informational presentations on animal models of vCJD, diagnostic test development for transmissible spongiform encephalopathies (TSEs) and bovine spongiform encephalopathy (BSE) surveillance and risk management.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material will be available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before June 4, 2009. Oral presentations from the public will be scheduled between approximately 10:30 a.m. and 11:15 a.m. and between 5:00 p.m. and 5:30 p.m. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 26, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 28, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact William Freas or Rosanna Harvey at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: April 28, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–10454 Filed 5–5–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; 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 Center for Research Resources Special Emphasis Panel. RCMI 1.

Date: June 10–11, 2009.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Steven Birken, PhD, Scientific Revew Officer, Office of Review, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., Dem. 1, Room 1078, MSC 4874, Bethesda, MD 20892–4874. 301–435–0815. *birkens@mail.nih.gov.*

Name of Committee: National Center for Research Resources Special Emphasis Panel. Comparative Medicine.

Date: July 9, 2009.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call).

Contact Person: Guo Zhang, MD, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., 1 Democracy Plaza, Rm. 1064, Bethesda, MD 20892–4874. 301–435–0812. *zhanggu@mail.nih.gov.*

Name of Committee: National Center for Research Resources Special Emphasis Panel. Pre-application for a Biomedical Technology Research Resource.

Date: July 20, 2009.

Time: 8 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, One Democracy Plaza, 6701 Democracy Boulevard, Bethesda, MD 20892. (Virtual Meeting).

Contact Person: Martha F. Matocha, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., 1 Democracy Plaza, Rm. 1070, Bethesda, MD 20892. 301–435–0810. *matocham@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333, National Institutes of Health, HHS)

Dated: April 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10444 Filed 5–5–09; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel. SBIR Contract Review.

Date: May 20, 2009.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852. (Telephone Conference Call).

Contact Person: Aileen Schulte, 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. 301–443–1225. *aschulte@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: April 29, 2009.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. E9–10430 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0197]

Psychopharmacologic Drugs Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Psychopharmacologic Drugs Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on June 9, 2009 from 8 a.m. to 6 p.m. and June 10, 2009, from 8 a.m. to 5 p.m.

Addresses: Electronic comments should be submitted to *http://www.regulations.gov*. Enter ''FDA–2009–N–0197 Use of Antipsychotics for Schizophrenia and Bipolar Disorder in Pediatric and Adolescent Patients'' and follow the prompts to submit your statement. Written comments should be submitted to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments received will be posted without change, including any personal information provided. Comments received on or before May 26, 2009, will be provided to the committee before the meeting.

Location: Marriott Conference Centers, UMUC Inn and Conference Center, 3501 University Blvd. East, Adelphi, MD. The hotel telephone number is 301–985–7385.

Contact Person: Diem-Kieu Ngo, Center for Drug Evaluation and Research (HFD–21), Food and Drug Administration, 5600 Fishers Lane (for express delivery, 5630 Fishers Lane, rm. 1093), Rockville, MD 20857, 301–827–7001, FAX: 301–827–6776, e-mail: *diem.ngo@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512544. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On both days, the committee will discuss safety and efficacy issues for the following new drug applications (NDAs): (1) NDA 20–639/S–045 and S–046: SEROQUEL (quetiapine fumarate) Tablets, AstraZeneca Pharmaceuticals LP, for the acute treatment of schizophrenia in adolescents from 13 to 17 years of age, and the acute treatment of bipolar mania in children from 10 to 12 years of age and adolescents from 13 to 17 years of age; (2) NDA 20–825/S–032: GEODON (ziprasidone hydrochloride) Capsules, Pfizer Inc., for the acute treatment of manic or mixed episodes associated with bipolar disorder, with or without psychotic features in children and adolescents ages from 10 to 17 years of age; and (3) NDA 20–592/S–040 and S–041: ZYPREXA (olanzapine) Tablets, Eli Lilly and Co., for the acute treatment of manic or mixed episodes associated with bipolar I disorder and the acute treatment of schizophrenia in adolescents. The committee will be asked to vote on whether or not these products have been shown to be effective and acceptably safe for these pediatric indications.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/ohrms/dockets/ac/acmenu.htm*, click on the year 2009 and scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before May 26, 2009. Oral presentations from the public will be scheduled between approximately 4 p.m. and 6 p.m. on June 9, 2009. Those desiring to make formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before May 22, 2009. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by May 26, 2009.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Diem-Kieu Ngo at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: April 28, 2009.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E9–10451 Filed 5–5–09; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of Biotechnology Activities; Recombinant DNA Research: Notice of Extension for Public Comment Period for the Consideration of a Proposed Action Under the NIH Guidelines for Research Involving Recombinant DNA Molecules (NIH Guidelines); Notice

A notice of consideration of a proposed action under the *NIH Guidelines* with an opportunity for public comment was published by the Department of Health and Human Services, National Institutes of Health, in the **Federal Register** (74 FR 9411) on March 4, 2009 for the Office of Biotechnology Activities; Recombinant DNA Research: Proposed Actions Under the *NIH Guidelines for Research Involving Recombinant DNA Molecules.* The public comment period ends on May 4, 2009. This notice announces an extension of the public comment period until June 1, 2009.

If you have questions, or require additional information about these proposed changes, please contact OBA by e-mail at *oba@od.nih.gov,* or by telephone at 301–496–9838. Comments may be submitted to the same e-mail address or submitted by fax to 301–496–9839, or sent by mail to the Office of Biotechnology Activities, National Institutes of Health, 6705 Rockledge Drive, Suite 750, MSC 7985, Bethesda, Maryland 20892–7985. Background information may be obtained by contacting NIH OBA by e-mail at *oba@od.nih.gov.*

Dated: April 30, 2009.

Jacqueline Corrigan-Curay,

Acting Director, Office of Biotechnology Activities, National Institutes of Health.

[FR Doc. E9–10432 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive License: Development of Therapeutics for Use in Humans To Induce Tolerance for Transplantation and To Treat T cell Lymphoma and Leukemia, Autoimmune Diseases Such as Lupus, and Graft-Versus-Host Disease

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: This is notice, in accordance with 35 U.S.C. 209(c)(1) and 37 CFR404.7(a)(1)(i), that the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an exclusive patent license to practice the inventions embodied in U.S. Patent No. 5,167,956 and PCT Application Serial No. PCT/US92/00813 and foreign equivalents thereof, entitled ''Immunotoxin with in vivo T cell suppressant activity and methods of use'' (HHS Ref. No. E–012–1991/0); U.S. Patent No. 5,725,857 and foreign equivalents thereof, entitled ''Immunotoxin with in vivo T cell suppressant activity and methods of use'' (HHS Ref. No. E–012–1991/2); U.S. Patent No. 5,762,927 and foreign equivalents thereof, entitled ''Immunotoxin with in vivo T cell suppressant activity and methods of use'' (HHS Ref. No. E–012–1991/4); Australian Patent No. 762197 and PCT Application Serial No. PCT/US96/05087 and other foreign equivalents thereof, entitled ''Methods of inducing immune tolerance using immunotoxins'' (HHS Ref. No. E–012–1991/5); U.S. Patent No. 6,103,235 and foreign equivalents thereof and U.S. Patent No. 7,125,553 and foreign equivalents thereof, entitled ''Methods of inducing immune tolerance using immunotoxins'' (HHS Ref. No. E–012–1991/7); Australian Patent No. 766692 entitled ''Novel vectors and expression methods for producing mutant proteins'' (HHS Ref. No. E–043–1997/0); U.S. Patent Application No. 10/566,886 and PCT Application No. PCT/US2004/24786 and foreign equivalents thereof entitled ''Methods for expression and purification of immunotoxins'' (E–043–1997/2); U.S. Patent No. 6,632,928 and PCT Application Serial No. PCT/US98/04303 and foreign equivalents thereof, entitled ''Novel immunotoxins and methods of inducing immune tolerance'' (HHS Ref. No. E–044–1997/0); U.S. Patent Application No. 10/296,085 and PCT Application Serial No. PCT/US01/16125 and foreign equivalents thereof entitled ''Immunotoxin Fusion Proteins and Means for Expression Thereof'' (HHS Ref. No. E–044–1997/1); U.S. Patent No. 7,288,254 and PCT Application Serial No. PCT/US99/08606 and foreign equivalents thereof entitled ''Use of immunotoxins to induce immune tolerance to pancreatic islet transplantation'' (HHS Ref. No. E–059–1998/0); Australian Patent No. 781547 and PCT Application No. PCT/US00/10253 and other foreign equivalents thereof, entitled ''Methods related to combined use of immunotoxins and agents that inhibit dendritic cell maturation'' (HHS Ref. No. E–168–1999/0), to Angimmune LLC which is located in Bethesda, Maryland. The patent rights in these inventions have been assigned to the United States of America.

The prospective exclusive license territory may be United States, Europe, Canada, Australia, Japan, India, Hong Kong, and Brazil and the field of use may be limited to the treatment of T cell lymphoma and leukemia, autoimmune diseases such as lupus, and complications of transplantation, including graft-versus-host disease, and induction of tolerance for organ, pancreatic islet, and cell transplantation as claimed in the Licensed Patent Rights.

DATES: Only written comments and/or applications for a license which are received by the NIH Office of Technology Transfer on or before July 6, 2009 will be considered.

ADDRESSES: Requests for copies of the patent application, inquiries, comments, and other materials relating to the contemplated exclusive license should be directed to: Samuel E. Bish, PhD, Licensing and Patenting Manager, Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, MD 20852–3804; Telephone: (301) 435–5282; Facsimile: (301) 402–0220; E-mail: *bishse@mail.nih.gov*.

SUPPLEMENTARY INFORMATION: The technology describes compositions of anti-human, anti-T cell bivalent immunotoxins, methods of producing immunotoxins using a genetically-engineered Pichia (yeast) expression system, and methods of using the immunotoxin moieties to treat various indications, including T cell lymphoma/leukemia, graft-versus-host disease (GVHD), and autoimmune diseases such as lupus, and methods to use the immunotoxins in combination with immunosuppressants to induce tolerance for organ, cell, and pancreatic islet transplants and to inhibit dendritic

cell maturation. The immunotoxins are fusion proteins consisting of a truncated diphtheria toxin joined to an anti-CD3 antibody, which binds to the CD3 antigen found on the T cell receptor (TCR) of mature T lymphocytes (T cells). The toxin moiety acts to kill cells, the anti-CD3 antibody portion performs cell targeting to direct the toxin to specifically kill T cells, and the bivalency allows the immunotoxin to bind to target cells with greater efficiency than monovalent constructs. Thus, bivalent, anti-CD3 immunotoxins that specifically deplete T cells, such as those constructs created by the inventors, could yield innovative therapeutics for T cell lymphoma and other disorders caused by T cell-related abnormalities.

The prospective exclusive license will be royalty bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR part 404.7. The prospective exclusive license may be granted unless within sixty (60) days from the date of this published notice, the NIH receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.7.

Applications for a license in the field of use filed in response to this notice will be treated as objections to the grant of the contemplated exclusive license. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

Dated: April 28, 2009.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. E9–10480 Filed 5–5–09; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2009–0049]

Homeland Security Advisory Council

AGENCY: The Office of Policy, DHS.

ACTION: Committee Management; Notice of Partially Closed Federal Advisory Committee Meeting.

SUMMARY: The Homeland Security Advisory Council (HSAC) will meet on June 5, 2009, in Albuquerque, New Mexico. The meeting will be partially closed to the public.

DATES: The HSAC will meet June 5, 2009, from 10 a.m. to 3 p.m. The meeting will be closed from 12:20 p.m. to 3 p.m.

ADDRESSES: The open portion of the meeting will be held at the University of New Mexico Student Union, Ballroom B—main campus, in Albuquerque, New Mexico. Requests to have written material distributed to each member of the committee prior to the meeting should reach the contact person at the address below by May 29, 2009. Comments must be identified by Docket number DHS–2009–0049 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: HSAC@dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202–282–9207.
- *Mail:* Homeland Security Advisory Council, 245 Murray Drive, SW., Building 410, Mailstop 0850, Washington, DC 20528.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the docket number for this action. Comments received will be posted without alteration at *www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the HSAC, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Homeland Security Advisory Council, (202) 447–3135, *HSAC@dhs.gov.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2. The HSAC provides independent advice to the Secretary of the Department of Homeland Security to aide in the creation and implementation of critical and actionable policies and capabilities across the spectrum of homeland security operations. The HSAC periodically reports, as requested, to the Secretary, on such matters. The HSAC serves as the Secretary's primary advisory body with the goal of providing strategic, timely and actionable advice.

The HSAC will meet for the purpose of receiving briefings and updates from DHS principals on the current status of the HSAC, a threat assessment and intelligence briefing focused on border security, internal DHS management directives and the successes and challenges of the DHS transition. The meeting will also include information briefings of the Department's sensitive processes including law enforcement and transportation security procedures. HSAC members will receive a classified intelligence briefing during the closed session.

Basis for Closure: This meeting will include updates on operational challenges, intelligence briefings, and pre-decisional policies from various DHS Components, including: various State and local senior officials including the office of International Affairs, Immigration and Customs Enforcement as well as Customs and Border Protection. The briefings will include information on sensitive homeland security procedures and the capabilities of the Department of Homeland Security Components.

In accordance with section 10(d) of the Federal Advisory Committee Act, it has been determined that this HSAC meeting concerns matters that ''disclose investigative techniques and procedures'' under 5 U.S.C. 552b(c)(7)(E) and are ''likely to significantly frustrate implementation of a proposed agency action'' within the meaning of 5 U.S.C. 552b(c)(9)(B). Discussion of ongoing investigations with Department of Homeland Security enforcement Components and outside law enforcement partners fall within the meaning of 5 U.S.C 552b(7)(E) insofar as they will ''disclose investigative techniques and procedures.'' Additionally, release of information presented during the briefings and the nature of the discussion could lead to premature disclosure of information on Department of Homeland Security actions that would be ''likely to significantly frustrate implementation of a proposed agency action.'' Therefore, the portion of the meeting of the HSAC from 12:20 p.m. to 3 p.m. will be closed to the public.

Public Attendance: Members of the public may register to attend the public session on a first-come, first-served basis per the procedures that follow. For security reasons, we request that any member of the public wishing to attend the public session provide his or her full legal name, date of birth and contact information no later than 5 p.m. EST on May 31, 2009, to the HSAC via e-mail at *HSAC@dhs.gov* or via phone at (202) 447–3135. Photo identification may be required for entry into the public session. Registration begins at 9 a.m. Those attending the public session of the meeting must be present and seated by 10 a.m. From 10:15 a.m. to 12 noon, the HSAC will meet to be sworn in and receive their initial briefing from the Secretary on their role within her administration and receive updates on

the Southwest Border and the HSAC's Quadrennial Review Advisory Committee.

Identification for Services for Individuals with Disabilities: For information on facilities or services for individuals with disabilities, or to request special assistant at the meeting, contact the HSAC as soon as possible.

Dated: May 1, 2009.

Richard C. Barth,

Acting Principal Deputy Assistant Secretary for Policy, Department of Homeland Security.

[FR Doc. E9–10492 Filed 5–5–09; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0006; FEMA Form 086–0–1, Flood Insurance Application, and FEMA Form 086–0–2, Flood Insurance Cancellation/ Nullification Request Form, and FEMA Form 086–0–3, Flood Insurance General Change Endorsement, and FEMA Form 086–0–5, Flood Insurance Preferred Risk Policy Application, and FEMA Form 086–0–4, V-Zone Risk Factor Rating Form and Instructions.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before June 5, 2009.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: National Flood Insurance Program Policy Forms.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0006.

Form Titles and Numbers: FEMA Form 086–0–1, Flood Insurance Application, and FEMA Form 086–0–2, Flood Insurance Cancellation/ Nullification Request Form, and FEMA Form 086–0–3, Flood Insurance General Change Endorsement, and FEMA Form 086–0–5, Flood Insurance Preferred Risk Policy Application, and FEMA Form 086–0–4, V-Zone Risk Factor Rating Form and Instructions.

Abstract: In order to provide for the availability of policies for flood insurance, policies are marketed through the facilities of licensed insurance agents or brokers in the various States. Applications from agents or brokers are forwarded to a servicing company designated as fiscal agent by FIA. Upon receipt and examination of the application and required premium, the servicing company issues the appropriate Federal flood insurance policy.

Affected Public: Individual and Households, Business or other for-profit, Farms, State, Local or Tribal Government.

Estimated Number of Respondents: 123,361.

Frequency of Response: Once Annually.

Estimated Average Hour Burden per Respondent: .0769 hours.

Estimated Total Annual Burden Hours: 9,480.58.

Estimated Cost: There are no start-up, operational or other costs associated with this information collection.

Larry Gray,

Director, Records Management Division, Office of Management, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. E9–10478 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–52–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3294–EM; Docket ID FEMA–2008–0018]

Texas; Amendment No. 4 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Texas (FEMA–3294–EM), dated September 10, 2008, and related determinations.

DATES: *Effective Date:* February 4, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Secretary of the Department of Homeland Security under 6 U.S.C. 112, Bradley Harris of FEMA is appointed to act as the Federal Coordinating Officer for this emergency.

This action terminates the appointment of Sandy Coachman as Federal Coordinating Officer for this emergency.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10476 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3290–EM; Docket ID FEMA–2008–0018]

Texas; Amendment No. 2 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Texas (FEMA–3290–EM), dated August 29, 2008, and related determinations.

DATES: *Effective Date:* February 4, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Secretary of the Department of Homeland Security under 6 U.S.C. 112, Bradley Harris of FEMA is appointed to act as the Federal Coordinating Officer for this emergency.

This action terminates the appointment of Sandy Coachman as Federal Coordinating Officer for this emergency.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10481 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1834–DR; Docket ID FEMA–2008–0018]

Arkansas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Arkansas (FEMA–1834–DR), dated April 27, 2009, and related determinations.

DATES: *Effective Date:* April 27, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 27, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Arkansas resulting from severe storms and tornadoes on April 9, 2009, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (''the Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Arkansas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance designated areas, Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs. If Public Assistance is later requested and warranted, Federal funds provided under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that W. Michael Moore, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Arkansas have been designated as adversely affected by this major disaster:

Miller, Polk, and Sevier Counties for Individual Assistance.

All counties within the State of Arkansas are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10439 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1780–DR; Docket ID FEMA–2008–0018]

Texas; Amendment No. 5 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Texas (FEMA–1780–DR), dated July 24, 2008, and related determinations.

DATES: *Effective Date:* February 4, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Secretary of the Department of Homeland Security under 6 U.S.C. 112, Bradley Harris of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Sandy Coachman as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10453 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1831–DR; Docket ID FEMA–2008–0018]

Florida; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Florida (FEMA–1831–DR), dated April 21, 2009, and related determinations.

DATES: Effective Date: April 28, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Florida is hereby amended to include Individual Assistance in the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 21, 2009.

Hamilton, Lafayette, Madison, and Suwannee Counties for Individual Assistance.

Calhoun, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington Counties for Individual Assistance (already designated for Public Assistance).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10441 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1831–DR; Docket ID FEMA–2008–0018]

Florida; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Florida (FEMA–1831–DR), dated April 21, 2009, and related determinations.

DATES: *Effective Date:* April 21, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 21, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Florida resulting from severe storms, flooding, tornadoes, and straight-line winds beginning on March 26, 2009, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (''the Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Florida.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas, and Hazard Mitigation throughout the State, and any other forms of assistance under the Stafford Act that you deem appropriate. Direct Federal assistance is authorized. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that Jeffrey L. Bryant, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Florida have been designated as adversely affected by this major disaster:

Bay, Calhoun, Gulf, Holmes, Jackson, Jefferson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington Counties for Public Assistance. Direct Federal assistance is authorized.

All counties within the State of Florida are eligible to apply for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially

Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10434 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1833–DR; Docket ID FEMA–2008–0018]

Georgia; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Georgia (FEMA–1833–DR), dated April 23, 2009, and related determinations.

DATES: *Effective Date:* April 23, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 23, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Georgia resulting from severe storms, flooding, tornadoes, and straight-line winds beginning on March 26, 2009, and continuing, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (''the Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Georgia.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that Terry L. Quarles, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Georgia have been designated as adversely affected by this major disaster:

Berrien, Brantley, Brooks, Coffee, Colquitt, Decatur, Dougherty, Echols, Lanier, Lowndes, Miller, Mitchell, Pierce, Tift, Ware, Wheeler, and Worth Counties for Individual Assistance.

Appling, Atkinson, Bacon, Baker, Ben Hill, Berrien, Clinch, Coffee, Colquitt, Early, Echols, Grady, Lowndes, Mitchell, Montgomery, Pierce, Toombs, and Ware Counties for Public Assistance.

All counties within the State of Georgia are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10437 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1830–DR; Docket ID FEMA–2008–0018]

Minnesota; Amendment No. 4 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Minnesota (FEMA–1830–DR), dated April 9, 2009, and related determinations.

DATES: *Effective Date:* April 28, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Minnesota is hereby amended to include the following area among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 9, 2009.

Cook County for Public Assistance. The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10442 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1834–DR; Docket ID FEMA–2008–0018]

Arkansas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–1834–DR), dated April 27, 2009, and related determinations.

DATES: *Effective Date:* April 28, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 27, 2009.

Ashley and Howard Counties for Public Assistance.

Miller, Polk, and Sevier Counties for Public Assistance (already designated for Individual Assistance).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10438 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1829–DR; Docket ID FEMA–2008–0018]

North Dakota; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Dakota (FEMA–1829–DR), dated March 24, 2009, and related determinations.

DATES: *Effective Date:* April 23, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Dakota is hereby amended to include Hazard Mitigation for the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of March 24, 2009.

McHenry, Pierce, and Ward Counties for Individual Assistance.

Grant, Oliver, Stark, and Walsh Counties and the Spirit Lake and Standing Rock Indian Reservations for Individual Assistance (already designated for emergency protective measures [Category B], including direct Federal assistance, under the Public Assistance program).

Bottineau, Bowman, Eddy, McHenry, Mountrail, Pierce, Ward, and Wells Counties and the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation for Public Assistance.

Griggs, Steele, Towner, and Traill Counties for Public Assistance (already designated for Individual Assistance).

Adams, Barnes, Benson, Burleigh, Cass, Cavalier, Dickey, Dunn, Emmons, Foster, Grand Forks, Grant, Hettinger, Kidder, LaMoure, Logan, McIntosh, McKenzie, McLean, Mercer, Morton, Nelson, Oliver, Pembina, Ramsey, Ransom, Richland, Sargent, Sioux, Stutsman, and Walsh Counties and the Spirit Lake and Standing Rock Indian Reservations for Public Assistance [Categories A and C–G] (already designated for emergency protective measures [Category B], including direct Federal assistance, under the Public Assistance program).

All counties in the State of North Dakota are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10436 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1832–DR; Docket ID FEMA–2008–0018]

Indiana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Indiana (FEMA–1832–DR), dated April 22, 2009, and related determinations.

DATES: *Effective Date:* April 22, 2009.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated April 22, 2009, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Indiana resulting from severe storms, tornadoes, and flooding during the period of March 8–14, 2009, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (''the Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Indiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance is supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation and Other Needs Assistance will be limited to 75 percent of the total eligible costs. If Public Assistance is later requested and warranted, Federal funds provided under that program will also be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for

a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that Regis Leo Phelan, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Indiana have been designated as adversely affected by this major disaster:

Allen, Carroll, DeKalb, Fulton, Jasper, Kosciusko, Lake, LaPorte, Marshall, Noble, Pulaski, White, and Whitley Counties for Individual Assistance.

All counties within the State of Indiana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

Nancy Ward,

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. E9–10433 Filed 5–5–09; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

National Communications System

[Docket No. NCS–2009–0002]

President's National Security Telecommunications Advisory Committee

AGENCY: National Communications System, DHS.

ACTION: Notice of Partially Closed Advisory Committee Meeting.

SUMMARY: The President's National Security Telecommunications Advisory Committee (NSTAC) will meet on May 21, 2009, in a partially closed session.

DATES: Thursday, May 21, 2009, from 2:30 p.m. until 5:10 p.m.

ADDRESSES: The meeting will take place at the U.S. Chamber of Commerce, 1615 H St., NW., Washington, DC. If you desire meeting materials, contact Ms. Sue Daage at (703) 235–5526 or by e-mail at *sue.daage@dhs.gov.* Please submit your comments by May 28, 2009. Comments must be identified by NCS–2009–0002 and may be submitted by *one* of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: NSTAC1@dhs.gov*. Include docket number in the subject line of the message.
- *Mail:* Office of the Manager, National Communications System, Department of Homeland Security, 245 Murray Lane, Washington, DC 20598–0615.
- *Fax:* 1–866–466–5370.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and NCS–2009–0002, the docket number for this action. Comments received will be posted without alteration at *www.regulations.gov*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received by the NSTAC, go to *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Ms. Sue Daage, Customer Service Division, at (703) 235–5526, e-mail: *Sue.Daage@dhs.gov*, or write the Deputy Manager, National Communications System, Department of Homeland Security, 245 Murray Lane, Washington, DC 20598–0615.

SUPPLEMENTARY INFORMATION: The NSTAC advises the President on issues and problems related to implementing national security and emergency preparedness telecommunications policy. Notice of this meeting is given under the Federal Advisory Committee Act, Public Law 92–463, as amended, appearing in 5 U.S.C. App. 2.

At the upcoming meeting, between 2:30 p.m. and 3:40 p.m., the NSTAC will receive comments from government stakeholders, including comments from the Federal Communications Commission Acting Chief of the Public Safety and Homeland Security Bureau, and discuss ongoing NSTAC work on research and development, and outreach efforts. This portion of the meeting will be open to the public.

Between 3:45 p.m. and 5:10 p.m., the NSTAC will receive briefings from the Director for the National Security Space Office and the Acting Senior Director for Cyber Space. The NSTAC will discuss cybersecurity and satellite security issues. This portion of the meeting will be closed to the public.

Basis for Closure: Briefings from the Director for the National Security Space Office and the Acting Senior Director for Cyber Space, as well as discussions on cybersecurity and satellite security, will likely involve sensitive infrastructure information. The NSTAC's discussions will likely include information which is predominantly internal and that, if disclosed, would significantly risk circumvention of Department of Homeland Security (DHS) regulations or statutes—specifically, identification of vulnerabilities in the Federal Government's cyber network, along with strategies for mitigating those vulnerabilities and other sensitive law enforcement or homeland security information. NSTAC members will likely inform the discussion by contributing confidential and voluntarily provided commercial information relating to private-sector network vulnerabilities that they would not customarily release to the public. Disclosure of this information can be reasonably expected to frustrate DHS's ongoing cybersecurity programs and initiatives and could be used to exploit vulnerabilities in the Federal Government's cyber network. Accordingly, the 3:45 p.m. and 5:10 p.m. portions of this meeting will be closed to the public pursuant to the authority set forth in 5 U.S.C. 552b(c)(2), (4) and (9)(B).

Dated: May 1, 2009.

James Madon,

Director, National Communications System.

[FR Doc. E9–10526 Filed 5–5–09; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF THE INTERIOR

National Park Service

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 and 5 CFR part 1320, Reporting and Record Keeping Requirements, the National Park Service (NPS) invites public comments on a proposed new collection of information (1024–xxxx).

DATES: Public comments will be accepted on the proposed Information Collection Request (ICR) on or before July 6, 2009.

ADDRESSES: *Send Comments To:* David K. Loomis, Ph.D., Department of Natural Resources Conservation, University of Massachusetts, 160 Holdsworth Way, Amherst, MA 01003: or via phone at

Phone: 413/545–6641, or via e-mail at: *Loomis@nrc.umass.edu*. Also, you may send comments to Dr. James Gramann, NPS Social Science Program, 1201 ''Eye'' St. (2300), Washington, DC 20005 or via e-mail at *James_Gramann@partner.nps.gov*. All responses to this notice will be summarized and included in the request for the Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

To Request a Draft of Proposed Collection of Information Contact: David K. Loomis, Ph.D., Department of Natural Resources Conservation, University of Massachusetts, 160 Holdsworth Way, Amherst, MA 01003: or via phone at Phone: 413/545–6641, or via e-mail at: *Loomis@nrc.umass.edu*; or Cliff McCreedy, Marine Resource Management Specialist, National Park Service, 1201 Eye Street, NW., 11th Floor (2301), Washington, DC 20005; or via phone at 202/513–7164, or via e-mail at *cliff_mccreedy@nps.gov*.

FOR FURTHER INFORMATION CONTACT: Dr. James Gramann, NPS Social Science Program, 1201 ''Eye'' St. (2300), Washington, DC 20005; or via phone at 202/513–7189; or via e-mail at *James_Gramann@partner.nps.gov*. You are entitled to a copy of the entire ICR package free of charge.

SUPPLEMENTARY INFORMATION:

Title: Social Science Assessment and Geographic Analysis of Marine Recreational Uses and Visitor Attitudes at Dry Tortugas and Biscayne National Parks.

Bureau Form Number: None.

OMB Number: To be requested.

Expiration Date: To be requested.

Type of Request: New Collection.

Description of Need: The National Park Service (NPS) Act of 1916, 38 Stat 535, 16 USC 1, *et seq.,* requires that the NPS preserve national parks for the use and enjoyment of present and future generations. The National Park Service is developing a visitor-focused program to reduce recreational impacts on marine resources in certain ocean units of the National Park System. The program aims to remove and mitigate degradation of ocean resources by enabling visitors to avoid boat grounding, anchor damage, fishing violations, wildlife disturbance, invasive species introduction, pollution and other impacts from boating, fishing, scuba diving, snorkeling and kayaking. Coral reefs, seagrass beds, fish, birds, marine mammals and other sensitive habitats and wildlife are particularly vulnerable to damage or disturbance. However, most visitors will use marine resources responsibly if provided appropriate information and navigational tools to encourage safe and environmentally sound behavior. Dry Tortugas National Park (DRTO) has adopted various anchoring or fishing prohibitions, and Biscayne National Park (BISC) is developing a Fisheries Management Plan and amendments to the Park General Management Plan. In order to succeed, these measures require a full understanding of local visitor use patterns and attitudes and a strategy to incorporate this information into resource management, education and enforcement efforts. The project will survey visitor attitudes, perceptions and beliefs concerning marine resources and provide a geospatial assessment of geographic locations of visitor uses at DRTO and BISC. The reports will be used to assess levels and patterns of recreational uses in these parks and develop and evaluate strategic communication efforts. This information will support efforts to address marine recreational impacts on sensitive habitats and marine resources, and guide strategies to reduce these impacts through education and outreach, navigational aids, and enhanced compliance with rules and regulations, working closely with the public and marine recreational communities.

Automated data collection: This information will be collected by identifying voluntary participants and providing surveys to be completed and returned via postal mail or electronic mail.

Description of respondents: Visitors to Biscayne and Dry Tortugas National Parks, Florida who visit between February 1st, 2010 and November 1st, 2010.

Estimated average number of respondents: We will contact 5,000 individuals stratified by month and expect 2,500 or 50 percent, to agree to respond.

Estimated average number of responses: We expect to collect 2,500 completed surveys.

Estimated average burden hours per response: 3 minutes for non-respondents and 23 minutes for respondents.

Frequency of Response: 1 time per respondent.

Estimated total annual reporting burden: 1,083 hours.

Comments are invited 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 techniques or other forms of information technology. Before including your address, phone number, e-mail address, or other personal identifying information in your comment—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 29, 2009.

Cartina Miller,

NPS, Information Collection Clearance Officer.

[FR Doc. E9–10482 Filed 5–5–09; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Development of Voluntary Standard (ANSI/ROV—1—200X) for Recreational Off-Highway Vehicles

Correction

In notice document E9–9395 appearing on page 18747 in the issue of April 24, 2009, make the following corrections:

1. On page 18747, the subject is corrected to read as set forth above.

2. On the same page, in the second column, in the final paragraph, ''September 12, 200 (7 FR 53043)'' is corrected to read ''September 12, 2008 (73 FR 53043)''.

[FR Doc. Z9–9395 Filed 5–5–09; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application Nos. and Proposed Exemptions; D–11498, MarkWest Energy Partners, L.P.; D–11508, Barclays Global Investment, N.A. and Its Affiliates and Successors (BGI) and Barclays Capital Inc. and Its Affiliates and Successors (BarCap) (collectively Applicants); and D–11523, The Bank of New York Mellon Corporation (BNYMC) and Its Affiliates (Collectively, BNY Mellon), et al.]

Notice of Proposed Exemptions

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.

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.

MarkWest Energy Partners, L.P. Located in Denver, Co

[Application No. D–11498]

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).

I. Retroactive Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), and 406(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) and 4975(c)(1)(E) of the Code,[1] shall not apply, effective February 21, 2008:

(a) To the acquisition by the individually, directed accounts (the Account(s)) of participants in the MarkWest Hydrocarbon, Inc. 401(k) Savings and Profit-Sharing Plan (the Plan), of publicly traded partnership units (the Units) issued by MarkWest Energy Partners, LP (Partners), the parent of MarkWest Hydrocarbon Inc. (Hydrocarbon), which is the sponsor of the Plan, as a result of the conversion of the common stock of Hydrocarbon (the Stock) held by the Plan into Units, pursuant to a plan of Redemption and Merger (the Merger); and

(b) to the holding of such Units by the Accounts in the Plan; provided that the conditions, as set forth, below, in this section I(b)(1) through (13), and the general conditions, as set forth, below, in section III of this proposed exemption, were satisfied at the time the transaction, described, above, in sections I(a) of this proposed exemption, was entered into and the transaction, described, above, in section I(b) of this proposed exemption occurred:

(1) The past acquisition and holding of the Units by the Accounts in the Plan occurred in connection with the conversion of the Stock, pursuant to the terms of the Merger, which was the result of an independent act of Hydrocarbon, as a corporate entity;

(2) All shareholders of the Stock, including the participants in the Accounts in the Plan, were treated in a like manner with respect to all aspects of the redemption and conversion of the Stock, pursuant to the terms of the Merger;

(3) The past acquisition and holding of the Units by the Accounts in the Plan occurred in accordance with provisions in the Plan for individual participant direction of the investment of the assets of such Accounts;

(4) The past acquisition and holding of the Units were each one-time transactions, and the dispositions of the Units by the Accounts in the Plan occurred in a series of transactions for cash on the New York Stock Exchange (NYSE);

(5) The participants in the Accounts in the Plan were provided with all shareholder rights and with the opportunity to direct the trustee of the Plan to vote ''for'', ''against,'' or ''abstain'' with regard to the redemption and conversion of the Stock held in the Accounts in the Plan, pursuant to the terms of the Merger.

(6) The decision as to which compensation package to accept, in connection with the redemption and conversion of the Stock held in Accounts in the Plan, was made in accordance with the directions of the individual participants in whose Accounts such Stock was held, or, in the case of Accounts in the Plan for which no participant direction was given, the decision as to which compensation package to accept, in connection with the redemption and conversion of the Stock held in such Accounts in the Plan, was made in accordance with the directions of an independent, qualified fiduciary (the I/F), acting on behalf of such Accounts;

(7) The Units acquired, as a result the conversion of the Stock held in the Accounts in the Plan, pursuant to the

[1] For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

terms of the Merger, were held in such Accounts for no more than a period of sixty (60) days after such Units were acquired by such Accounts;

(8) The Accounts in the Plan disposed of all of the Units that such Accounts acquired as a result of the conversion of the Stock; and such dispositions occurred on the NYSE in a series of blind transactions for cash resulting in a weighted average price per Unit of no less than $32.394,

(9) The cash proceeds from such dispositions of the Units by the Accounts in the Plan were distributed thereafter to each of the Accounts based on the number of Units held in each such Account;

(10) The decision to dispose of the Units, acquired by the Accounts in the Plan as a result of the conversion of the Stock was made by the I/F, acting on behalf of each such Account;

(11) The Accounts in the Plan did not pay any fees, commissions, transaction costs, or other expenses in connection with the redemption of the Stock by Hydrocarbon, the conversion of the Stock into Units, the acquisition and holding of such Units by such Accounts in the Plan, or the disposition of the Units on the NYSE ;

(12) At the time each of the transactions, described, above, in sections I(a) and I(b) of this proposed exemption occurred, the individual participants whose Accounts in the Plan engaged in each such transaction, or the I/F, acting on behalf of Accounts in the Plan for which no participant direction was given, determined that each such transaction was in the interest of the participants and beneficiaries of such Accounts; and

(13) The I/F took all appropriate actions necessary to safeguard the interests of the Accounts in the Plan, in connection with the transactions, described, above, in sections I(a)and I(b) of this proposed exemption.

II. Prospective Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(E) and 406(a)(2) of the Act shall not apply, effective, as of the date a final exemption is published in the **Federal Register**, to:

(a) The purchase of Units in the future by the Accounts in the Plan, and

(b) The holding of such Units by the Accounts in the Plan, provided that the conditions, as set forth below, in this section II(b)(1) through (8), and the general conditions, as set forth, below, in section III of this proposed exemption, are satisfied at the time the transaction, described, above, in section II(a) of this proposed exemption is entered into, and at the time the transaction, described, above, in section II(b) of this proposed exemption occurs:

(1) The decision by the Accounts in the Plan as to whether to engage in the purchase, the holding, or the sale of the Units shall be made by the individual participants of the Accounts in the Plan which engage in such transactions;

(2) Hydrocarbon, rather than the Accounts in the Plan, shall bear any fees, commissions, expenses, or transaction costs, with respect to the purchase, holding, or sale of the Units;

(3) Each purchase and each sale of any of the Units shall occur only in blind transactions for cash on the NYSE at the fair market value of such Units on the date of each such purchase and each such sale;

(4) Each purchase and each sale of any of the Units shall occur on the same day (or if such day is not a trading day, the next day) as the direction to purchase or to sell the Units is received by the administrator of the Plan from the applicable participant of an Account which is engaging in such purchase or such sale;

(5) The terms of each purchase and each sale are at least as favorable to the Account as terms generally available in comparable arm's-length transactions between unrelated parties;

(6) Prior to the purchase by an Account in the Plan of any Units, Partners provides the participant who is directing the investment of such Account in the Units with the most recent prospectus describing the Units, and the most recent quarterly statement, and annual report, concerning Partners, and thereafter, provides such participant with updated prospectuses on the Units, and updated quarterly statements, and annual reports of Partners, as published;

(7) Prior to a participant of an Account in the Plan engaging in the purchase of any Units, Partners must provide the following disclosures to such participant. The disclosure must contain the following information regarding the transactions and a supplemental disclosure must be made to the participant directing the covered investments if material changes occur. This disclosure must include:

(A) Information relating to the exercise of voting, tender, and similar rights with respect to the Units;

(B) The exchange or market system where the Units are traded; and

(C) A statement that a copy of the proposed and final exemption shall be provided to participants upon request.

(8) Each participant in an Account in the Plan shall have discretionary authority to direct the investment of such Account:

(A) To sell the Units purchased by such Account no less frequently than monthly, and

(B) to vote, tender, and exercise similar rights with respect to the Units held in such Account.

III. General Conditions

(a) Partners or its affiliates maintain, or cause to be maintained, for a period of six (6) years from the date of each of the covered transactions such records as are necessary to enable the persons described, below, in section III(b)(1), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to the Plan which engages in the covered transactions, other than Partners 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 are not available for examination, as required, below, by section III(b)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of Partners and its affiliates, such records are lost or destroyed prior to the end of the six-year period.

(b)(1) Except as provided, below, in section III(b)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in section III(a) 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 the 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 the Plan that engages in the covered transactions, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the 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 III(b)(1)(B)–(D) shall be authorized to examine trade secrets of Partners and its affiliates, or commercial

or financial information which is privileged or confidential; and

(3) Should Partners or its affiliates refuse to disclose information on the basis that such information is exempt from disclosure, Partners 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.

Summary of Facts and Representations

1. The Plan is a 401(k) defined contribution profit-sharing plan, established on August 1, 1993. Fidelity Management Trust Company (Fidelity) with offices in Boston, Massachusetts is the trustee for the Plan.

Full-time permanent employees of Hydrocarbon are eligible to participate in the Plan. There are an estimated 441 participants and beneficiaries in the Plan. Individual Accounts are maintained for each participant in the Plan. Each participant's Account is credited with the participant's contribution, non-discretionary matching contributions made by Hydrocarbon, any allocations of discretionary contributions made by Hydrocarbon, and any earnings or losses and expenses, which are allocated based on the balance in each participant's Account.

Participants direct the investment of their contributions into various investment options offered by the Plan. The Plan currently offers mutual funds and a collective trust fund as investment options. As of September 9, 2008, the approximate aggregate fair market value of the total assets of the Plan was $23,058,075.

Prior to the consummation of the Merger, discussed in greater detail below, the Plan permitted investments in shares of the common Stock of Hydrocarbon, which at that time was publicly traded. It is represented that shares of such Stock are ''qualifying employer securities,'' pursuant to section 407(d)(5) of the Act.[2]

Immediately prior to the Merger, the Plan held approximately 137 million shares of Hydrocarbon Stock, representing 2 percent (2%) of the outstanding shares of such Stock. As of December 31, 2007, the value of the Hydrocarbon Stock represented approximately 49 percent (49%) of the aggregate value of the assets of the Plan. After the effective date of the Merger, Hydrocarbon Stock was delisted from the American Stock Exchange, and the Stock was eliminated as an investment option under the Plan.

2. Hydrocarbon, the sponsor and named fiduciary of the Plan, is the applicant (the Applicant) for this proposed exemption. Hydrocarbon was founded in 1988 as a partnership and later incorporated in the state of Delaware. Currently, Hydrocarbon has offices located in Denver Colorado. Hydrocarbon completed an initial public offering of its common Stock in 1996.

3. On January 25, 2002, Hydrocarbon formed Partners, a master limited partnership with MarkWest Energy, GP, L.L.C., as the general partner (the GP). As of December 31, 2006, Hydrocarbon owned a 17 percent (17%) interest in Partners and an 89.7 percent (89.7%) ownership interest in the GP.

Partners is a Delaware limited partnership, engaged in the gathering, transportation and processing of natural gas, the transportation, fractionation, and storage of natural gas liquids, and the gathering and transportation of crude oil. Partners conducts business in the southwest, northeast, and the Gulf Coast of the United States.

Partners does not have any employees. Employees of Hydrocarbon operate Partner's facilities and provide general and administrative services. As of September 28, 2007, Hydrocarbon employed approximately 318 people for these purposes.

4. On September 5, 2007, Hydrocarbon entered into a Plan of Redemption and Merger with Partners and with MWEP, L.L.C. (MWEP), which is a wholly-owned subsidiary of Partners. The terms of the Merger were negotiated between Hydrocarbon and Partners. It is represented that no shareholder was treated in a different manner, pursuant to the terms of the Merger. On February 21, 2008, the Merger was consummated. Accordingly, as a result of the Merger, MWEP merged with and into Hydrocarbon, and Hydrocarbon became a direct wholly-owned subsidiary of Partners.

It is represented that, as minority shareholders, the Accounts in the Plan did not have the ability to materially influence the structure of the Merger. It is represented that under the terms of the Plan, voting rights to the Stock were passed through to participants in Accounts in the Plan. Accordingly, the participants in the Accounts in the Plan were provided with shareholder rights to vote ''for'' or ''against,'' or ''abstain'' with regard to the Merger and to elect the form of consideration such Accounts would receive as a result of the Merger. The deadline for the exercise of such rights was February 13, 2008.

Under the terms of the Merger, shareholders of the Stock, including the participants of Accounts in the Plan, were permitted to elect to receive consideration for their shares of Stock in the form of: (a) An exchange of all shares of Stock attributable to an Account in the Plan for a stated consideration of $20 in cash and 1.285 Units per share of Stock; (b) an exchange of all shares of Stock attributable to an Account in the Plan for 1.905134 Units per share of Stock, (c) an exchange of all shares of Stock attributable to an Account in the Plan for $61.442663 of cash per each share of Stock, or (d) an exchange of a specific portion of the shares of Stock attributable to an Account in the Plan for cash and the balance in Units. It is represented that Stock exchanged for cash was redeemed by Hydrocarbon immediately prior to the Merger.

As a result of the Merger, it is represented that shareholders of the Hydrocarbon Stock received in the aggregate consideration of approximately 15,400,000 Units and $240,000,000 in cash. Specifically, the Accounts in the Plan exchanged 229,372 shares of Stock for 294,743 Units and received approximately $4.6 million in cash.[3]

It is represented that the cash payments were made to the Accounts in the Plan through a redemption process in which no brokerage fees were paid. In order to accommodate the redemption of the Stock, the Plan adopted an amendment to add a money market fund, Fidelity Retirement Money Market Portfolio, as an investment option. All cash proceeds from the redemption of the Stock were directed into this money market fund for each participant in the Accounts in the Plan.

Units acquired by the Accounts in the Plan as a result of the Merger were permitted to remain in the Plan for up to sixty (60) days from the date of such

[2] The Department, herein, is not opining as to whether the Hydrocarbon Stock satisfies the definition of ''qualifying employer securities'', as set forth in section 407(d)(5) of the Act, nor is the Department, herein, providing any relief from Title I or Title II of the Act for the acquisition and holding of such Stock by the Plan.

[3] In the opinion of the Applicant, the cash portion of the consideration received by the Accounts in the Plan, as a result of the redemption of the Stock held by such Accounts in the Plan, is statutorily exempt, pursuant to section 408(e) of the Act. Section 408(e) of the Act provides that a plan may sell ''qualifying employer securities,'' to a party in interest, provided the plan receives adequate consideration, and no commission is charged. The Department, herein, is offering no view, as to whether the cash redemption of the Hydrocarbon Stock held in the Accounts in the Plan satisfied the requirements of the statutory exemption provided under section 408(e) of the Act. The Department, herein, is not providing any exemptive relief, with respect to such redemption of such Stock by the Accounts in the Plan.

acquisition. During this period of time, it is represented that the Units in the Accounts in the Plan were held by an independent trustee, other than Fidelity. In this regard, Banker's Trust Company (Banker's) was appointed to act as directed trustee to receive the Units on behalf of the Accounts in the Plan. It is further represented that the participants in the Accounts in the Plan were not permitted to direct any activity with respect to these Units during this sixty (60) day period.

Hydrocarbon retained an independent, qualified, fiduciary, as discussed in greater detail below, to direct the dispositions of the Units within the 60 day period from the date such Units were acquired by such Accounts. It is represented that all Units in the Accounts in the Plan had been sold by April 4, 2008. The proceeds from the dispositions of the Units received by each participant's Account equaled the number of Units previously held in each such participant's Account, multiplied by $32.394, which is the weighted average sales price of all Units sold from the Plan in a series of blind transactions for cash on the NYSE. The proceeds from the sale of the Units were directed to the money market fund in the appropriate participants' Accounts. The participants in the Account in the Plans did not pay any fees, commissions or similar charges with respect to the disposition of the Units on the NYSE.

6. The Units of Partners are limited partnership units. Such Units are publicly traded on the NYSE under the symbol MWE. As of the date the application for exemption was submitted to the Department, there were 56,639,952 Units outstanding. The average daily trading volume for the Units is approximately 120,000. The Applicant maintains that for purposes of regulation by the Securities and Exchange Commission and the rules of the NYSE, the Units are similar to publicly traded securities.

It is represented that the Units are securities under federal securities law and constitute ''employer securities'' under section 407(d)(1) of the Act.[4] However, the Units do not satisfy the definition of ''qualifying employer securities'' under the section 407(d)(5) of the Act.[5] Because the Units are not qualifying employer securities, the Plan could not have acquired the Units in the past, in connection with the conversion of the Stock into Units, pursuant to the Merger, without violating section 406(a)(1)(A) and 406(a)(1)(E) of the Act and 4975(c)(1)(A) of the Code and cannot purchase the Units on the NYSE in the future without violating sections 406(a)(1)(E) the Act. For the same reason, the Plan could not have held the Units in the past and cannot hold the Units in the future, without violating section 406(a)(2) of the Act.

It is represented that qualifying employer security investments are commonly offered by employers when designing 401(k) plans. In the opinion of the Applicant, there is no valid public policy reason to deny employees of a publicly traded partnership a similar investment opportunity. It is represented that, if the requested exemption is granted, Hydrocarbon will amend the Plan in all necessary respects to provide for the prospective purchase and holding of the Units.[6]

8. As the employer any of whose employees are covered by the Plan, Hydrocarbon is a party in interest with respect to the Plan, pursuant to section 3(14)(C) of the Act. As the owner of Hydrocarbon, Partners is a party in interest with respect to the Plan, pursuant to section 3(14)(E). Fidelity, as trustee, Hydrocarbon, the named fiduciary, and Banker's, the directed trustee, are fiduciaries with respect to the Plan, pursuant to section 3(14)(A) of the Act.

9. Hydrocarbon is seeking an exemption, effective February 21, 2008, for the past acquisition by the Accounts of the Units issued by Partners, as a result of the conversion of the Stock into Units, pursuant to the Merger, and the holding of such Units by the Accounts in the Plan. Accordingly, Hydrocarbon has requested retroactive relief from the restrictions of sections 406(a)(1)(A), 406(a)(1)(E), 406(a)(2), 406(b)(1), and 406(b)(2) of the Act.

Further, Hydrocarbon and the Plan desire an exemption in order to make the Units available in the future to the employees of Hydrocarbon through the Accounts of participants in the Plan. Specifically, the Applicant requests relief to permit the Accounts in the future to purchase Units for cash in blind transactions on the NYSE and to hold such Units. Accordingly, prospective relief from the restrictions of 406(a)(1)(E) and 406(a)(2) of the Act has been requested.

10. It is represented that the past acquisition and holding of the Units, pursuant to the Merger were feasible in that the past acquisition and holding of the Units were each one-time transactions.

11. It is represented that the past acquisition and holding of the Units by the Accounts in the Plan provided sufficient safeguards for such Accounts and for the participants and beneficiaries of such Plan. In this regard, the past transactions occurred, in connection with the Merger, in which all shareholders of the Stock, including the Accounts in the Plan, were treated in like manner with respect to all aspects of the redemption and conversion of the Stock. The participants in the Accounts in the Plan were provided with shareholder rights and with the opportunity to direct the trustee of the Plan to vote ''for,'' ''against,'' or ''abstain'' with regard to the redemption and conversion of the Stock held in the Accounts in the Plan, pursuant to the Merger. The decision as to which compensation package to accept, in connection with the redemption of the Stock held in Accounts in the Plan, was made in accordance with the directions of the individual participants in whose Accounts such Stock was held. Furthermore, the decision to redeem for cash the Stock held in Accounts in the Plan for which no participant direction was received, and the decision to dispose of all of the Units in the Accounts in the Plan for cash on the NYSE within a period of no more than sixty (60) days was made by the I/F.

12. It is represented that on August 17, 2007, well in advance of the Merger, Hydrocarbon retained Consulting Fiduciaries, Inc. (CFI), located in Northbrook, Illinois, to serve as the I/F acting on behalf of the Plan. When hired, CFI acknowledged that it is a fiduciary with respect to the Plan, as that term is defined in the Act.

CFI is registered as an investment adviser under the Investment Advisers Act of 1940. CFI is qualified in that it provides professional independent fiduciary decision making, consultation, and alternative dispute resolution services to plans, plan sponsors, trustees, and investment advisers. David L. Heald, JD (Mr. Heald) and Mr. Seymour R. Zilberstein (Mr. Zilberstein)

[4] Section 407(d)(1) of the Act defines the term, ''employer security,'' as ''a security issued by an employer of employees covered by the plan, or by an affiliate of such employer.''

[5] Section 407(d)(5) of the Act defines the term, ''qualifying employer security,'' as an employer security which is stock, a marketable obligation (as defined in subsection (e)), or an interest in certain publicly traded partnerships.

[6] Section 29 CFR 2550.404c–1(d)(2)(ii)(E)(4)(i) provides that in order for the limitation on liability of plan fiduciaries under section 404(c) of the Act to apply, the securities must be qualifying employer securities, as defined in section 407(d)(5) of the Act. Because the Units are not qualifying employer securities, as defined in section 407(d)(5) of the Act, the relief afforded by section 404(c) of the Act would not be available to Hydrocarbon, the sponsor of the Plan. The Department notes that the fact that a transaction is the subject of an exemption under section 408(a) of the Act does not relieve a fiduciary from the general fiduciary responsibility provisions of section 404 of the Act.

are the founding principals of CFI. It is represented that Mr. Heald's and Mr. Zilberstein's qualifications include over 37 years and 35 years, respectively, of legal and management experience with trust companies and institutional investment advisers. Mr. Heald is also a Charter Fellow of the American College of Employee Benefits Counsel. Both Mr. Heald and Mr. Zilberstein are active in professional associations.

CFI was retained to: (a) Review and evaluate the Merger, (b) direct the trustee of the Plan to take appropriate action (including the execution of any pass-through voting procedures, if necessary), (c) make an election on the form of consideration for those Accounts in the Plan for which no participant direction was received, and (d) to the extent any Units were acquired in the Merger, to ensure that such Units were disposed of in a timely and prudent manner. It is represented that CFI had full discretion and was fully empowered to act on behalf of the Plan in determining what action to take with respect to the Merger, and to direct the trustee. In the event of a pass-through vote, CFI had discretion to determine how to vote any unallocated shares of Stock and any allocated shares of Stock held in the Plan for which no participant direction was received and to direct the trustee accordingly. Upon completion of its assignment, CFI provided a written report to the Plan summarizing its activities, including, but not limited to, a review of the process undertaken by CFI, the issues considered, and the information reviewed in formulating the conclusions reached.

It is represented that in addition to the proxy package provided to each participant of the Accounts in the Plan, CFI provided a notice to each such participant that described CFI's role, its process of consideration, and the position it would take with respect to voting and to electing the form of consideration to be received from the Merger. CFI also informed participants that any Units received as a result of the Merger consideration would be sold on the public market and that there could be no guarantee as to the price that would be received in such sale. It is represented that participants returned voting directions with respect to 69,742 shares of Stock, leaving 165,733 shares of Stock to be voted by CFI. It is represented that on February 19, 2008, CFI directed the vote on behalf of the Plan in favor of the Merger and elected to receive the maximum amount of cash consideration for the Stock. On February 21, 2008, it was announced that the Merger had been approved. On February 26, 2008, it was announced that the cash consideration had not been oversubscribed, so any shareholder, including the Accounts in the Plan, electing all cash would receive all cash. Subsequently, CFI received information from Fidelity that the Plan had received approximately 71,994 Units, as part of the Merger consideration elected by participants. Pursuant to CFI's direction, the Units were sold in the open market receiving total proceeds of $2,332,176 or $32.394 per Unit which was the equivalent of $61.71 per each share of Stock converted into Units.

13. CFI, acting as independent fiduciary for the Plan, determined that the Merger was fair and in the best interest of the Plan. In reaching this decision, CFI undertook a process of review which included visits with the management of Hydrocarbon, review of relevant documents regarding the business of Hydrocarbon, and the Merger, discussions with outside advisors and consultants to Hydrocarbon, and an analysis of the terms of the Merger. In addition, CFI on September 2, 2007, retained the services of Stout Risius Ross, Inc. (SRR) to act as independent financial advisor in connection with the Merger, to perform a financial analysis, and to issue a fairness opinion with respect to the Merger.

SRR is a financial advisory firm specializing in business valuations, investment banking, and restructuring and performance improvement. SRR's business valuation practice provides valuations of privately held business and business interests for all purposes. It is represented that SRR is qualified in that it has provided financial advisory services for more than 100 employee benefit plan clients.

SRR represents that it is independent in that the professional fees for the services rendered in connection with the transactions described in section I(a) and I(b) of this proposed exemption were not contingent upon the opinion expressed in their report. Further, neither SRR nor any of its employees has a present or intended financial relationship with or interest in the Plan, Hydrocarbon, or Partners.

In order to assess the fairness of the terms and conditions of the Merger, SRR prepared a valuation analysis of Hydrocarbon and Partners (ignoring the effects of the Merger) to determine if the publicly traded price of each entity was a reasonable representation of its value. In addition, SRR prepared a valuation analysis of Partners on a post-merger basis, to assess the value of the Units following the Merger, because part of the consideration was in the form of Units.

In performing its valuation analysis, SRR considered several valuation approaches, including the Income Approach, the Market Approach, and the Asset-Based Approach. Specifically, after giving consideration to the facts and circumstances surrounding Hydrocarbon and Partners, it is represented that SRR relied on the Guideline Company Method (a form of the Market Approach) and the Discounted Cash Flow Method (a form of the Income Approach).

In a written report issued September 28, 2007, SRR concluded that: (a) The consideration received by the Plan for its Hydrocarbon Stock was not less than the fair market value of such shares; and (b) the overall terms and conditions of the Merger were fair to the Plan from a financial point of view. In the opinion of SRR, the Merger would create value for the Plan, because the consideration received for the shares of Stock held by the Plan was worth at least 20 percent (20%) more than the publicly traded value of those shares (prior to the announcement of the Merger).

14. It is represented that the prospective transactions are feasible in that Hydrocarbon will amend the Plan in all necessary respects to provide for the purchase and holding of the Units in the future. Further, Hydrocarbon will bear the cost of filing the application and the cost of notifying interested persons.

15. It is represented that there are sufficient safeguards to permit the transactions for which prospective relief is requested. In this regard, future decisions to purchase, to hold, and to sell the Units will be made by the participants of the Accounts in the Plan no less frequently than monthly. Prior to the purchase of Units by the Account in the Plan, participants who are directing such investment in Units will receive the most recent copies of the prospectus of the Units, and the most recent quarterly statements, and annual report of Partners and updates, as published. Prior to purchase, and subsequent to purchase, if material changes occur, disclosures to participants in the Accounts of the Plan who are directing the investment in the Units will include information relating to the exercise of voting, tender, and similar rights with respect to the Units, the exchange on which the Units are traded, and a copy of the proposed and final exemption, upon request. In addition, participants in the Account in the Plan which holds Units shall have the same rights as all other holders of Units. These rights include voting rights, as set forth in the

Third Amended and Restated Agreement of Limited Partnership of MarWest Energy Partners, L.P.

The imposition of a 20 percent (20%) limitation on the amount of assets of each Account in the Plan which can be comprised of Units will also insure that each Account will not become unduly concentrated in Units.

It is further represented that because the Units are publicly traded on the NYSE, a ready market for the Units exists. Accordingly, in the opinion of the Applicant the Units have sufficient liquidity and market-pricing protections. It is represented that the fact that the Units are traded on the NYSE will insure that each participant's Account in the Plan will receive arm's length terms. Further, the fair market value for the Units, whether the Plan purchases or sells such Units, will be determined by the price of such Units on the NYSE.

Hydrocarbon, rather than the Accounts in the Plan, shall bear any fees, commissions, expenses, or transaction costs, with respect to the purchase, holding, or sale of the Units. It is represented that when the Accounts in the Plan previously provided for the purchase of Stock and when the Accounts in the Plan disposed of the Units in the past, the broker was Fidelity. Fidelity is not an affiliate of Partners and no fees or other amounts were shared with Partners. A broker has not yet been selected for the purpose of future purchases or sales of the Units on the NYSE by the Accounts in the Plan. If the proposed exemption is granted and the Accounts in the Plan are permitted to purchase and sell Units on the NYSE, it is represented that no affiliate of Partners will be used as a broker, and no fees or other amounts will be shared with Partners.

16. In the opinion of the Applicant, the purchase and holding of the Units, for which prospective relief is requested, are in the interest of Accounts in the Plan. In this regard, such transactions in the future will enable employees of Hydrocarbon to share in the growth of Partners and provide such employees with a more generally efficient and inexpensive means to participate in the growth of and profitability of the energy sector of the economy.

17. In summary, the Applicant represents that the retroactive transactions and the prospective transactions which are the subject of this proposed exemption satisfy the statutory criteria of section 408(a) of the Act and section 4975 of the Code because:

(a) The past acquisition and holding of the Units by the Accounts in the Plan occurred in connection with the conversion of the Stock, pursuant to the terms of the Merger, which was the result of an independent act of Hydrocarbon, as a corporate entity;

(b) All shareholders of the Stock, including the participants in the Accounts in the Plan, were treated in like manner with respect to all aspects of the redemption and conversion of the Stock, pursuant to the terms of the Merger;

(c) The past acquisition and holding of the Units by the Accounts in the Plan occurred in accordance with Plan provisions for individual participant direction of investments of the assets of such Accounts;

(d) The past acquisition and holding of the Units were each one-time transactions, and the dispositions of the Units by the Accounts in the Plan occurred in a series of transactions on the NYSE;

(e) The participants in the Accounts in the Plan were provided with all shareholder rights and with the opportunity to direct the trustee of the Plan to vote ''for,'' ''against,'' or ''abstain'' with regard to the redemption and conversion of the Stock held in the Accounts in the Plan, pursuant to the Merger;

(f) The decision as to which compensation package to accept, in connection with the redemption and conversion of the Stock held in Accounts in the Plan, was made in accordance with the directions of the individual participants in whose Accounts such Stock was held, or, in accordance with the directions of the I/F, acting on behalf of Accounts for which no participant direction was given;

(g) The Units acquired, as a result of the conversion of the Stock held in the Accounts in the Plan, pursuant to the terms of the Merger, were held in such Accounts for no more than a period of sixty (60) days after such Units were acquired by such Accounts;

(h) The Accounts in the Plan disposed of all of the Units that such Accounts acquired as a result of the conversion of the Stock; and such dispositions occurred on the NYSE in a series of blind transactions for cash resulting in a weighted average price per Unit of no less than $32.394;

(i) The cash proceeds from such dispositions of the Units by the Accounts in the Plan were distributed thereafter to each of the Accounts based on the number of Units held in each such Account;

(j) The decision to dispose of the Units, acquired by the Accounts in the Plan as a result of the conversion of the Stock was made by the I/F, acting on behalf of each such Account;

(k) The Accounts in the Plan did not pay any fees, commissions, transaction costs, or other expenses in connection with the redemption of the Stock by Hydrocarbon, the conversion of the Stock into Units, and acquisition and holding of such Units by such Accounts in the Plan or the disposition of the Units on the NYSE;

(l) At the time each of the transactions, described, above, in sections I(a) and I(b) of this proposed exemption occurred, the individual participants of the Account that engaged in each such transaction, or the I/F, acting on behalf of the Accounts for which no participant direction was given, determined that each such transaction was in the interest of the participants and beneficiaries of such Accounts;

(m) The I/F took all appropriate actions necessary to safeguard the interests of the Accounts in the Plan, in connection with the transactions, described, above, in sections I(a) and I(b) of this proposed exemption;

(n) Hydrocarbon, rather than the Accounts in the Plan, will bear any fees, commissions, expenses, transaction costs, or other expenses with respect to the prospective purchase, holding, or sale of the Units;

(o) The decision by the Accounts in the Plan as to whether to engage in the prospective purchase, holding, or sale of the Units will be made by the individual participants of the Accounts in the Plan which engage in such transactions;

(p) Each purchase and each sale of any of the Units in the future will occur only in blind transactions on the NYSE for cash at the fair market value of such Units on the date of each such purchase and each such sale;

(q) Each purchase and each sale of any of the Units in the future will occur on the same day (or if such day is not a trading day, on the next day) as the direction to purchase or to sell the Units is received by the administrator of the Plan from the applicable participant of an Account which is engaging in such purchase or such sale;

(r) Immediately following a purchase of Units in the future by an Account, the fair market value of all of the Units held in such Account will not exceed twenty percent (20%) of the aggregate fair market value of the assets in such Account;

(s) The terms of each prospective purchase and each prospective sale of the Units are at least as favorable to the

Account as terms generally available in comparable arm's-length transactions between unrelated parties;

(t) Prior to the purchase by an Account in the Plan of any Units, Partners will provide the participant who is directing the investment of such Account with the most recent prospectuses, quarterly statements, and annual reports, and thereafter provides updated prospectuses, quarterly statements, and annual reports, as published;

(u) Prior to a participant of an Account in the Plan engaging in the purchase of any Units, Partners will provide the certain disclosures to such participant and a supplemental disclosure must be made to the participant directing, if material changes occur;

(v) Each participant in an Account in the Plan will have discretionary authority to direct the investment of such Account to sell the Units purchased by such Account no less frequently than monthly, and to vote, tender, and exercise similar rights with respect to the Units held in such Account; and

(w) Partners or its affiliates will maintain, or cause to be maintained, for a period of six (6) years from the date of any of the covered transactions such records as are necessary to determine whether the conditions of this exemption have been met.

Notice to Interested Persons

The persons who may be interested in the publication in the **Federal Register** of the Notice of Proposed Exemption (the Notice) include the participants of the Plan, the fiduciaries of the Plan, and the trustees of Plan.

It is represented that each of these classes of interested persons will be notified of the publication of the Notice by mail, within fifteen (15) calendar days of publication of the Notice in the **Federal Register.** Such mailing will contain a copy of the Notice, as it appears in the **Federal Register** on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise all interested persons of their right to comment and to request a hearing.

Any written comments and/or requests for a hearing must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

Barclays Global Investors, N.A. and its affiliates and successors (BGI) and Barclays Capital Inc. and its affiliates and successors (BarCap) (collectively Applicants); Located in San Francisco, CA, and New York, NY
[Application No. D–11508]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act, section 8477(c)(3) of the Federal Employees' Retirement System Act of 1986 (FERSA) 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).

Section I—Temporary Exemption for Securities Lending Transactions Involving Index and Model-Driven Funds That Are Based on BarCap-Lehman Indices

If the exemption is granted, for the period from September 22, 2008, through the earlier of (i) the effective date of an individual exemption granting permanent relief for the following transactions or (ii) one year from the grant date of this individual exemption (the Relief Period), the restrictions of section 406(a)(1)(A) through (D) and 406(b)(1) and (2) of the Act, section 8477(c)(2)(A) and (B) of 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 to the lending of securities carried out on behalf of Client Plans in reliance on Prohibited Transaction Exemption (PTE) 2002–46 [7], where the applicable Index or Model-Driven Fund managed by BGI meets the definition of an ''Index Fund'' or a ''Model-Driven Fund'' as set forth in Section III of PTE 2002–46 but for the fact that the underlying index is a BarCap-Lehman Index, provided that all of the other conditions of PTE 2002–46 and the conditions set forth in Section IV of this proposed exemption are met.

Section II—Temporary Exemption for Transactions Involving Exchange-Traded Funds That Are Index and Model-Driven Funds Based on BarCap-Lehman Indices

If the exemption is granted, effective for the Relief Period, the restrictions of section 406(a) and (b) of the Act, section 8477(c)(2) of FERSA, and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (F) of the Code, shall not apply to transactions carried out on behalf of Client Plans in reliance upon Prohibited Transaction Exemption (PTE) 2008–01 [8], where the applicable Index or Model-Driven Fund would meet the definition of an ''Index Fund'' or a ''Model-Driven Fund'' as set forth in Section V of PTE 2008–01 but for the fact that the underlying index is a BarCap-Lehman Index, provided that all of the other conditions of PTE 2008–01 and the conditions set forth in Section IV of this proposed exemption are met.

Section III—Temporary Exemption for Principal Transactions With the BarCap-Lehman Broker-Dealer

If the exemption is granted, effective for the Relief Period, the restrictions of section 406(a) and 406(b)(1) and (2) of the Act, section 8477(c)(2)(A) and (B) of FERSA, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the purchase or sale of fixed income securities between BGI on behalf of Client Plans and the BarCap-Lehman Broker-Dealer (Covered Principal Transactions) provided that the conditions set forth in Section V are met.

Section IV—Conditions Applicable to Sections I and II

(a) Each BarCap-Lehman Index is a published Index widely used in the market by independent institutional investors other than pursuant to an investment management or advisory relationship with BGI and is prepared or applied in the same manner for non-affiliated customers as for BGI.

(b) Prior to the use of a BarCap-Lehman Index in connection with the exemption and on an annual basis thereafter (but in no event prior to the date that is 90 days following the date of the publication of this proposed exemption in the **Federal Register**), BGI will provide BarCap with a list of BarCap Lehman Indices proposed to be used by BGI in connection with the exemption. BarCap will certify to BGI whether, in its reasonable judgment, each such index is widely used in the market. In making this determination, BarCap shall take into consideration factors such as (i) publication by Bloomberg, or a similar institution involved in the dissemination of financial information, (ii) hits on relevant websites including LehmanLive (or any successor website maintained by BarCap or its affiliate(s)) and Bloomberg.com (or similar website), and (iii) delivery of index information to

[7] 67 FR 59569, September 23, 2002.

[8] 73 FR 3274, January 17, 2008.

clients by means other than through Web site access.

(c) Any fees charged for the use of the BarCap-Lehman Index are paid by BGI and not Client Plans.

(d) Information barriers are in place throughout the Relief Period between BGI and BarCap such that BGI is not provided access to information regarding the rules, decisions and data underlying the BarCap-Lehman Indices before such information is provided to users of such Indices who are independent of BarCap and such rules, decisions and data are determined objectively without regard to BGI's use of such BarCap-Lehman Indices.

(e) At the end of the Relief Period, a Qualified Independent Reviewer, as defined in Section VII(n), shall issue a written report (the Compliance Report), following its review of relevant BarCap-Lehman Indices and the underlying rules, certifying to each of the following:

(i) Each BarCap-Lehman Index was operated in accordance with objective rules, in the ordinary course of business as would be conducted between unaffiliated parties;

(ii) No manipulation of any BarCap-Lehman Index for the purpose of benefiting BGI, BarCap, or their affiliates occurred;

(iii) In the event that any rule change occurred in connection with the rules underlying any BarCap-Lehman Index, such rule change was not made for the purpose of benefiting BGI, BarCap, or their affiliates;

(iv) Based on a review of the factors cited in condition (b) above, each BarCap-Lehman Index was widely used in the market during the Relief Period;

(v) Based on the result of the Qualified Independent Reviewer's factual inquiries to the Applicants, condition (d) above was met; and

(vi) Based on the Qualified Independent Reviewer's review of paid bills or invoices, condition (c) above was met with respect to the fee or fees paid in connection with each transaction.

The Compliance Report shall be issued no later than 90 days following the end of the Relief Period describing the steps performed during the course of the Qualified Independent Reviewer's review, the level of compliance with conditions (e)(i) through (vi), and any specific instances of non-compliance. The Compliance Report shall be included in the records maintained by BGI pursuant to Section VI of this proposed exemption, and BGI shall notify the independent fiduciary(ies) of each Client Plan, as part of its regular disclosure with respect to the applicable Fund(s), that the Compliance Report is available for their review.

(f) The Index or Model-Driven Funds described in Sections I and II meet the definition of Index Fund or Model-Driven Fund in Sections VII(k) or (l) of this proposed exemption.

Section V—Conditions Applicable to Section III

(a) BGI exercises discretionary authority or control or renders investment advice with respect to the Client Plan assets involved in the Covered Principal Transaction solely in connection with an Index Fund or Model-Driven Fund in which Client Plans invest.[9]

(b) Each Covered Principal Transaction occurs as a direct result of a Triggering Event, as defined in Section VII(o), and is executed no later than the close of the third business day following such Triggering Event.

(c) Each Covered Principal Transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security.

(d) Each Covered Principal Transaction is on terms that BGI reasonably determines to be more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty would have been.

(e) Each Covered Principal Transaction is executed either:

(i) through an automated routing system reasonably designed to ensure execution at the best available net price to the Client Plan for the number of securities to be purchased or sold in the Covered Principal Transaction; or

(ii) at a net price to the Client Plan for the number of securities to be purchased or sold in the Covered Principal Transaction which is as favorable or more favorable to the Client Plan as the prices at which at least two independent Approved Counterparties, who are ready and willing to trade the relevant security, offer to purchase or sell such security.

(f) The Covered Principal Transaction does not involve any security issued by Barclays PLC.

(g) At the end of the Relief Period, a Qualified Independent Reviewer shall issue a Compliance Report certifying to each of the following:

(i) Based on a review of execution policies and procedures during the Relief Period and a sample of Covered Principal Transactions, that the policies and execution procedures used in connection with Covered Principal Transactions were reasonably designed to obtain best execution for the securities to be purchased or sold in the Covered Principal Transaction; and

(ii) Each sampled Covered Principal Transaction occurred in accordance with conditions (a), (b), (c) and (e) above. The Compliance Report shall be issued no later than 90 days following the end of the Relief Period describing the steps performed during the course of the Qualified Independent Reviewer's review, the level of compliance with conditions (g)(i) and (ii), and any specific instances of non-compliance. The Compliance Report shall be included in the records maintained by BGI pursuant to Section VI of this proposed exemption, and BGI shall notify the independent fiduciary(ies) of each Client Plan, as part of its regular disclosure with respect to the applicable Fund(s), that the Compliance Report is available for their review.

(h) In the case of any Covered Principal Transaction in connection with an Index Fund or a Model-Driven Fund with respect to which the underlying Index is a BarCap-Lehman Index, each of conditions (a) through (f) set forth in Section IV above is met.

Section VI—Recordkeeping Conditions Applicable to Sections I, II and III

(a) BGI maintains, or causes to be maintained, for a period of six (6) years following the end of the Relief Period the records necessary to enable the persons described in paragraph (b) below to determine whether the conditions of the exemption have been met, including the Compliance Reports described in Sections IV(e) and V(g), and records which identify with respect to the Covered Principal Transactions:

(i) On a Fund by Fund basis, the specific Triggering Events which result in the creation of the index or model prescribed output describing the characteristics of the securities to be traded; [10]

(ii) On a Fund by Fund basis, the index or model prescribed output which described the characteristics of the securities to be traded in detail sufficient to allow an independent plan fiduciary or the Qualified Independent Reviewer to verify that each of the above decisions for the Fund was made in response to specific Triggering Events; and

[9] This does not preclude, in the case of a BGI Plan that is a defined contribution plan under which participants direct the investment of their accounts among various investment options, the discretionary authority to select and offer investment options under the plan.

[10] Characteristics of the securities used in rebalancing a fixed income index would include changes in (a) amount of securities, (b) duration, (c) yield curve, and (d) convexity.

(iii) On a Fund by Fund basis, the actual trades executed by the Fund on a particular day, the identity of the counterparty, the prices offered by the Approved Counterparties, if relevant, and which of those trades resulted from Triggering Events.

Such records must be readily available to assure accessibility and maintained so that an independent fiduciary, the Qualified Independent Reviewer, or other persons identified below in paragraph (b) of this Section, may obtain them within a reasonable period of time. However, a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of BGI, the records are lost or destroyed prior to the end of the six-year period; and no party in interest other than BGI and its affiliates shall be subject to the civil penalty that may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (b) below.

(b) (1) Except as provided in Section (2) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (a) are unconditionally available at their customary location 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;

(B) Any fiduciary of a participating Client Plan or any duly authorized representative of such fiduciary;

(C) Any contributing employer to any participating Client Plan or any duly authorized employee representative of such employer;

(D) Any participant or beneficiary of any participating Client Plan, or any duly authorized representative of such Client Plan participant or beneficiary; and

(E) The Qualified Independent Reviewer.

(2) None of the persons described above in subparagraphs (B)–(E) of paragraph (b)(1) are authorized to examine the trade secrets of BGI or its affiliates or commercial or financial information that is privileged or confidential.

(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 written notice advising that person of the reason for the refusal and that the Department may request such information.

Section VII—Definitions

(a) *Approved Counterparty:* A dealer that (x) is either (i) registered in accordance with section 15(b) of the Exchange Act or (ii) exempt from the requirement to register as a dealer under the Exchange Act because it is a bank that buys and sells government securities (as such terms are defined in the Exchange Act) and (y) meets the credit and execution standards of BGI as described in paragraph 20 of the Summary of Facts and Representations herein.

(b) *Barclays:* Barclays PLC and its direct and indirect subsidiaries.

(c) *BarCap:* Barclays Capital Inc. and its successors.

(d) *BarCap-Lehman Broker-Dealer:* BarCap's U.S. broker-dealer business, including the broker-dealer business acquired by BarCap from Lehman on September 22, 2008.

(e) *BarCap-Lehman Index:* A generally accepted standardized securities Index created by Lehman prior to the closing of the Asset Purchase Agreement on September 22, 2008, and maintained by its successor, BarCap.

(f) *BGI:* Barclays Global Investors, N.A., its investment advisory affiliates and their respective successors.

(g) *BGI Plan:* A Plan maintained by BGI or an affiliate for the benefit of its own employees.

(h) *Client Plan:* An employee benefit plan subject to the Act, FERSA and/or the Code, whose assets are managed by or which is advised by BGI, or a BGI-managed fund or separate account in which assets of such plans are invested.

(i) *Exchange Act:* The Securities Exchange Act of 1934, as amended.

(j) *Index:* A securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States and/or foreign countries, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients;

(B) A publisher of financial news or information; or

(C) A public stock exchange or association of securities dealers; and

(2) The index is either (i) created and maintained by an organization independent of Barclays or (ii) a BarCap-Lehman Index; and

(3) The index is a generally accepted standardized index of securities which is not specifically tailored for the use of BGI.

(k) *Index Fund:* Any investment fund, account or portfolio sponsored, maintained, trusteed or managed by BGI in which one or more investors invest, and—

(1) Which is designed to track the rate of return, risk profile and other characteristics of an Index by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) For which either (i) BGI or its affiliate does not use its discretion, or data within its control, to affect the identify or amount of securities to be purchased or sold or (ii) the underlying Index is a BarCap-Lehman Index;

(3) That contains ''plan assets'' subject to the Act; and

(4) That involves no agreement, arrangement or understanding regarding the design or operation of the Fund which is intended to benefit BGI its affiliate or any party in which BGI or its affiliate may have an interest.[11]

(l) *Model-Driven Fund:* Any investment fund, account or portfolio sponsored, maintained, trusteed or managed by BGI in which one or more investors invest and—

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria to transform an Index using either (i) independent third-party data not within the control of BGI or an affiliate or (ii) data provided by the BarCap-Lehman Broker-Dealer that is commercially available on a widespread basis to unaffiliated end users such as mutual funds and collective investment funds on the same terms and conditions;

(2) Which contains ''plan assets'' subject to the Act; and

(3) That involves no agreement, arrangement or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit BGI or its affiliate or any party in which BGI or its affiliate may have an interest.[12]

(m) Lehman: Lehman Brothers Holdings Inc. and, as the context requires, its subsidiaries and affiliates prior to September 15, 2008.

(n) *Qualified Independent Reviewer:* A third party appointed by BGI that is independent of Barclays and its

[11] This requirement does not preclude BGI's payment of fees to BarCap for use of the Indices.

[12] This requirement does not preclude BGI's payment of fees to BarCap for use of the Indices or data.

affiliates and has extensive experience in reviewing and/or auditing transactions and procedures involving assets of plans subject to the Act, FERSA and/or the Code for the purpose of confirming that the applicable transactions or procedures serve the best interests of such plans.

(o) *Triggering Event:* Any of the following events in connection with an Index Fund or a Model-Driven Fund (together, ''Funds''):

(1) A change in the composition or weighting of the Index underlying a Fund by either (i) the independent organization creating and maintaining the Index or (ii) in the case of a BarCap-Lehman Index, by the BarCap-Lehman Broker-Dealer. In the case of a change described in clause (ii) of the preceding sentence, the change is uniformly applied to all customers using the Index, including non-affiliated customers, and is not adopted for the purpose of benefiting BGI.

(2) A material amount of net change in the overall level of assets in a Fund, as a result of investments in and withdrawals from the Fund, provided that:

(A) Such material amount has either been identified in advance as a specified amount of net change relating to such Fund and disclosed in writing as a ''triggering event'' to an independent fiduciary of each Client Plan having assets held in the Fund prior to, or within ten (10) days following, its inclusion as a ''triggering event'' for such Fund or BGI has otherwise disclosed to the independent fiduciary the parameters for determining a material amount of net change, including any amount of discretion retained by the BGI that may affect such net change; and

(B) Investments or withdrawals as a result of BGI's discretion to invest or withdraw assets of a BGI Plan, other than a BGI Plan which is a defined contribution plan under which participants direct the investment of their accounts among various investment options, including the applicable Fund, will not be taken into account in determining the specified amount of net change;

(3) An accumulation in the Fund of a material amount of either:

(A) Cash which is attributable to interest or dividends on, and/or tender offers for, portfolio securities; or

(B) Stock attributable to dividends on portfolio securities; provided that such material amount has been identified in advance as a specified amount relating to such Fund and disclosed in writing as a ''triggering event'' to an independent fiduciary of each Client Plan having assets held in the Fund prior to, or within ten (10) days following, its inclusion as a ''triggering event'' for such Fund, or BGI has otherwise disclosed to the independent fiduciary the parameters for determining a material amount of accumulated cash or securities, including any amount of discretion retained by the BGI that may affect such net change.

(4) A change in the composition of the portfolio of a Model-Driven Fund mandated solely by operation of the formulae contained in the computer model underlying the Fund where the basic factors for making such changes (and any fixed frequency for operating the computer model) have been disclosed in writing to an independent fiduciary of each Client Plan having assets held in the Fund prior to, or within ten (10) days following, its inclusion as a ''triggering event'' for such Fund; or

(5) A change in the composition or weighting of a portfolio for an Index or Model-Driven Fund which results from an independent fiduciary's direction to exclude certain securities or types of securities from the Fund, notwithstanding that such securities are part of the Index used by the Fund.

Summary of Facts and Representations

Background

1. BGI is a national banking association headquartered in San Francisco, California. BGI is the largest asset manager in the U.S., with over $1.9 trillion in assets under management worldwide and over $1.1 trillion in assets under management in the U.S. as of June 30, 2008. A significant amount of BGI's assets under management in the U.S. consists of assets of employee benefit plans subject to ERISA, FERSA and/or the Code, including assets managed by BGI for the Federal Thrift Savings Fund established pursuant to the provisions of FERSA (the ''Federal Thrift Savings Fund''). BGI is also a market leader in index and model-driven investment products.

2. BarCap is a U.S. registered securities broker-dealer and futures commission merchant headquartered in New York, with registered domestic branch offices in Boston, Chicago, Miami, Los Angeles and San Francisco. BarCap's broker-dealer activities include significant participation in the market in U.S. Treasury securities, one of the most liquid and transparent fixed income securities markets; BarCap had approximately 10.2% of the overall Treasury securities market as of the close of the third quarter of 2008. BarCap is also a market leader in the market for inflation-protected U.S. Treasury securities, with a market share of approximately 28.5% of the market as of the close of the third quarter of 2008.

3. Both BGI and BarCap are indirect subsidiaries of Barclays PLC, a public limited company organized under the laws of England and Wales.

4. On September 16, 2008, BarCap, Lehman Brothers Holdings Inc. (''Lehman Parent'') and certain subsidiaries of Lehman Parent [13] entered into an Asset Purchase Agreement (the ''Asset Purchase Agreement'') pursuant to which BarCap acquired most of Lehman's U.S. broker-dealer business (the U.S. broker-dealer business of BarCap, including the acquired broker-dealer business of Lehman, is referred to herein as the ''BarCap-Lehman Broker-Dealer''). The acquisition contemplated by the Asset Purchase Agreement (the ''Sale'') closed on Monday, September 22, 2008.

5. The assets acquired by BarCap in the Sale include rights to all Lehman indices and the analytics that support such indices. Prior to the Sale, Lehman was the world's largest provider of fixed income indices. Lehman published the first total return bond index, the U.S. Aggregate Index, and was the leading fixed income index provider since the 1970s. Lehman produced many of the most widely followed benchmarks in the global and U.S. debt markets. Prior to the Sale, approximately $4 trillion in assets worldwide was benchmarked to Lehman's Global Aggregate Index and its subcomponents. Approximately $1.5 trillion of that amount was benchmarked to Lehman's U.S. Aggregate Index and its subcomponents. The entire U.S. debt market covered by the U.S. Aggregate Index is valued at approximately $10.5 trillion; fully one seventh (14%) of that market was benchmarked to Lehman's U.S. Aggregate Index. Lehman estimated that more than 90% of fixed income investors in the U.S. used Lehman indices. BGI used Lehman indices for the vast majority of its fixed income index and model driven investment products. Nearly $70 billion (99%) of BGI's U.S. fixed income indexed assets were indexed to a Lehman index.

6. In addition, prior to the Sale, Lehman was a significant participant in the fixed income markets as a broker-dealer and was frequently used by BGI for fixed income principal trades, participating in approximately 13% of BGI's client trades in fixed income

[13] Lehman Parent and its affiliates and subsidiaries (including former subsidiaries acquired by BarCap in the Sale) are collectively referred to herein as ''Lehman''.

securities. Following the Sale, the BarCap-Lehman Broker-Dealer has an increased presence in the market for U.S. Treasury securities and in particular inflation-protected securities. Combining the market shares of Bar-Cap as it existed prior to the Sale with the additional market share added as a result of the Sale, the BarCap-Lehman Broker-Dealer had a total share of approximately 12.4% of the overall market for U.S. Treasury securities and approximately 41.7% of the market for inflation-protected Treasuries as of October 1, 2008.

7. The Sale took place under extraordinary circumstances for the U.S. financial services industry generally, and on an unusually expedited time frame that was dictated by those exigent circumstances. Accordingly, the Applicants state that it was not practicable to submit a formal application for exemptive relief for the transactions in advance of the closing of the Sale. However, the Applicants contacted the Department on several occasions (in writing and by telephone) in advance of and immediately after the closing of the Sale to discuss the transactions, the unusual circumstances of the Sale and the interim relief that the Applicants expected to seek, which is materially the same as the relief requested herein.

8. The Applicants state that the advantages to Client Plans and their participants and beneficiaries of engaging in the transactions, and the harm to Client Plans and their participants and beneficiaries that would result if the transactions were prohibited, will continue to apply in the long term. Accordingly, Applicants expect to submit a further application at a later date for permanent relief.

Description of the Transactions

Use of BarCap-Lehman Indices

9. Prior to the Sale, Lehman was virtually the sole provider of standardized fixed income indices used by BGI in the U.S. market. BGI selected Lehman indices, which are widely regarded as preeminent in the market, for the vast majority of its fixed income index and model driven investment products. With these products, BGI either attempted to replicate the return on the relevant indices or to provide an enhanced return benchmarked against the indices. The majority of BGI's largest fixed income clients used Lehman indices, including the Federal Thrift Savings Fund and a large number of private-sector and other governmental pension plans.

10. On behalf of Client Plans, BGI effects various transactions involving Index Funds and Model-Driven Funds (Funds) in reliance on prohibited transaction exemptions that require the indices underlying the Funds to be created and maintained by an independent third party. These transactions include (x) the lending of securities to BarCap and other affiliates of BGI and the receipt of compensation by BGI in connection with such transactions where BGI acts as a fiduciary with respect to the Client Plan assets involved in the transaction in connection with an Index Fund or a Model-Driven Fund, in reliance on PTE 2002–46 and (y) the acquisition, sale or exchange by Client Plans of shares of exchange-traded funds advised by BGI that are Index Funds or Model-Driven Funds, and the receipt of fees by BGI for acting as an investment adviser to such funds and for providing certain secondary services, in reliance on PTE 2008–1. As a result of BarCap's acquisition of Lehman's indices, the Index Funds and Model-Driven Funds involved in these transactions that are based on Lehman indices no longer meet the requirements set forth in the respective exemptions that the underlying indices must be created and maintained by an organization independent of BGI and its affiliates.

11. The Applicants request relief, retroactive to September 22, 2008 (the closing date of the Sale), and for a period until the earlier of (i) effective date of an individual exemption granting permanent relief for the following transactions or (ii) one year from the grant date of this individual exemption (the ''Relief Period'') to permit transactions carried out in reliance on PTEs 2002–46 and 2008–1 involving Client Plan assets invested in Index Funds and Model-Driven Funds, where the underlying index is a BarCap-Lehman Index, to continue on a ''business as usual'' basis as if there were no affiliate relationship between BGI and the entity creating and maintaining the BarCap-Lehman Indices.

12. As a condition of the exemption, each BarCap-Lehman Index is required to be a published index widely used in the market by independent institutional investors other than pursuant to an investment management or advisory relationship with BGI, and such index must be prepared or applied in the same manner for non-affiliated customers as for BGI.

Prior to the use of a BarCap-Lehman Index in connection with the exemption and on an annual basis thereafter (but in no event prior to the date that is 90 days following the date of the publication of this proposed exemption in the **Federal Register**), BGI will provide BarCap with a list of BarCap Lehman Indices proposed to be used by BGI in connection with the exemption. BarCap will certify to BGI whether, in its reasonable judgment, each such index is widely used in the market. In making this determination, BarCap shall take into consideration factors such as (i) publication by Bloomberg, or similar institution involved in the dissemination of financial information, (ii) hits on relevant websites including LehmanLive (or any successor website maintained by BarCap or its affiliate(s)) and Bloomberg.com (or similar website), and (iii) delivery of index information to clients by means other than through website access.

Any fees charged for the use of the BarCap-Lehman Index will be paid by BGI and not Client Plans.

13. Additionally, information barriers will be in place throughout the Relief Period between BGI and BarCap such that BGI is not provided access to information regarding the rules, decisions and data underlying the BarCap-Lehman Indices before such information is provided to parties outside of BarCap and such rules, decisions and data must be determined objectively without regard to BGI's use of such BarCap-Lehman Indices.

14. At the end of the Relief Period, a Qualified Independent Reviewer will issue a written report (the Compliance Report) following its review of the relevant BarCap-Lehman Indices and the underlying rules, certifying to each of the following: (i) Each BarCap-Lehman Index was operated in accordance with objective rules, in the ordinary course of business as would be conducted between unaffiliated parties; (ii) no manipulation of any BarCap-Lehman Index for the purpose of benefiting BGI, BarCap, or their affiliates occurred; (iii) in the event that any rule change occurred in connection with the rules underlying any BarCap-Lehman Index, such rule change was not made for the purpose of benefiting BGI, BarCap, or their affiliates; (iv) based on a review of the factors considered by BarCap in its certification described in paragraph 12 above, each BarCap-Lehman Index was widely used in the market during the relief period; and (v) certain conditions of the exemption were met.

The Compliance Report shall be issued no later than 90 days following the end of the Relief Period describing the steps performed during the course of the Qualified Independent Reviewer's review, the level of compliance with the

applicable conditions ((i)–(v) described in the previous paragraph), and any specific instances of non-compliance. In addition, the Compliance Report shall be included in the records maintained by BGI pursuant to Section VI of this proposed exemption, and BGI shall notify the independent fiduciary(ies) of each Client Plan, as part of its regular disclosure with respect to the applicable Fund(s), that the Compliance Report is available for their review.

15. The Qualified Independent Reviewer will be a third party appointed by BGI that is independent of Barclays and its affiliates, and has extensive experience in reviewing and/or auditing transactions and procedures involving assets of plans subject to the Act, FERSA and/or the Code for the purpose of confirming that the applicable transactions or procedures serve the best interests of such plans.

Principal Transactions With the BarCap-Lehman Broker-Dealer

16. Prior to the Sale, Lehman was a significant participant in the fixed income markets as a broker-dealer. BGI frequently used Lehman as a dealer for fixed income securities trades on a principal basis based on a determination that Lehman provided best execution for the applicable trade, including trades for Index Funds and Model-Driven Funds in which Client Plans invest. Lehman was the second most frequently used dealer by BGI for fixed income principal trades, participating in approximately 13% of BGI' s client trades.

17. The Applicants state that obtaining the best available purchase or sale price for a particular trade presents special challenges in the fixed income market, which trades a very large array of different securities with specific features including some securities issued in relatively small numbers and/or in which markets are made by only a small number of dealers. The diminution in the number of market makers due to the recent exit of several major participants from the financial services industry through bankruptcies or acquisitions has heightened these challenges.

18. BGI's ability to obtain best execution of fixed income trades for Client Plans would be significantly curtailed without the ability to trade with the BarCap-Lehman Broker-Dealer, according to the Applicants. The interests of Client Plans and their participants and beneficiaries would be better served if such trades were permitted where the BarCap-Lehman Broker-Dealer provides the best available purchase or sale price for the security being traded, in accordance with conditions designed to safeguard the interests of Client Plans. Accordingly, the Applicants are requesting relief to permit principal trades of fixed income securities on behalf of Client Plans with the BarCap-Lehman Broker-Dealer, where such trades are carried out in connection with Index Funds and Model-Driven Funds and pursuant to ''Triggering Events''—that is, events identified in advance as triggers for purchasing and selling the Fund's portfolio.[14] Accordingly, the decision to purchase or sell a security would not be at BGI's discretion but would be made in accordance with pre-determined objective rules governing the composition of the Fund's portfolio.

19. Each Covered Transaction would be a purchase or sale, for no consideration other than cash payment against prompt delivery of a security. Each Covered Principal Transaction would be on terms that BGI reasonably determines in good faith to be more favorable to the Client Plan than the terms of an arm's length transaction with an unaffiliated counterparty would have been, for the number of shares to be purchased or sold, at the time of the transaction. Covered Principal Transactions will not involve any security issued by Barclays PLC.

20. Such trades would take place with the BarCap-Lehman Broker-Dealer only pursuant to procedures designed to ensure that best execution would be obtained for the Client Plan either through an automated routing system reasonably designed to ensure execution at the best available net price to the Client Plan for the number of securities to be purchased or sold, or at a price at least as favorable to the Client Plan as the prices at which at least two independent ''Approved Counterparties'' who are ready and willing to trade the relevant security offer to purchase or sell the security. BGI will keep records of the prices offered by the Approved Counterparties.

The Applicants provide the following description of the process used by BGI in approving counterparties. BGI's Global Credit Group (CGC) monitors counterparty exposures arising from the trading on a principal basis by BGI's clients/funds and is responsible for counterparty evaluation, exposure analysis and the management of trading limits. All counterparties must be formally approved by GCG prior to engaging in the trading on a principal basis, and trading limits for such trading are based on metrics which may include the following: asset class being traded, Ratings (S&P, Moody's, Fitch) book and market capital, published financials (for qualitative and quantitative review), due diligence visits covering business and risk management practices, and credit default swap (''CDS'') spreads (real time measure of default likelihood). In the case of ''delivery versus payment'' principal securities transactions and Qualified Forward Delivery Transactions, Counterparty exposure is controlled and monitored by establishing specific trading limits for the total amount of ''delivery versus payment'' exposure and Qualified Forward Delivery Transaction exposure for the particular counterparty. Exposure to a particular counterparty, including a counterparty that is a BGI affiliate, is monitored daily against the counterparty's individual trading limit and against any updates to GCG's assessment of such counterparty's credit quality or market volatility over the settlement period, and any changes to the applicable limit will be made as deemed appropriate by GCG.

21. At the end of the Relief Period, a Qualified Independent Reviewer will issue a written Compliance Report certifying to the following: (i) Based on a review of execution policies procedures during the Relief Period and a sample of the Covered Principal Transactions, that the policies and execution procedures used in connection with the transactions were reasonably designed to obtain best execution for the securities to be purchased or sold in the Covered Principal Transaction; and (ii) each sampled transaction occurred in accordance with certain conditions of the exemption. The Compliance Report will be issued no later than 90 days following the end of the Relief Period describing the steps performed during the course of the Qualified Independent Reviewer's review, the level of compliance with conditions (i) and (ii) described above, and any specific instances of non-compliance; and the Compliance Report shall be included in the records maintained by BGI pursuant to Section VI of this proposed exemption. In addition, BGI shall notify the independent fiduciary(ies) of each Client Plan, as part of its regular disclosure with respect to the applicable

[14] Applicants note that in-house plans of BGI (BGI Plans) are currently invested indirectly through a master-feeder structure in two U.S. fixed income Index Funds that participate in transactions for which retroactive relief is requested in the exemption application. As of September 30, 2008, approximately 0.03% of the assets of one of these Funds, and approximately 0.61% of the assets of the other Fund, consist of BGI Plan assets.

Fund(s), that the Compliance Report is available for their review.

22. Section VI requires that BGI maintain records necessary to allow a determination of whether the conditions of the exemption have been met. Those records must be maintained for a period of six (6) years from the end of the Relief Period. The records include the Compliance Reports as well as records which identify with respect to the Covered Principal Transactions:

(i) On a Fund by Fund basis, the specific Triggering Events which result in the creation of the index or model prescribed output describing the characteristics of the securities to buy or sell;

(ii) On a Fund by Fund basis, the index or model prescribed output which described the characteristics of the securities to buy or sell in detail sufficient to allow an independent plan fiduciary or Qualified Independent Reviewer to verify that each of the above decisions for the Fund was made in response to specific Triggering Events; and

(iii) On a Fund by Fund basis, the actual trades executed by the Fund on a particular day, the identity of the counterparty, the prices offered by the Approved Counterparties, if relevant, and which of those trades resulted from Triggering Events.

23. In summary, the Applicants represent that the transactions will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because:

a. *Administratively feasible.* With respect to the use of BarCap-Lehman Indices for transactions that were covered prior to the Sale by PTE 2002–46 and 2008–1, the transactions that would be covered by the requested exemption are essentially identical to those permitted under those exemptions, except that additional procedures and protections would be in place to ensure that use of the BarCap-Lehman Indices is not disadvantageous to Client Plans or manipulated to benefit the Applicants. With respect to principal transactions with the BarCap-Lehman Broker-Dealer pursuant to Index Funds and Model-Driven Funds, the transactions that would be covered by the requested exemption are substantially similar to the transactions permitted under PTE 75–1, Part IV (40 FR 50845, Oct. 31, 1975) (Market Maker Exemption). The Applicants will follow procedures similar to those set forth in the Market Maker Exemption to ensure that best execution is obtained on behalf of Client Plans. In addition, at the end of the Relief Period a Qualified Independent Reviewer will review procedures with respect to the transactions, and a sample of the transactions for compliance with the procedures, at the expense of Barclays. Granting the exemption will require no additional monitoring by the Department.

b. *In the interests of plans and participants and beneficiaries.* As discussed above, the Applicants state that the exemption would permit Client Plans to continue to invest in Index Funds and Model-Driven Funds based on the leading fixed income indices and to obtain best execution in purchases and sales of fixed income securities.

c. *Protective of the rights of participants and beneficiaries of such plan.* The requested exemption would require the Applicants to: (i) Obtain certification from a Qualified Independent Reviewer at the end of the Relief Period that each BarCap-Lehman Index was operated in accordance with objective rules, in the ordinary course of business as would be conducted between unaffiliated parties, no manipulation of any BarCap-Lehman Index for the purpose of benefiting the Applicants occurred, any change in the rules underlying any BarCap-Lehman Index was not made for the purpose of benefiting the Applicants, and that each BarCap-Lehman Index was widely used in the market during the Review Period; (ii) obtain certification from a Qualified Independent Reviewer at the end of the Relief Period that execution procedures used in connection with Covered Principal Transactions were reasonably designed to obtain best execution for the Client Plans and, based on a review of a sampling of Covered Principal Transactions, occurred in accordance with the conditions of the exemption; and (iii) maintain and comply with information barriers between BGI and BarCap such that BGI is not provided access to information regarding the rules, decisions or data underlying any BarCap-Lehman Index used during the Relief Period before such information is provided to parties outside of BarCap.

Notice to Interested Persons

Written notice will be provided to the Federal Retirement Thrift Investment Board and will be published in the **Federal Register**. Any written comments and/or requests for a hearing must be received by the Department from interested persons within 30 days of the publication of this proposed exemption in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Karen E. Lloyd of the Department, 202–693–8554. (This is not a toll-free number.)

The Bank of New York Mellon Corporation (BNYMC) and its Affiliates (collectively, BNY Mellon) Located in New York, New York

Exemption Application Number D–11523

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).[15]

Section I. Transactions

If the proposed exemption is granted, the restrictions of section 406(a) 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 (D) of the Code, shall not apply, effective October 3, 2008, to the cash sale (the Sale) by a Plan (as defined in section II(d)) of certain Auction Rate Securities (as defined in section II(b)) to BNY Mellon, provided that the following conditions are met:

(a) The Sale was a one-time transaction for cash payment made on or before December 31, 2008 on a delivery versus payment basis in the amount described in paragraph (b);

(b) The Plan received an amount equal to the par value of the Auction Rate Securities (the Securities) plus accrued but unpaid income (interest or dividends, as applicable) as of the date of the Sale;

(c) The last auction for the Securities was unsuccessful;

(d) The Sale was made in connection with a written offer by BNY Mellon containing all of the material terms of the Sale;

(e) The Plan did not bear any commissions or transaction costs with respect to the Sale;

(f) A Plan fiduciary independent of BNY Mellon (in the case of a Plan that is an IRA, the individual for whom the IRA is maintained) determined that the Sale of the Securities was appropriate for, and in the best interests of, the Plan at the time of the transaction, and the Plan's decision to enter into the transaction was affirmatively made by such independent fiduciary on behalf of the Plan;

[15] 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.

(g) BNY Mellon took all appropriate actions necessary to safeguard the interests of each Plan in connection with the Sale;

(h) The Plan does not waive any rights or claims in connection with the Sale;

(i) The Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(j) If the exercise of any of BNY Mellon's rights, claims or causes of action in connection with its ownership of the Securities results in BNY Mellon recovering from the issuer of the Securities, or any third party, an aggregate amount that is more than the sum of:

(1) The purchase price paid to the Plan for the Securities by BNY Mellon; and

(2) the income (interest or dividends, as applicable) due on the Securities from and after the date BNY Mellon purchased the Securities from the Plan, at the rate specified in the respective offering documents for the Securities or determined pursuant to a successful auction with respect to the Securities, BNY Mellon will refund such excess amount promptly to the Plan (after deducting all reasonable expenses incurred in connection with the recovery);

(k) Neither BNYMC 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 written offer or retain the Security;

(l) BNY Mellon 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 person described below in paragraph (m)(i), to determine whether the conditions of this exemption have been met, except that—

(i) No party in interest with respect to a Plan which engages in the covered transactions, other than BNY Mellon, 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 (m)(i);

(ii) A separate prohibited transaction shall not be considered to have occurred solely because due to circumstances beyond the control of BNY Mellon, such records are lost or destroyed prior to the end of the six-year period.

(m)(i) Except as provided, below, in paragraph (m)(ii), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to, above, in paragraph (l) 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;

(ii) None of the persons described, above, in paragraph (m)(i)(B)–(D) shall be authorized to examine trade secrets of BNY Mellon, or commercial or financial information which is privileged or confidential; and

(iii) Should BNY Mellon refuse to disclose information on the basis that such information is exempt from disclosure, BNY Mellon 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 II. Definitions

(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 ''Auction Rate Security'' or ''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;

(c) The term ''Independent'' means a person who is not BNYMC or an affiliate (as defined in Section II(a)); and

(d) The term ''Plan'' means: any plan described in section 3(3) of the Act and/or section 4975(e)(1) of the Code.

Effective Date: This proposed exemption, if granted, will be effective from October 3, 2008 through December 31, 2008.

Summary of Facts and Representations

1. The Bank of New York Mellon Corporation (BNYMC and, together with its affiliates, BNY Mellon), is a Delaware financial services company that provides a wide range of banking and fiduciary services to a broad array of clients, including employee benefit plans subject to the Act and plans subject to Section 4975 of the Code.

2. The plans that are the subject of this proposed exemption (Plans) consist of four Individual Retirement Accounts (IRAs), two ''SEP IRAs'' and a defined contribution profit sharing plan. The Plans are employee benefit plans or other plans subject to section 4975 of the Code and/or ERISA for which BNY Mellon currently serves as the custodian and/or trustee.

3. On October 3, 2008, BNY Mellon communicated in writing to its clients, including the Plans, its offer to purchase certain auction rate securities (i.e., the Securities) for an amount equal to the par value of the applicable Security, plus any accrued and unpaid income (interest or dividends, as applicable) thereon. The purchase transactions occurred on the first regular auction date for the applicable Security that followed the Plan's submission to BNY Mellon of its written acceptance of the offer. The applicant represents that no purchase transaction involving plan assets subject to ERISA or section 4975 of the Code occurred after December 31, 2008.

4. BNY Mellon represents that the Securities are debt or preferred equity auction rate securities issued with an interest or dividend rate that is reset on a regular basis (generally between every 7 and 35 days) through a ''Dutch auction'' process. Historically, by means of such auction process, the interest or dividend rate was periodically adjusted to a level at which demand for the Security depleted the available supply at a purchase price equal to the par value of the Securities. In this way, the auctions served as a form of secondary market for the Securities, by providing liquidity at par on a regular, periodic basis to any holder who wished to sell the Securities. The applicant represents that the Securities were frequently purchased by, or for the benefit of, clients seeking a reasonable short-term return and a high degree of liquidity.

5. If an auction for one of the Securities fails (e.g., because there is insufficient demand for the Security), the interest or dividend rate will be reset to the ''maximum rate'' or ''failed auction rate'' (in either case, ''default rate'') for that Security as specified in the offering documents for such Security. In some cases, the default rate changes from time to time as specified in the relevant documents. For the Securities that are the subject of this

exemption, such rates ranged from .168% to 4.8% per annum as of the date the purchase offer was made.

6. BNY Mellon states that auctions for the Securities have failed consistently since approximately February, 2008, with the result that the interest or dividend rate for each of the Securities presently equals the default rate and holders of the Securities have been unable to sell the Securities at their par value. As of the date the purchase offer was made, the default rate for three of the six Securities held by the Plans was higher than the rate set by the last successful auction for such Securities, while the last auction rate for the remaining three Securities held by Plans exceeded the default rate, determined as of such date, with respect to such Securities. In addition, because the auctions have failed consistently since February, 2008 and given the absence of any other meaningful secondary market for the Securities, the Securities no longer provide the liquidity that had been anticipated when they were acquired.

7. BNY Mellon represents that the following Securities were held by Plans and covered by BNY Mellon's offer described in Representation 3, above: (1) Minnesota St. Higher Ed., (2) Iowa Student Loan, (3) Brazos Texas Higher Ed., (4) Nuveen Quality PFD Income FDARP, (5) Nuveen PFD & CVT INC FD2 and (6) Northstar Ed. Fin Inc.

8. Generally, the Plans purchased the Securities through an underwriter unaffiliated with BNY Mellon. In all of those cases, BNY Mellon acted as discretionary trustee and caused the Plan to purchase the Securities. Only one Plan purchased Securities through a capital markets affiliate of BNYMC. In that one case, BNY Mellon was a non-discretionary custodian of the Plan and was directed to purchase the Securities by an independent fiduciary of that Plan.[16]

9. BNY Mellon states that the terms of the offer expressly provided that a client is not obligated to sell Securities and must affirmatively agree to enter into a sale of Securities to BNY Mellon (*i.e.,* a Sale). BNY Mellon represents that any Plan's decision to sell the Securities to BNY Mellon pursuant to its offer has been made by such Plan's fiduciary, who in all cases was independent of BNY Mellon. In the case of a Plan that is an IRA, such fiduciary was the individual for whom the IRA is maintained.

10. BNY Mellon estimates that the total aggregate par value plus accrued and unpaid income (interest or dividends, as applicable) thereon for all Securities held by clients subject to the offer is approximately $192,840,000. Securities held by the Plans represent approximately $1,050,000 of such total aggregate amount.

11. BNY Mellon represents that the Sale of the Securities by a Plan benefited the Plan because of the Plan's inability to sell the Securities at par as a result of the continuing failed auctions. In addition, BNY Mellon states that each transaction was a one-time Sale for cash in connection with which such Plan did not bear any brokerage commissions, fees or other expenses. BNY Mellon represents that it took all appropriate actions necessary to safeguard the interests of the Plans in connection with the Sale of the Securities by the Plans.

12. BNY Mellon states that, pursuant to the terms of the offer, the sale of Securities by a Plan to BNY Mellon resulted in an assignment of all of the Plan's rights, claims, and causes of action against an issuer or any third party arising in connection with or out of the client's purchase, holding or ownership of the Securities. This assignment did not include any rights, claims or other causes of action against BNY Mellon. Rather, such assignment was limited to rights, claims and causes of action against the issuers of the Securities and any third parties unrelated to BNY Mellon. This has been the case at all times from the date as of which retroactive relief has been requested. BNY Mellon states further that if the exercise of any of the foregoing rights, claims or causes of action results in BNY Mellon recovering from the issuer or any third party an aggregate amount that is more than the sum of (a) the purchase price paid for the Securities by BNY Mellon and (b) the income (interest or dividends, as applicable) due on the Securities from and after the date BNY Mellon purchased Securities from a Plan, at the rate specified in the respective offering documents for the Securities or determined pursuant to a successful auction with respect to the Securities, BNY Mellon will refund such excess amount promptly to the Plan (after deducting all reasonable expenses incurred in connection with the recovery).

13. In summary, BNY Mellon represents that the transactions satisfied the statutory criteria of section 408(a) of the Act and section 4975 of the Code because: (a) Each Sale was a one-time transaction for cash; (b) each Plan received an amount equal to the par value of the Securities, plus accrued but unpaid income (interest or dividends, as applicable), which was beneficial to the Plan due to the Plan's inability to sell the Securities at par because of continuing failed auctions; (c) no Plan paid any commissions or other transaction expenses with respect to the Sale; (d) each Plan voluntarily entered into the Sale, as determined in the discretion of the Plan's independent fiduciary; (e) BNY Mellon took all appropriate actions necessary to safeguard the interests of the Plans in connection with the transactions; and (f) BNY Mellon will promptly refund to the applicable Plan any amounts recovered from the issuer or any third party in connection with its exercise of any rights, claims or causes of action as a result of its ownership of the Securities, if such amounts are in excess of the sum of (i) the purchase price paid for the Securities by BNY Mellon and (ii) the income (interest or dividends, as applicable) due on the Securities from and after the date BNY Mellon purchased the Securities from the Plan, at the rate specified in the respective offering documents for the Securities or determined pursuant to a successful auction with respect to the Securities.

[16] The Department is expressing no opinion in this proposed exemption regarding whether the acquisition and holding of the Securities by any Plan, that is subject to Title I of the Act, violated any of the fiduciary responsibility provisions of Part 4 of Title I of ERISA. In this regard, the Department notes that section 404(a) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan. Accordingly, a Plan fiduciary must act prudently with respect to, among other things, the decision to engage (or to not engage) in a Sale. Section 404(a) of the Act also states that a plan fiduciary should diversify the investments of a plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Moreover, the Department is not providing any opinion as to whether a particular category of investments or investment strategy would be considered prudent or in the best interests of a plan as required by section 404 of the Act. The determination of the prudence of a particular investment or investment course of action must be made by a plan fiduciary after appropriate consideration of those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including a plan's potential exposure to losses and the role the investment or investment course of action plays in that portion of the plan's portfolio with respect to which the fiduciary has investment duties (see 29 CFR 2550.404a–1). The Department also notes that in order to act prudently in making investment decisions, a plan fiduciary must consider, among other factors, the availability, risks and potential return of alternative investments for the plan. Thus, a particular investment by a plan, which is selected in preference to other alternative investments, would generally not be prudent if such investment involves a greater risk to the security of a plan's assets than other comparable investments offering a similar return or result.

Notice to Interested Persons

Written notice will be provided to an independent representative of each Plan that elected to sell the Securities to BNY Mellon. The notice shall contain a copy of the proposed exemption as published in the **Federal Register** and an explanation of the rights of interested parties to comment regarding the proposed exemption. Such notice will be provided by first class mail within 15 days of the issuance of the proposed exemption. Any written comments must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the **Federal Register**.

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 30th day of April , 2009.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E9–10361 Filed 5–5–09; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemptions and Grant of Individual Exemptions involving: 2009–13, The Bank of New York Mellon Corporation (the Applicant); and 2009–14, UBS AG (UBS), and Its Affiliates UBS Financial Services Inc. (UBS Financial), and UBS Financial Services Inc. of Puerto Rico (PR Financial) (Collectively, the Applicants)

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, D.C. 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.

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, effective December 24, 2008, to the purchase of certain securities (the Securities), as defined below in Section III(h), by an asset management affiliate of The Bank of New York Mellon Corporation (BNYMC), as ''affiliate'' is defined below in Section III(c), from any person other than such asset management affiliate of BNYMC or any affiliate thereof, during the existence of an underwriting or selling syndicate with respect to such Securities, where a broker-dealer affiliated with BNYMC (the Affiliated Broker-Dealer), as defined below in Section III(b), is a manager or member of such syndicate (an ''affiliated underwriter transaction'' (AUT [1])) and/or where an Affiliated Trustee, as defined below in Section III(m), serves as trustee of a trust that issued the Securities (whether or not debt securities) or serves as indenture trustee of Securities that are debt Securities (an ''affiliated trustee transaction'' (ATT [2]))

[1] For purposes of this proposed exemption, an In-House Plan may engage in AUTs only through investment in a Pooled Fund.

[2] For purposes of this proposed exemption, an In-House Plan may engage in ATTs only through investment in a Pooled Fund.

and the asset management affiliate of BNYMC, as a fiduciary, purchases such Securities:

(a) On behalf of an employee benefit plan or employee benefit plans (Client Plan(s)), as defined below in Section III(e); or

(b) On behalf of Client Plans, and/or In-House Plans, as defined below in Section III(l), which are invested in a pooled fund or in pooled funds (Pooled Fund(s)), as defined below in Section III(f).

Section II—Conditions

This exemption is conditioned upon adherence to the material facts and representations described in the Notice of Proposed Exemption published in the **Federal Register** on December 24, 2008 at 73 FR 79174, and also upon the satisfaction of the following conditions:

(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.) or, 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)). 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—

(1) Are 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) Are 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) Are 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:

(i) A bank; or

(ii) An issuer of securities which are exempt from such registration requirement, pursuant to a Federal statute other than the 1933 Act; or

(iii) 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 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 SEC during the preceding twelve (12) months.

(c) The aggregate amount of Securities of an issue purchased, pursuant to this exemption, by the asset management affiliate of BNYMC with: (i) The assets of all Client Plans; (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 management affiliate of BNYMC; and (iii) The assets of plans to which the asset management affiliate of BNYMC 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 debt securities being

offered, if such securities are 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 management affiliate of BNYMC 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 management affiliate of BNYMC or an affiliate.

(f) If the transaction is an AUT, 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 upon 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 management affiliate of BNYMC on behalf of any single Client Plan or any Client Plan or In-House Plan in Pooled Funds.

(g) If the transaction is an AUT,

(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 management affiliate of BNYMC 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, on a quarterly basis, to the asset management affiliate of BNYMC a written certification, signed and dated by an officer of the Affiliated Broker-Dealer, stating that 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(g).

(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 management affiliate of BNYMC 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 provided simultaneously; and

(2) Any other reasonably available information regarding the covered transactions that such Independent Fiduciary requests the asset management affiliate of BNYMC to provide.

(j) Subsequent to the initial authorization by an Independent Fiduciary of a single Client Plan permitting the asset management affiliate of BNYMC to engage in the covered transactions on behalf of such single Client Plan, the asset management affiliate of BNYMC 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 management affiliate of BNYMC 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 management affiliate of BNYMC 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 management affiliate of BNYMC not less than 45 days prior to such asset management affiliate of BNYMC 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 transaction that the Independent Fiduciary of a plan (or fiduciary of an In-House Plan) participating in a Pooled Fund requests the asset management affiliate of BNYMC 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 must 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 management affiliate of BNYMC in the case of a plan (or In-House Plan) participating in a Pooled Fund by the specified date shall be considered as 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 BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and/or Affiliated Trustee and will provide the address of the asset management affiliate of BNYMC. The instructions will state that the exemption will not be available, unless the fiduciary of each plan participating in the covered transactions as an investor in a Pooled Fund is, in fact, independent of BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, and the Affiliated Trustee. The instructions will also state that the fiduciary of each such plan must advise the asset management affiliate of BNYMC, in writing, if it is not an ''Independent Fiduciary,'' as that term is defined below in Section III(g) of this exemption.

For purposes of this Section II(k)(1) and (2), 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 management affiliate of BNYMC shall not apply in the case of an In-House Plan.

(3) Notwithstanding the requirement described in Section II(h), the written authorization requirement for an existing single Client Plan shall be satisfied solely with respect to covered ATT transactions if the asset management affiliate provides to the Independent Fiduciary of such existing single Client Plan the written information and materials described below in Section II(k)(4), and the Independent Fiduciary does not return the termination form required to be provided by Section II(k)(4)(iii) within the time period specified therein.

(4) The following information and materials (which may be provided electronically) shall be provided by the asset management affiliate of BNYMC not less than 45 days prior to such asset management affiliate of BNYMC engaging in the covered ATT transactions on behalf of such existing single Client Plan pursuant to this proposed exemption:

(i) A notice of the intent of such asset management affiliate 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 ATT transactions that the Independent Fiduciary of such existing single Client Plan requests the asset management affiliate of BNYMC to provide; and

(iii) A termination form expressly providing an election for the Independent Fiduciary of an existing single Client Plan to deny the asset management affiliate of BNYMC from engaging in covered ATT transactions on behalf of such Client Plan. Such form shall include instructions specifying how to use the form. Specifically, the instructions must explain that the existing single Client Plan has an opportunity to deny the asset management affiliate of BNYMC from engaging in covered ATT transactions of behalf of such Client Plan for a period of no more than 30 days after such Client Plan's receipt of the initial notice of intent, described above in Section II(k)(4)(i), and that the failure of the Independent Fiduciary of such existing single Client Plan to return the form to the asset management affiliate of BNYMC by the specified date shall be considered an approval by such Client Plan of its participation in the covered ATT transactions.

Further, the instructions will identify BNYMC, the asset management affiliate of BNYMC, and the Affiliated Trustee and will provide the address of the asset management affiliate of BNYMC. The instructions will state that the exemption will not be available, unless the Independent Fiduciary of such existing single Client Plan is, in fact, independent of BNYMC, the asset management affiliate of BNYMC, and the Affiliated Trustee. The instructions will also state that the fiduciary of each such existing single Client Plan must advise the asset management affiliate of BNYMC, in writing, if it is not an ''Independent Fiduciary,'' as that term is defined, below, in Section III(g).

(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).

(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 BNYMC 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 management affiliate of BNYMC 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 management affiliate of BNYMC 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 management affiliate of BNYMC 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 the 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, so that the Independent Fiduciary may verify compliance with section II(c);

(v) The number of Securities purchased by the asset management affiliate of BNYMC 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) In the case of an AUT, 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) In the case of an ATT, the basis upon which the Affiliated Trustee is compensated in each transaction;

(ix) The price at which any of the Securities purchased during the period to which such report relates were sold; and

(x) 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) In the case of AUTs, a representation that the asset management affiliate of BNYMC 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;

(ii) In the case of ATTs, a representation by the asset management affiliate of BNYMC affirming that, as to each ATT, the transaction was not part of an agreement, arrangement of understanding designed to benefit the Affiliated Trustee; and

(iii) A statement 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 the 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 management affiliate of BNYMC 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 or an Affiliated Trustee 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 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,[3] 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 fifty 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 fifty 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)(F)).

For purposes of the net asset requirements described above in this

[3] 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 [Sec. 230.144A of this chapter], or rules 501–508 thereunder [Sec. 230.501–230–508 of this chapter];

(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 Sec. 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 Sec. 230.144A of this chapter.

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 and 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 management affiliate of BNYMC is a ''qualified professional asset manager'' (QPAM), as that term is defined under Part V(a) of PTE 84–14, as amended from time to time, or any successor exemption thereto. In addition to satisfying the requirements for a QPAM under Section V(a) of PTE 84–14, the asset management affiliate of BNYMC also must 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 twenty percent (20%) of the assets of a Pooled Fund at the time of a covered transaction are comprised of assets of In-House Plans for which BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, the Affiliated Trustee or an affiliate exercises investment discretion.

(r) The asset management affiliate of BNYMC, the Affiliated Broker-Dealer, and the Affiliated Trustee, 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 BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee, 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 if, due to circumstances beyond the control of the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, or the Affiliated Trustee, 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 management affiliate of BNYMC, the Affiliated Broker-Dealer, or the Affiliated Trustee, or commercial or financial information which is privileged or confidential; and

(3) Should the asset management affiliate of BNYMC, the Affiliated Broker-Dealer, or the Affiliated Trustee refuse to disclose information on the basis that such information is exempt from disclosure, pursuant to Section II(s)(2) above, the asset management affiliate of BNYMC 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.

(t) An indenture trustee whose affiliate has, within the prior 12 months, underwritten any Securities for an obligor of the indenture Securities must resign as indenture trustee if a default occurs upon the indenture Securities within a reasonable amount of time of such default.

Section III—Definitions

(a) The term, ''the Applicant,'' means BNYMC and its current and future affiliates.

(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,'' 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(h), 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.

(d) The term, ''control,'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(e) 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 management affiliate of BNYMC 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(l).

(f) The term, ''Pooled Fund(s),'' means a common or collective trust fund(s) or a pooled investment fund(s): (i) In which employee benefit plan(s) subject to the Act and/or Code invest; (ii) Which is maintained by an asset management affiliate of BNYMC, (as the term, ''affiliate'' is defined above in Section III(c)); and (iii) For which such asset management affiliate of BNYMC exercises discretionary authority or discretionary control respecting the management or disposition of the assets of such fund(s).

(g)(1) The term, ''Independent Fiduciary,'' means a fiduciary of a plan who is unrelated to, and independent of, BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and the Affiliated Trustee. For purposes of this exemption, a fiduciary of a plan will be deemed to be unrelated to, and independent of, BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer and the Affiliated Trustee, 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 section 4975(e)(2)(H) of the Code) of BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee and represents that such fiduciary shall advise the asset management affiliate of BNYMC within a reasonable period of time after any change in such facts occur.

(2) Notwithstanding anything to the contrary in this Section III(g), 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 BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee;

(ii) If such fiduciary directly or indirectly receives any compensation or other consideration from BNYMC, the asset management affiliate of BNYMC, the Affiliated Broker-Dealer or the Affiliated Trustee 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 section 4975(e)(2)(H) of the Code) of the asset management affiliate of BNYMC responsible for the transactions described above in Section I of this exemption, is an officer, director or highly compensated employee (within the meaning of section 4975(e)(2)(H) of the Code) of the sponsor of the plan or of the fiduciary responsible for the decision to authorize or terminate authorization for the transactions described 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 Section III(g)(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 BNYMC or any affiliate thereof.

(h) 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)). 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(k), will be treated as debt securities.

(i) 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.

(j) 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.

(k) 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.

(l) 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, respectively, sponsored by the Applicant as defined above in Section III(a) or by any affiliate, as defined above in Section III(b), of the Applicant, for its own employees.

(m) The term, ''Affiliated Trustee,'' means the Applicant and any bank or trust company affiliate of the Applicant (as ''affiliate'' is defined above in Section III(c)(1)), that serves as trustee of a trust that issues Securities which are asset-backed securities or as indenture trustee of Securities which are either asset-backed securities or other debt securities that meet the requirements of this exemption. For purposes of this exemption, other than Section II(t), performing services as custodian, paying agent, registrar or in similar ministerial capacities is, in each case, also considered serving as trustee or indenture trustee.

Effective December 24, 2008, this exemption is available to BNYMC and its affiliates for as long as the terms and conditions of the exemption are satisfied with respect to each Client Plan.

Written Comments

1. The Notice of Proposed Exemption (the Notice), published in the **Federal Register** on December 24, 2008, stated that the Applicant would distribute the Notice to interested persons within fifteen (15) days of its publication in the **Federal Register**; the Notice also invited all interested persons to submit written comments and requests for a hearing to the Department concerning the proposed exemption within forty-five (45) days of the date of its publication.

On December 31, 2008, the Applicant requested that the Department extend the foregoing deadlines for notification to interested persons. The Department agreed to this request, and instructed the Applicant that notification of interested persons be provided no later than January 18, 2009. In addition, the Department directed the Applicant to advise such interested persons that the deadline for receipt of written comments and requests for a hearing had been adjusted to February 17, 2009. The Department received a written certification from the Applicant dated January 19, 2009 confirming that the Notice and the accompanying supplemental statement had been distributed to interested persons on or before January 18, 2009 via first-class mail or electronically (with verification of receipt).

2. At the conclusion of the adjusted comment period on February 17, 2009, the Department received a written comment from the Applicant regarding the content of the Notice. In its comment, the Applicant expressed the opinion that the references to ''Affiliated Broker-Dealer'' in the second paragraph of Section II(k)(4)(iii) of the Notice were inappropriate insofar as this subsection only relates to the notice requirements of asset management affiliates of BNYMC engaging solely in covered ATT transactions on behalf of existing single Client Plans. Because the Department concurs with the Applicant's comment, the references to ''Affiliated Broker-Dealer'' contained in the second paragraph of Section II(k)(4)(iii) have been deleted.

In addition, the Applicant's comment to the Department proposed a number of minor editorial adjustments to Sections II and III of the Notice, none of which related to the substance of the exemption. After reviewing these suggestions, the Department incorporated the requested changes. Further, the Department did not receive a request for a hearing.

During the comment period, the Department also received two e-mails from recipients of the notice to interested persons who inquired generally about its significance, but contained no comments regarding the Notice. The Department determined that no additional revisions to the Notice were necessary after reviewing the content of these communications.

3. The Department has determined, on its own motion, to amend the content of Section II(g)(2) as it appears in the Notice by requiring that the quarterly written certification concerning compensation that is provided by the Affiliated Broker-Dealer to the asset management affiliate of BNYMC must

not only be signed but also dated by an officer of the Affiliated Broker-Dealer.

The Department has also determined, on its own motion, to amend the content of Section II(k)(3) as it appears in the Notice. Section II(k)(3) of the Notice states that, ''[N]otwithstanding the requirement described in Section II(h), the written authorization requirement for an existing single Client Plan shall be satisfied solely with respect to covered ATT transactions (where the asset management affiliate of BNYMC or any affiliate thereof is not a manager or member of an underwriting or selling syndicate) if the asset management affiliate provides to the Independent Fiduciary of such existing single Client Plan the written information and materials described below in Section II(k)(4), and the Independent Fiduciary does not return the termination form required to be provided by Section II(k)(4)(iii) within the time frame specified therein.''

Specifically, the Department notes that the inclusion of the parenthetical clause in the preceding sentence may create confusion, insofar as the ''solely'' covered ATT transactions referenced in the preceding paragraph do not involve selling syndicates or underwriters. Accordingly, the Department has determined to delete the forgoing parenthetical clause from Section II(k)(3).

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 73 FR 79174.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8339. (This is not a toll-free number.)

Exemption

The restrictions of sections 406(a), 406(b)(1), 406(b)(2), and 407(a) 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: (1) The acquisition by the UBS Savings and Investment Plan, the UBS Financial Services Inc. 401(k) Plus Plan, and the UBS Financial Services Inc. of Puerto Rico Savings Plus Plan (collectively, the Plans) of certain entitlements (each, an Entitlement) and certain subscription rights (each, a Right) issued by UBS, a party in interest with respect to the Plans; (2) the holding of the Entitlements by the Plans between April 28, 2008 and May 9, 2008, inclusive, pending the automatic conversion of the Entitlements into shares of UBS common stock; and (3) the holding of the Rights by the Plans between May 27, 2008 and June 9, 2008, inclusive, provided that the following conditions were satisfied:

(a) All decisions regarding the acquisition and holding of the Rights and Entitlements by the Plans were made by U.S. Trust, Bank of America Private Wealth Management (U.S. Trust), a qualified, independent fiduciary;

(b) The Plans' acquisition of the Rights and Entitlements resulted from an independent act of UBS as a corporate entity, and without any participation on the part of the Plans;

(c) The acquisition and holding of the Rights and Entitlements by the Plans occurred in connection with a capital improvement plan approved by the board of directors of UBS, in which all holders of UBS common stock, including the Plans, were treated exactly the same;

(d) All holders of UBS common stock, including the Plans, were issued the same proportionate number of Rights based on the number of shares of UBS common stock held by such Plans;

(e) All holders of UBS common stock, including the Plans, were issued the same proportionate number of Entitlements based on the number of shares of UBS common stock held by such Plans;

(f) The acquisition of the Rights and Entitlements by the Plans occurred on the same terms made available to other holders of UBS common stock;

(g) The acquisition of the Rights and Entitlements by the Plans was made pursuant to provisions of each such Plan for the individually-directed investment of participant accounts; and

(h) The Plans did not pay any fees or commissions in connection with the acquisition or holding of the Rights or Entitlements.

The Notice of Proposed Exemption (the Notice), published in the **Federal Register** on January 21, 2009, stated that the Applicants would distribute the Notice to interested persons within fifteen (15) days of its publication in the **Federal Register**; the Notice also invited all interested persons to submit written comments and requests for a hearing to the Department concerning the proposed exemption within forty-five (45) days of the date of its publication.

On January 27, 2009, the Applicants requested in writing that the Department permit a 10 day extension of the foregoing deadlines for the provision of the Notice to interested persons. The Department agreed to this request, and instructed the Applicants that notification of interested persons be provided no later than February 15, 2009. In this connection, the Department received a written certification from a corporate officer of UBS AG (the sponsor of the UBS Savings and Investment Plan) dated February 11, 2009, as well as written certifications from a corporate officer of both UBS Financial Services Inc. (the sponsor of the UBS Financial Services Inc. 401(k) Plus Plan) and of UBS Financial Services Inc. of Puerto Rico (the sponsor of the UBS Financial Services Inc. of Puerto Rico Savings Plus Plan) dated February 9, 2009; each of these certifications confirmed that the Notice and the accompanying supplemental statement had been distributed to interested persons on or before February 15, 2009 via first class mail. At the conclusion of the comment period, the Department had not received any written comments or requests for a hearing from interested persons with respect to the Notice. Accordingly, the Department has determined to grant the exemption as proposed.

For a complete statement of the facts and representations, refer to the Notice published on January 21, 2009 at 74 FR 3647.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8339. (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 describe all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 30th day of April 2009.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E9–10360 Filed 4–30–09; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,660]

Muth Mirror Systems; Sheboygan, WI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 24, 2009, in response to a petition filed on behalf of workers of Muth Mirror Systems, Sheboygan, Wisconsin.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of April, 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10391 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,167]

Anderson Global Muskegon Heights, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 9, 2009 in response to a petition filed by the International Association of Machinists and Aerospace Workers, Local PM2848 on behalf of workers of Anderson Global, Muskegon Heights, Michigan.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 2nd day of April, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10373 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,358]

Dauphin Precision Tool; Millersburg, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 24, 2009 in response to a petition filed by United Steelworkers of America, Subdistrict Office 10, on behalf of workers of Dauphin Precision Tool, Millersburg, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 2nd day of April 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10378 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,405]

Biofit Engineered Products, Bowling Green, OH; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 26, 2009 in response to a petition filed by UNITE HERE, Local 1758 on behalf of workers of Biofit Engineered Products, Bowling Green, Ohio.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 1st day of April, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10380 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,452]

Newport Precision, Inc., Newport, TN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 3, 2009 in response to a worker petition filed on behalf of workers of Newport Precision, Inc., Newport, Tennessee.

The petitioners have requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 1st day of April, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10382 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,118]

Vanity Fair Brands, LP; Jackson Knitting Facility, a Wholly Owned Subsidiary of Fruit of the Loom, Jackson, AL; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 4, 2009 in response to a petition filed by a company official on behalf of workers of Vanity Fair Brands, LP, Jackson Knitting Facility, a wholly owned subsidiary of Fruit of the Loom, Jackson, Alabama.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 1st day of April, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10369 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,059]

Core Molding Technologies, Columbus, OH; Notice of Termination of Investigation

The investigation was initiated on February 2, 2009 in response to a petition filed by the International Association of Machinists, Local 1471 on behalf of workers of Core Molding Technologies, Columbus, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of April 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10368 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,782]

Lund Boat Company, a Division of Brunswick Corporation; New York Mills, MN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 29, 2008 in response to a petition filed on behalf of the workers at Lund Boat Company, a Division of Brunswick Corporation, New York Mills, Minnesota.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10366 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,708]

NuTech Tooling Systems, Inc.; Meadville, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 17, 2008 in response to a petition filed by a company official on behalf of the workers at NuTech Tooling Systems, Inc., Meadville, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10365 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–64,651]

Johnson Controls, Inc. Rockwood, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 11, 2008 in response to a worker petition filed by the United Auto Workers Local 3000 on behalf of workers at Johnson Controls, Inc., Rockwood, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10364 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,714]

Egide USA, Inc.; Cambridge, MD; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 31, 2009, in response to a petition filed by the State of Maryland on behalf of workers at Egide USA, Inc., Cambridge, Maryland.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of April 2009.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10363 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,599]

Century Mold Co., Inc; Shelbyville, TN; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 16, 2009 in response to a petition filed by company officials on behalf of workers of Century Mold Co., Inc., Shelbyville, Tennessee.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 1st day of April, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10386 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,583]

Autosplice, Inc.; San Diego, CA; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 12, 2009 in response to a petition filed by a company official on behalf of workers of Autosplice, Inc., San Diego, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 2nd day of April, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10384 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,544]

Ruud Lighting, Inc.; Racine, WI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 10, 2009 in response to a worker petition filed on behalf of workers of Ruud Lighting, Inc., Racine, Wisconsin.

The petitioners have requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 1st day of April, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10383 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,409]

Mohawk Industries, Inc., Flooring Manufacturing Division, Calhoun Falls, SC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 26, 2009 in response to a worker petition filed on behalf of the workers at Mohawk Industries, Inc., Flooring Manufacturing Division, Calhoun Falls, South Carolina.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 1st day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10381 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,403]

Du-Co Ceramics, Saxonburg, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 26, 2009 in response to a petition filed by the United Steelworkers, Local 8042, on behalf of the workers of Du-Co Ceramics, Saxonburg, Pennsylvania.

The petitioner requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 1st day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10379 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,307]

Sypris Technologies; Kenton, OH; Notice of Termination of Investigation

The investigation was initiated on February 19, 2009 in response to a petition filed by the United Steelworkers of America, Local 1109 on behalf of workers of Sypris Technologies, Kenton, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 3rd day of April 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10377 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,300]

Tube City IMS Inc., Ecorse, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 19, 2009 in response to a petition filed by the United Steelworkers of America, Local 1299 on behalf of workers of Tube City IMS Inc., Ecorse, Michigan.

The petitioners have requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 2nd day of April, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10376 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,171]

Frontier Spinning Mills, Inc.; Cheraw, SC; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 9, 2009 in response to a petition filed by a company official on behalf of workers of Frontier Spinning Mills, Inc., Cheraw, South Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 1st day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10374 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,159]

Chrysler LLC; Sterling Heights Assembly; Sterling Heights, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 6, 2009 in response to a worker petition filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 1700, on behalf of workers of Chrysler LLC, Sterling Heights Assembly, Sterling Heights, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 1st day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10371 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,665]

Conmed Corporation, Utica, NY; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 24, 2009 in response to a petition filed by a company official on behalf of workers of Conmed Corporation, Utica, New York.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 1st day of April 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10393 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,661]

Zurn Industries; Erie, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 23, 2009 in response to a petition filed by the United Association of Plumbers and Pipefitters on behalf of workers of Zurn Industries, Erie, Pennsylvania.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 2nd day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10392 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,648]

Aleris International; Lewisport, KY; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 20, 2009 in response to a worker petition filed by the United Steelworkers Local 9443 on behalf of workers at Aleris Internatnional, Lewisport, Kentucky.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 1st day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10390 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,372]

Ethan Allen Operations Inc., Case Goods Division, Orleans, VT; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 25, 2009 in response to a petition filed by a company official on behalf of the workers of Ethan Allen Operations Inc., Case Goods division, Orleans, Vermont.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 30th day of March 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10224 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,640]

Gaston County Dyeing Machine Company; Mount Holly, NC; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 20, 2009 in response to a petition filed by a One-Stop operator on behalf of workers of Gaston County Dyeing Machine Company, Mount Holly, North Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 3rd day of April 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10389 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,126]

Regal Beliot Electric Motors, Incorporated, Lebanon, MO; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 4, 2009 in response to a petition filed on behalf of workers of Regal Beliot Electric Motors, Incorporated, Lebanon, Missouri.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 2nd day of April, 2009.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10370 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,587]

Vitec Group Communications; Clear-Com Division; Alameda, CA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 13, 2009 in response to a worker petition filed on behalf of the workers at Vitec Group Communications, Clear-Com Division, Alameda, California.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 3rd day of April 2009.

Richard Church,

Trade Adjustment Assistance.

[FR Doc. E9–10385 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,620]

Foamade Industries, Inc.; Auburn Hills, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 17, 2009 in response to a petition filed by company officials on behalf of workers at Foamade Industries, Inc., Auburn Hills, Michigan.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 1st day of April 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10387 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Notice of a Proposed Amendment to Prohibited Transaction Exemption (PTE) 90–29, 55 FR 21459 (May 24, 1990), as Amended by PTE 97–34, 62 FR 39021 (July 21, 1997), PTE 2000–58, 65 FR 67765 (November 13, 2000), PTE 2002–41, 67 FR 54487 (August 22,2002) and PTE 2007–05, 72 FR 13130 (March 20, 2007) as Corrected at 72 FR 16385 (April 4, 2007) (PTE 2007–05), (PTE 90–29), Involving Merrill Lynch, Pierce, Fenner & Smith, Inc., the Principal Subsidiary of Merrill Lynch & Co., Inc. and Its Affiliates (Merrill Lynch) and to PTE 2002–19, 67 FR 14979 (March 28, 2002) as Amended by PTE 2007–05, (PTE 2002–19), Involving J.P. Morgan Chase & Company and Its Affiliates (D–11519)

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of a Proposed Amendment to PTE 90–29.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to PTE 90–29 and PTE 2002–19, Underwriter Exemptions.[1] The Underwriter Exemptions are individual exemptions that provide relief for the origination and operation of certain asset pool investment trusts and the acquisition, holding and disposition by employee benefit plans (Plans) of certain asset-backed pass-through certificates representing undivided interests in those investment trusts. The proposed amendment to PTE 90–29 and 2002–19, if granted, would provide a six month period to resolve certain affiliations, as a result of Bank of America Corporation's acquisition of Merrill Lynch, between Bank of America, N.A., the Trustee, and Merrill Lynch as members of the Restricted Group, as those terms are defined in the Underwriter Exemptions (the Proposed Amendment). The Proposed Amendment, if granted, would affect the participants and beneficiaries of the Plans participating in such transactions and the fiduciaries with respect to such Plans.

DATES: Written comments and requests for a hearing should be received by the Department by June 5, 2009.

ADDRESSES: All written comments and requests for a public hearing (preferably, three copies) should be sent to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5700, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, (Attention: Exemption Application Number D–11519). Interested persons are invited to submit comments and/or hearing requests to the Department by the end of the scheduled comment period either by facsimile to (202) 219–0204 or by electronic mail to *moffitt.betty@dol.gov.* The application pertaining to the Proposed Amendment (Application) and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Wendy M. McColough of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: This document contains a notice of pendency before the Department of a proposed exemption to amend PTE 90–29 and PTE 2002–19, Underwriter Exemptions. The Underwriter Exemptions are a group of individual exemptions granted by the Department that provide substantially identical relief from certain of the restrictions of sections 406 and 407 of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and from the taxes imposed by sections 4975(a) and (b) of the Internal Revenue Code of 1986, as amended (Code), by reason of certain provisions of section of 4975(c)(1) of the Code for the operation of certain asset pool investment trusts and the acquisition, holding, and disposition by Plans of certain asset-backed pass-through certificates representing undivided interests in those investment trusts.

All of the Underwriter Exemptions were amended by PTE 97–34, 62 FR 39021 (July 21, 1997), PTE 2000–58, 65 FR 67765 (November 13, 2000), and PTE 2007–05, 72 FR 13130 (March 20, 2007), as corrected at 72 FR 16385 (April 4, 2007). Certain of the Underwriter Exemptions were amended by PTE 2002–41, 67 FR 54487 (August 22, 2002) or modified by PTE 2002–19.

The Department is proposing this amendment to PTE 90–29 and to PTE 2002–19 pursuant to 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).[2]

1. The Underwriter Exemptions permit Plans to invest in pass-through securities representing undivided interests in asset-backed or mortgage-backed investment pools (Securities). The Securities generally take the form of certificates issued by a trust (Trust). The Underwriter Exemptions permit transactions involving a Trust, including the servicing, management and operation of the Trust, and the sale, exchange or transfer of Securities evidencing interests therein, in the initial issuance of the Securities or in the secondary market for such Securities (the Covered Transactions). The most recent amendment to the Underwriter Exemptions is PTE 2007–05, 72 FR 13130 (March 20, 2007), as corrected at 72 FR 16385 (April 4, 2007) (PTE 2007–05). One of the General Conditions of the Underwriter Exemptions, as amended, requires that the Trustee not

[1] The ''Underwriter Exemptions'' are a group of individual exemptions that provide substantially identical relief for the operation of certain asset-backed or mortgage-backed investment pools and the acquisition and holding by Plans of certain securities representing interests in those investment pools.

[2] Section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 [1996]) generally transferred the authority of the Secretary of the Treasury to issue exemptions under section 4975(c)(2) of the Code to the Secretary of Labor.

be an ''Affiliate'' of any member of the ''Restricted Group'' other than an ''Underwriter.'' PTE 2007–05, subsection II.A.(4). The term ''Restricted Group'' is defined under section III.M. as: (1) Each Underwriter; (2) Each Insurer; (3) The Sponsor; (4) The Trustee; (5) Each Servicer (6) Any Obligor with respect to obligations or receivables included in the Issuer constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the Issuer, determined on the date of the initial issuance of Securities by the Issuer; (7) Each counterparty in an Eligible Swap Agreement; or (8) Any Affiliate of a person described in subsections III.M.(1)-(7).'' The term ''Servicer'' is defined to include ''the Master Servicer and any Subservicer.'' PTE 2007–05, section III.G. The term ''Affiliate'' is defined, in part, to include ''(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (2) Any officer, director, partner, employee * * * of such other person; and (3) Any corporation or partnership of which such other person is an officer, director or partner.'' PTE 2007–05, section III.N.

2. On May 24, 1990, PTE 90–29 was granted to Merrill Lynch, Pierce, Fenner & Smith, Inc. (MLPFS), the principal subsidiary of Merrill Lynch. MLPF&S is a Delaware corporation registered with and regulated by the SEC as a broker-dealer, and is a member of the New York Stock Exchange, and the National Association of Securities Dealers, Inc. MLPFS is also regulated by the Municipal Securities Rulemaking Board (with respect to municipal securities activities), the Commodity Futures Trading Commission, and the National Futures Association (with respect to MLPFS's activities as a futures commission merchant). MLPFS is a leading broker and/or dealer in the purchase and sale of corporate equity and debt securities, mutual funds, money market instruments, government securities, high yield bonds, municipal securities, financial futures contracts, and options. As a leading investment banking firm, MLPFS provides corporate, institutional, and government clients with a wide variety of financial services including underwriting the sale of securities to the public, structured and derivative financing, private placements, mortgage and lease financing, and financial advisory services, which includes advice on mergers and acquisitions. MLPFS also acts as a prime broker for hedge funds. Further, MLPFS operates mutual fund advisory programs, which provide plans governed by ERISA or section 4975 of the Code investment advice concerning purchasing mutual funds shares.

3. Bank of America Corporation (Bank of America or the Applicant) notes that it is the parent holding company of Bank of America, N.A., the Trustee of each of the commercial or residential mortgage-backed securitizations in the Covered Transactions. The Proposed Amendment was requested by application dated November 24, 2008, and as updated by Bank of America (the Application). The Applicant states that on January 1, 2009 (the Acquisition Date), Bank of America acquired Merrill Lynch (the Acquisition). Merrill Lynch is a holding company that, through its subsidiaries, provides broker-dealer, investment banking, financing, wealth management, advisory, insurance, lending and related products and services on a global basis. Merrill Lynch is a ''Consolidated Supervised Entity,'' [3] and is subject to group-wide supervision by the SEC. On March 4, 2009, the Applicant explained that Merrill Lynch & Co., Inc. (Parent or Merrill Lynch) is the ultimate parent of all of its subsidiaries, and was (prior to its acquisition by Bank of America) a publicly traded holding company. Among the direct subsidiaries of the Parent, each 100% owned by Parent, are Merrill Lynch Group, Inc. (MLG), Merrill Lynch Bank & Trust Co., FSB (MLBT) and Merrill Lynch, Pierce, Fenner & Smith Incorporated (MLPFS).

For the Covered Transactions that are the subject of the Applicant's request, Merrill Lynch Mortgage Capital Inc. (Mortgage Capital) is the Sponsor of certain transactions subject to PTE 90–29 and is an indirect, 100% owned subsidiary of MLG. Mortgage Capital's direct 100% owned subsidiaries include Merrill Lynch Mortgage Lending, Inc., the Sponsor of certain Covered Transactions, Merrill Lynch Mortgage Investors, Inc., the Sponsor of one Covered Transaction and Wilshire Credit Corporation (Wilshire), the Servicer of certain Covered Transactions.

Mortgage Capital purchased Wilshire in January 2004. MLBT is the 100% parent of FF Mortgage Corporation, which in turn is the 100% parent of Home Loan Services, Inc. (HLS), a Servicer of certain of the Covered Transactions. On October 20, 2006, MLBT acquired the subprime mortgage assets of National City Bank, including the stock of First Franklin Financial Corporation (FFFC), National City Home Loan Services (the related servicing platform) and the mortgage loan origination platform of National City Bank (which operated as the First Franklin Financial division of National City Bank). The mortgage loan origination platform was subsequently transferred into First Franklin Financial Corporation. With the acquisition, the servicing division was renamed HLS and this entity services First Franklin loans. HLS is a direct 100% owned subsidiary of MLBT. FFFC is the Sponsor of certain of the Covered Transactions. On March 5, 2008, Parent announced that FFFC would no longer originate loans. Concurrent with this announcement, FF Mortgage Corporation sold the stock of FFFC to Merrill Lynch Mortgage Services Corporation, a subsidiary of Mortgage Capital (which actions were taken to satisfy the Office of Thrift Supervision). PTE 90–29 was granted to MLPFS, a direct 100% owned subsidiary of Parent and the Underwriter of certain of the Covered Transactions.

4. The Acquisition caused certain transactions previously subject to PTE 90–29 or PTE 2002–19 to fail to satisfy the requirement under the Underwriter Exemptions that the Trustee not be an Affiliate of any member of the Restricted Group other than an Underwriter. PTE 2007–05 subsection II.A.(4). Currently, for transactions where Merrill Lynch is the Servicer, a six-month period is provided by the Underwriter Exemptions to sever the affiliation between the Servicer and the Trustee if the affiliation occurred after the initial issuance of the Securities. PTE 2007–05, subsection II.A.(4)(b). However, there is currently no transitional relief under PTE 90–29 where Merrill Lynch is a Sponsor, Underwriter or a Swap Counterparty and Bank of America, N.A. is the Trustee. Accordingly, Bank of America seeks a temporary amendment to PTE 90–29 to provide for a six-month period for resolution of certain

[3] Effective August 2004, the Securities Exchange Commission (Commission) adopted rule amendments that established a voluntary, alternative method for computing net capital for certain broker-dealers. As a condition to its use of the alternative method, a broker-dealer's ultimate holding company and affiliates (referred to collectively as a consolidated supervised entity or CSE) must consent to group-wide Commission supervision. These rules, among other things, respond to international developments. Specifically, affiliates of certain US broker-dealers that conduct business in the European Union (EU) have stated that they must demonstrate that they are subject to consolidated supervision at the ultimate holding company level that is ''equivalent'' to EU consolidated supervision. Commission supervision incorporated into these rule amendments addresses this standard. These amendments and the SEC's program for consolidated supervision of broker-dealers and affiliates will minimize duplicative regulatory burdens on firms that are active in the EU, as well as in other jurisdictions that may have similar laws.

prohibited affiliations caused by the Acquisition of Merrill Lynch by Bank of America, the parent of the Trustee.

In addition, the Applicant requests that the amendment provide similar relief for one other Covered Transaction, JPM 2003–ML1, where Bank of America is Trustee and Merrill Lynch is a Sponsor. In this transaction, the Underwriter, J.P. Morgan Securities Inc., who is unrelated to Bank of America, relies upon PTE 2002–19, granted to J.P. Morgan Chase & Co. and its affiliates. The Applicant provides that J.P. Morgan Securities Inc. is the principal nonbank subsidiary of J.P. Morgan Chase & Co. JP Morgan Chase Commercial Mortgage Securities Corp. is 100% owned by JPMorgan Chase Bank, N.A., which in turn, is 100% owned by J.P. Morgan Chase & Co. JP Morgan Chase Commercial Mortgage Securities Corp. has confirmed to the Applicant that it has been notified of the application for the Proposed Amendment and has agreed to coverage under the Proposed Amendment. Bank of America represents that it has placed a notice on its web pages for each of the Covered Transactions affected by the Acquisition and that this notice would be updated upon publication of the Proposed Amendment, and if granted, the final amendment. Further, the Web pages will note the appointment of any co-trustee and the appointment of the replacement trustee. The Applicant states that Bank of America, N.A., in its role of Trustee, will bear the cost of appointing such co-trustee and that there will be no financial impact on any Underwriter.

5. Bank of America represents that the Covered Transactions affected by the Acquisition consist of 49 commercial or residential mortgage-backed securitizations (CMBS or RMBS) (Securitizations) as detailed at section III.KK of the Proposed Amendment (the Securitizations List). Bank of America states that all of the Securitizations were structured and are managed to meet the requirements of PTE 90–29 or in the case of JPM 2003–ML1, PTE 2002–19, in each case as amended by PTE 2007–05. Bank of America, N.A. is the Trustee in each of the Securitizations. The Applicant represents that, in its role as Trustee, Bank of America, N.A. is obligated under both the operative documents that securitize the loans, and under state law relating to fiduciaries, to protect the interests of security holders. Specifically, the Trustee is required to enforce the rights of security holders against other parties to the transaction, including Servicers, Swap Counterparties and loan sellers. The Applicant notes further that in practice, due to industry standards and reputation concerns by the various parties, little such protection or enforcement is necessary, and the Trustee's role, while vigilant, is relatively passive. Merrill Lynch is a party to each of the Securitizations in the capacity or capacities detailed in the Securitizations List. The Applicant states that, in any of these capacities, Merrill Lynch is obligated, under the operative documents of the transaction, to perform its designated duties under contractual and, in some cases, industry standards for the benefit of security holders. The Applicant represents that each of the Pooling and Servicing Agreements has been structured to comply with PTE 90–29 or in the case of JPM 2003–ML1, PTE 2002–19 and that each of the Trusts has been managed in accordance with the related Pooling and Servicing Agreement. Consequently, Securities issued by each Trust currently are eligible for purchase by Plans that meet the requirements of PTE 90–29 or in the case of JPM 2003–ML1, PTE 2002–19.

6. The Applicant states that none of the Trusts were formed or marketed with the knowledge that Bank of America and Merrill Lynch would become affiliated. In this regard, the Applicant notes that there are no securitizations on the Securitization List that closed later than 2007; the Acquisition was announced in the third quarter of 2008. The Applicant states that, in general, the Pooling and Servicing Agreements governing the applicable Securitizations permit the cures detailed in their Application by contemplating a Trustee's resignation and replacement so as to comply with applicable law and providing the Trustee the ability to appoint co-trustees and other agents authorized to carry out the Trustees' duties. The Applicant notes that the agreements do not provide specific qualifications for co-trustees. While the agreements vary in the detail, after due diligence, the Applicant asserts that it is not aware of any provisions of the agreements or SEC requirements that preclude the cures detailed in the Application.

7. Bank of America represents in its Application that during the proposed six month resolution period, for each Securitization on the Securitization List, the Trustee shall appoint a co-trustee, which is not an Affiliate of Bank of America, no later than the earlier of (a) April 1, 2009 or (b) five business days after Bank of America, N.A., the Trustee, has become aware of a conflict between the Trustee and any member of the Restricted Group that is an Affiliate of the Trustee. The co-trustee will be solely responsible for resolving such conflict between the Trustee and any member of the Restricted Group that has become an Affiliate of the Trustee as a result of the Acquisition; provided that if the Trustee has resigned on or prior to April 1, 2009, and no event described in clause (b) has occurred, no co-trustee shall be required since a replacement trustee would be in place by April 1, 2009. Bank of America represents that as Trustee, Bank of America, N.A. will appoint a co-trustee with the knowledge and skill necessary to resolve any conflict arising between Bank of America, N.A. and any Bank of America affiliated member of the Restricted Group. In the event that a co-trustee were appointed, such co-trustee would assume Bank of America, N.A.'s role under the related Pooling and Servicing Agreement (solely with respect to any conflict between Bank of America, N.A. and a Bank of America affiliate that is a member of the Restricted Group) until a replacement trustee replaced Bank of America, N.A.

On January 29, 2009, The Applicant informed the Department that Bank of America, N. A. is resigning as Trustee from a total of 70 transactions (this number includes transactions where the conflict is not ERISA-related and the transaction is not on the Securitization List). Bank of America, N.A. resigned from 12 of these transactions on December 31, 2008, will resign from 50 of these transactions by March 31, 2009, and will resign from the remaining 8 no later than June 30, 2009. Of the 12 transactions BofA resigned from on December. 31, 2008, it resigned from 2 solely for ERISA purposes and 10 solely for securities law purposes. As of January 29, 2009, 27 transactions had received replacement trustees. The Applicant represented that the replacement trustees for the remaining transactions were currently being negotiated. On March 16, 2009, the Applicant informed the Department that for all 49 of the Covered Transactions on the Securitization List, the replacement trustees will be in place as of March 31, 2009. Wells Fargo Bank, N.A. will be the replacement trustee for five of the Covered Transactions and U.S. Bank National Association will be the replacement trustee for the remaining 44 Covered Transactions. The Applicant has further indicated that there were no actual conflicts from the date that the affiliation arose, January 1, 2009 through March 20, 2009. Thus, no co-trustee had to be appointed during that period. The Applicant noted that in cases where the Trustee is also the securities administrator, Bank of

America, N.A. will resign as Trustee and remain securities administrator.

For purposes of this Proposed Amendment, a conflict would arise whenever (a) Merrill Lynch is a member of the Restricted Group and fails to perform in accordance with the timeframes contained in the relevant Pooling and Servicing Agreement following a request for performance from Bank of America, N.A., as Trustee, or (b) Bank of America, N.A., as Trustee, fails to perform in accordance with the timeframes contained in the relevant Pooling and Servicing Agreement following a request for performance from Merrill Lynch, a member of the Restricted Group. The time as of which a conflict occurs is the earlier of the day immediately following the last day on which compliance is required under the relevant Pooling and Servicing Agreement; or the day on which a party affirmatively responds that it will not comply with a request for performance.

Additionally, for purposes of this Proposed Amendment, the term conflict includes but is not limited to, the following: (1) Merrill Lynch's failure, as Sponsor, to repurchase a loan for breach of representation within the time period prescribed in the relevant Pooling and Servicing Agreement, following Bank of America, N.A.'s request, as Trustee, for performance; (2) Merrill Lynch, as Sponsor, notifies Bank of America, N.A., as Trustee, that it will not repurchase a loan for breach of representation, following Bank of America, N.A.'s request that Merrill Lynch repurchase such loan within the time period prescribed in the relevant Pooling and Servicing Agreement (the notification occurs prior to the expiration of the prescribed time period for the repurchase); and (3) Merrill Lynch, as Swap Counterparty, makes or requests a payment based on a value of LIBOR [4] that Bank of America, N.A., as Trustee, considers erroneous.

8. In correspondence dated January 29, and February 3, 2009, Bank of America represented to the Department that it and Merrill Lynch were currently identifying replacement trustees to replace Bank of America, N.A. as Trustee in approximately 70 transactions. The Applicant stated that it intends to complete the negotiations and paperwork on an ongoing basis, with the effective date for all changes to be April 1, 2009. The Applicant noted that in contrast to co-trustees, any replacement trustee will have to meet the requirements of the related Trust agreement for qualification as a Trustee (i.e., will meet the same requirements that Bank of America, N.A. (and its predecessor, LaSalle Bank, N.A. had to meet). A copy of a typical Pooling and Servicing Agreement requirements for a Trustee was provided to the Department. The Applicant further noted that if a conflict were to arise prior to April 1, 2009 with respect to any Trust, the most likely course would be that Bank of America, N.A. would promptly resign as Trustee and the replacement trustee would assume its role earlier than scheduled. The next most likely scenario is that the party that would become the replacement trustee (and hence meets the requirements of the related Pooling and Servicing Agreement for qualification as a Trustee) would be appointed co-trustee under the terms of the Proposed Amendment. The Applicant stated, however, there might be situations where either such course of action would be impossible or impractical, in which case the parties would have to appoint a different co-trustee until the replacement trustee assumed its role.

The Applicant states that in certain cases, Bank of America, N.A. will continue as a securities administrator, retaining certain reporting requirements but be responsible to the replacement trustee. The replacement trustee will have legal title to the assets of the trust, will have fiduciary responsibility to the securities holders and will be responsible for supervising Bank of America, N.A. in whatever role it retains.

9. Bank of America represents that, as of March 20, 2009, there was no outstanding conflict requiring resolution involving Bank of America, N.A. and any Merrill Lynch entity involved in the transactions listed in the Securitizations List. Further, Bank of America has stated that it would notify the Department of Labor of any conflict that arose prior to the replacement of Bank of America, N.A. as Trustee in any of these transactions. The Applicant notes that, as a technical matter, in the most likely case (e.g. the assertion of a breach of representation or warranty by the Sponsor), the Pooling and Servicing Agreements all require that the Trustee provide the offending party 90 days to cure the issue before the Trustee may take any action to do so itself. Consequently, if an issue would have arisen after January 1, 2009; the Trustee would not have been able to take any action to cure the issue until after April 1, 2009. The Applicant asserts that since it is expected that the Trustee replacements will be made by April 1, 2009, it is not anticipated that a conflict will arise while Bank of America, N.A. is the Trustee of any of the Covered Transactions.

10. The Applicant notes that Plans acquired Securities issued under the Securitizations in reliance on the exemptive relief provided by the Underwriter Exemptions. Absent additional relief, the Acquisition has caused these granted exemptions to cease to apply to several of the Securitizations. Bank of America represents that the Securities issued in transactions such as the Securitizations are attractive investments for Plans subject to Title I of ERISA or section 4975 of the Code and conversely, such plans are an important market for issuers of such Securities. Bank of America asserts that to force Bank of America, N.A. to resign as Trustee in all of the Securitizations before the Acquisition was not administratively feasible because the number of available trustees is limited and there is work required in changing trustees. Similarly, to have the exemptions no longer apply to the Securitizations would force the Plans to sell their securities in the current unstable market, likely at a loss. The Applicant additionally notes that although the Acquisition has been widely covered, it is conceivable that Plan fiduciaries would not realize that the Underwriter Exemption relied upon by the Plans had ceased to apply, raising the possibility that a Plan would not sell and that non-exempt prohibited transactions would occur.

11. Bank of America states that the Plans purchased Securities in reliance on PTE 90–29 or PTE 2002–19. At that time, the Plans had no knowledge that the Trustee would become an Affiliate of one or more members of the Restricted Group. On or after the Acquisition, except in cases covered by PTE 90–29 as amended by PTE 2000–58 (providing a six-month window for Trustee-Servicer affiliations) or PTE 2002–41 (Trustee-Underwriter affiliations), the purchased Securities would no longer be afforded coverage under the Underwriter Exemptions and the Plans would have been obligated to sell the Securities prior to January 1, 2009. The Applicant asserts that this is problematic for several reasons. First, as is customary for such transactions, the physical securities are not used in most cases. Rather, an electronic system, usually the Depository Trust Company's electronic system, is utilized and the securities are in global form. In such cases, it is difficult (and may be impossible) to ascertain the beneficial ownership of the securities, meaning that it is not known whether Plans are owners and to what extent. The Applicant asserts that identifying the

[4] The London Interbank Offered Rate.

affected Plans would be time consuming and expensive, and may be impossible to do with complete accuracy because of the book-entry system under which Securities were issued. As stated above, the Applicant represents that notice of this request for relief was posted on the Trustee's website at the time this Application was submitted, which would be updated to reflect any action of the Department with respect to the Application. The Applicant has informed the Department that, although Bank of America, N.A. will have been replaced as Trustee by April 1, 2009, Bank of America, N.A. will remain as the Securities Administrator for any of the Securitizations on the Securitization List for which it was providing such services. Further, the Applicant has indicated that either Bank of America, N.A. (in cases where Bank of America, N.A. continues as Securities Administrator) or the replacement trustee (in all other cases) will continue to update its website concerning the status of the Proposed Amendment. In this regard, the Applicant also requests that the publication of the Proposed Amendment in the **Federal Register** serve as the Notice to Interested Persons for purposes of this submission.

Second, and more importantly, the current disruption in the mortgage-backed securities market makes sales problematic, both in terms of finding buyers and establishing proper valuation. Granting the requested relief prevents these problems. The Applicant states further that the relief is of the same duration, six months, as that already provided by the Department for Trustee-Servicer affiliations, suggesting that the Department has already determined that this period is sufficiently brief to prevent serious conflicts of interest from arising.

12. Bank of America requests that the relief, if granted, be made retroactive to January 1, 2009, the Acquisition Date. If the relief is granted retroactively, Plans would be able to retain their prior Securitization investments and to purchase Securities in the secondary market relying upon the Underwriter Exemptions once exemptive relief is granted, even if the transactions originally closed or will close prior to the date the final Amendment is published in the **Federal Register**, if granted by the Department.

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 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 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 require, among other things, a fiduciary to discharge his or her 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 requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

2. Before an exemption can be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interest of the plans and of their participants and beneficiaries and protective of the rights of participants and beneficiaries of the plans; and

3. The proposed amendment, 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.

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending amendment to the address above, within the time frame set forth above, after the publication of this proposed amendment in the **Federal Register**. All comments will be made a part of the record. Comments received will be available for public inspection with the Application at the address set forth above.

Proposed Exemption

Based on the facts and representations set forth in the application, 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, August 10, 1990), the Department proposes to modify Prohibited Transaction Exemption (PTE) 90–29, 55 FR 21459 (May 24, 1990), as amended by PTE 97–34, 62 FR 39021 (July 21, 1997), PTE 2000–58, 65 FR 67765 (November 13, 2000), PTE 2002–41, 67 FR 54487 (August 22, 2002) and PTE 2007–05, 72 FR 13130 (March 20, 2007), as corrected at 72 FR 16385 (April 4, 2007) (PTE 2007–05), (PTE 90–29) and to modify PTE 2002–19, 67 FR 14979 (March 28, 2002) as amended by PTE 2007–05, (PTE 2002–19).

1. Subsection II.A.(4) of PTE 90–29 and PTE 2002–19 is amended to add a new subsection (c) that reads as follows:

(c) Effective January 1, 2009 through July 1, 2009, Bank of America, N.A., the Trustee, shall not be considered to be an Affiliate of any member of the Restricted Group solely as the result of the acquisition of Merrill Lynch & Co., Inc. and its affiliates (Merrill Lynch) by Bank of America Corporation and its subsidiaries (Bank of America), the parent holding company of Bank of America, N.A. (the Acquisition), which occurred after the initial issuance of the Securities, provided that:

(i) The Trustee, Bank of America, N.A., ceases to be an Affiliate of any member of the Restricted Group no later than July 1, 2009;

(ii) Any member of the Restricted Group that is an Affiliate of the Trustee, Bank of America, N.A., did not breach any of its obligations under the Pooling and Servicing Agreement, unless such breach was immaterial and timely cured in accordance with the terms of such agreement, during the period from January 1, 2009 through the date the member of the Restricted Group ceased to be an Affiliate of the Trustee, Bank of America, N.A.; and

(iii) In accordance with each Pooling and Servicing Agreement, the Trustee, Bank of America, N.A., appoints a co-trustee, which is not an Affiliate of Merrill Lynch or any other member of the Restricted Group, no later than the earlier of (A) April 1, 2009 or (B) five business days after Bank of America, N.A. becomes aware of a conflict between the Trustee and any member of the Restricted Group that is an Affiliate of the Trustee. The co-trustee will be responsible for resolving any conflict between the Trustee and any member of the Restricted Group that has become an Affiliate of the Trustee as a result of the Acquisition; provided, that if the Trustee has resigned on or prior to April 1, 2009 and no event described in clause (B) has occurred, no co-trustee shall be required.

(iv) For purposes of this subsection II.A.(4)(c), a conflict arises whenever (A) Merrill Lynch, as a member of the Restricted Group, fails to perform in accordance with the timeframes contained in the relevant Pooling and Servicing Agreement following a request for performance from Bank of America, N.A., as Trustee, or (B) Bank of America, N.A., as Trustee, fails to perform in accordance with the timeframes contained in the relevant Pooling and Servicing Agreement following a request for performance from Merrill Lynch, a member of the Restricted Group.

The time as of which a conflict occurs is the earlier of: the day immediately following the last day on which compliance is required under the relevant Pooling and Servicing Agreement; or the day on which a party affirmatively responds that it will not comply with a request for performance.

For purposes of this subsection II.A.(4)(c), the term ''conflict'' includes but is not limited to, the following: (1) Merrill Lynch's failure, as Sponsor, to repurchase a loan for breach of representation within the time period prescribed in the relevant Pooling and Servicing Agreement, following Bank of America, N.A.'s request, as Trustee, for performance; (2) Merrill Lynch, as Sponsor, notifies Bank of America, N.A., as Trustee, that it will not repurchase a loan for breach of representation, following Bank of America, N.A.'s request that Merrill Lynch repurchase such loan within the time period prescribed in the relevant Pooling and Servicing Agreement (the notification occurs prior to the expiration of the prescribed time period for the repurchase); and (3) Merrill Lynch, as Swap Counterparty, makes or requests a payment based on a value of the London Interbank Offered Rate (LIBOR) that Bank of America, N.A., as Trustee, considers erroneous.

2. The Definition of ''Underwriter'' at section III.C. of PTE 90–29 and PTE 2002–19 is temporarily replaced with a definition that includes J.P. Morgan Securities Inc. and reads:

C. Effective January 1, 2009 through July 1, 2009, ''Underwriter'' means:

(1) Merrill Lynch or J.P. Morgan Securities Inc.;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with such entities; or

(3) Any member of an underwriting syndicate or selling group of which such firm or person described in subsections III.C.(1) or (2) is a manager or co-manager with respect to the Securities.

3. The Definition of ''Sponsor'' at section III.D. of PTE 90–29 and PTE 2002–19 is temporarily extended to include language applicable to transactions on the Securitization List at section III.KK and reads:

D. ''Sponsor'' means:

(1) The entity that organizes an Issuer by depositing obligations therein in exchange for Securities; or

(2) Effective January 1, 2009 through July 1, 2009, for those transactions listed on the Securitization List at section III.KK., Merrill Lynch.

4. Section III of PTE 90–29 and PTE 2002–19 is temporarily amended to add a new section III.KK that reads as follows:

KK. Effective January 1, 2009 through July 1, 2009,

''Securitization List'' means:

Name	Issuance type	MLynch role
CMAC Series 1997 ML1	C	S, U
WFPD 1996 WFP–D	C	S, U
Merrill Lynch 2003–KEY 1	C	S, U
Merrill Lynch Series 1997–C1	C	S, U
Merrill Lynch Series 2004–KEY 2	C	S, U
Merrill Lynch Series 2006–C2	C	S, U
Mezz Cap 2004–C2	C	S, U
C–BASS 2007–CB4	R	S, U
First Franklin MLT 2006–FF18	R	S, U, MS
First Franklin MLT 2007–01	R	S, U, MS
First Franklin MLT 2007–02	R	U, MS
First Franklin MLT 2007–03	R	U, MS
First Franklin MLT 2007–4	R	S, U, MS
First Franklin MLT 2007–5	R	S, U, MS
First Franklin MLT 2007–A	R	S, U, MS
First Franklin MLT 2007–FF1	R	S, U, MS
First Franklin MLT 2007–FF2	R	S, U, MS
First Franklin MLT 2007–FFA	R	S, U, MS
First Franklin MLT 2007–FFC	R	S, U, MS
First Franklin MLT 2007–H1	R	S, U, MS
Merrill Lynch Series 2005–SL3	R	S, U, MS
Merrill Lynch Series 2006–AHL1	R	S, U, MS
Merrill Lynch Series 2006–AR1	R	S, U, MS
Merrill Lynch Series 2006–FF1	R	S, U, MS
Merrill Lynch Series 2006–FM1	R	S, U, MS
Merrill Lynch Series 2006–HE2	R	S, U, MS
Merrill Lynch Series 2006–HE3	R	S, U, MS
Merrill Lynch Series 2006–HE4	R	S, U, MS
Merrill Lynch Series 2006–HE6	R	S, U, MS
Merrill Lynch Series 2006–MLN1	R	S, U, MS
Merrill Lynch Series 2006–OPT1	R	S, U
Merrill Lynch Series 2006–RM1	R	S, U, MS
Merrill Lynch Series 2006–RM2	R	S, U, MS
Merrill Lynch Series 2006–RM3	R	S, U
Merrill Lynch Series 2006–RM4	R	S, U, MS
Merrill Lynch Series 2006–RM5	R	S, U, MS
Merrill Lynch Series 2006–SD1	R	S, U, MS
Merrill Lynch Series 2006–SL1	R	S, U, MS
Merrill Lynch Series 2006–WMC2	R	S, U, MS
Merrill Lynch Series 2007–HE1	R	S, U, MS
Merrill Lynch Series 2007–HE3	R	S, U, MS
Merrill Lynch Series 2007–SD1	R	S, U, MS
MLMI Trust 2002–AFC1	R	S, U
Ownit Mort Loan ABS 2006–3	R	S, U
Ownit Mort Loan ABS 2006–4	R	S, U
Ownit Mort Loan ABS 2006–5	R	S, U
Ownit Mort Loan ABS 2006–6	R	S, U
Ownit Mort Loan ABS 2006–7	R	S, U

Name	Issuance type	MLynch role
JP Morgan Chase 2003–ML1 (U—JP Morgan Securities Inc.)	C	S

Legend: C = Commercial mortgage-backed securitizations.
R = Residential mortgage-backed securitizations.
U = Underwriter.
S = Sponsor.
MS = Master Servicer (either HLS or Wilshire).
MLynch = Merrill Lynch.

The availability of this amendment, if granted, is subject to the express condition that the material facts and representations contained in the Application are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the Application change, the amendment will cease to apply as of the date of such change. In the event of any such change, an application for a new amendment must be made to the Department.

Signed at Washington, DC, this 30th day of April, 2009.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E9–10362 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,173]

Superior Fabrication Company LLC, Kincheloe, MI; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on February 9, 2009 in response to a petition filed by a company official on behalf of workers of Superior Fabrication Company LLC, Kincheloe, Michigan.

The petitioner has requested that the petition be withdrawn. Therefore, the investigation under this petition has been terminated.

Signed at Washington, DC, this 1st day of April, 2009.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10375 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–65,626]

Russell Brands, LLC, Coosa River Yarn Division, Wetumpka, AL; Notice of Termination of Investigation

In accordance with Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on March 18, 2009 in response to a petition filed by a company official on behalf of workers of Russell Brands, LLC, Coosa River Yarn, Wetumpka, Alabama.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 1st day of April, 2009

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E9–10388 Filed 5–5–09; 8:45 am]

BILLING CODE 4510–FN–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 09–09]

Request for Information From the Private Sector for Malawi Compact Program Development

AGENCY: Millennium Challenge Corporation.

ACTION: Invitation for private sector input.

Authority: 22 U.S.C. 7701 *et seq.*

SUMMARY: The Millennium Challenge Corporation (''MCC'') is a U.S. Government agency created in 2004 to administer the Millennium Challenge Account. Its mission is to reduce poverty through the promotion of sustainable economic growth. Since 2004, MCC has signed Compact programs with eighteen partner countries ranging from $66 million to $698 million. In April 2009, the Government of Malawi (''GoM'') through ''MCA–Malawi'' presented a proposal including three projects to MCC for potential Compact funding. This Request for Information (''RFI'') aims to solicit feedback from the private sector on these projects.

SUPPLEMENTARY INFORMATION: This solicitation has the following objectives: (a) Share best practices and private sector experiences on similar projects from other countries; (b) Generate opportunities for leverage of Compact funds with private sector financing, trade, and investment; and (c) Solicit information about opportunities and challenges facing businesses in the sectors which have been identified for possible Compact projects.

This solicitation is focused on the three following project proposals, which are posted publicly in full detail at *http://www.mca-m.gov.mw/index.php/concept-papers/81:*

☐ The proposed ''Energy'' project would fund increased availability of reliable and quality power, access to power, efficient power service delivery, and improved natural resources management.

☐ The proposed ''Transport'' project would fund more reliable, efficient and affordable transport options through road and rail investments.

☐ The proposed ''Governance'' project would fund improvements to the public financial management and budget oversight system as well as assistance to GoM anti-corruption agencies.

Where possible, respondents are encouraged to provide information based on experience in the country. Experiences from other countries may also be applicable. MCA–Malawi may use information provided by the private sector to structure projects for Compact funding.

FOR FURTHER INFORMATION: Visit *http://www.mca-rn.gov.mw/.* Responses to and questions about this Request for Information should be e-mailed to *info@mca-m.gov.mw* and to *psi@mcc.gov.*

DATES: Companies, other organizations, and individuals are invited to submit responses on or before Friday, May 15, 2009.

Dated: April 30, 2009.

Jeri Jensen,

Managing Director for Private Sector Initiatives, Millennium Challenge Corporation.

[FR Doc. E9–10347 Filed 5–5–09; 8:45 am]

BILLING CODE 9211–03–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 09–039]

Notice of Intent To Grant Exclusive License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Intent to Grant Exclusive License.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant an exclusive license in the United States to Ocean Tomo Federal Services, having its principal place of business in Bethesda MD, to promote the utilization by the public of the inventions described and claimed in the following U.S. Patents by, *inter alia,* engaging in marketing activities: ''Microresonator and associated method for producing and controlling photonic signals with a photonic bandgap delay apparatus'', U.S. Patent No. 6,028,693; ''Fabrication of fiber optic grating apparatus and method'', U.S. Patent No. 6,873,762; ''Video guidance sensor system with laser rangefinder'', U.S. Patent No. 6,658,329; ''Video image tracking engine'', U.S. Patent No. 6,778,180; ''Video guidance sensor system with integrated rangefinding'', U.S. Patent No. 7,006,203; ''Synchronized docking system'', U.S. Patent No. 6,254,035; ''Synchronized autonomous docking system'', U.S. Patent No. 6,227,495; ''Control method for video guidance sensor system'', U.S. Patent No. 6,888,476; ''Fiber coupled laser diodes with even illumination pattern'', U.S. Patent No. 7,174,077; ''Video sensor with range measurement capability'', U.S. Patent No. 7,375,801.

The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive licenses will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. NASA has not yet made a determination to grant exclusive licenses and may deny the requested licenses even if no objections are submitted within the comment period.

DATES: The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of exclusives licenses would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Objections relating to the prospective license may be submitted to James J. McGroary, Chief Patent Counsel/LS01, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–0013.

FOR FURTHER INFORMATION CONTACT: Sammy A. Nabors, Technology Transfer Program Office/ED03, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–5226. Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov/.*

Dated: May 1, 2009.

Richard W. Sherman,

Deputy General Counsel.

[FR Doc. E9–10498 Filed 5–5–09; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before June 5, 2009. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001

E-mail: request.schedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and

some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1228.24(b)(3).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Agricultural Research Service (N1–310–08–3, 5 items, 3 temporary items). Scanned versions of records accumulated by the Office of the Administrator relating to substantive agency functions and activities, records documenting routine administrative matters, and tracking and management reports generated from an electronic information system used to track records sent to the Office of the Administrator. Proposed for permanent retention are paper copies of substantive records accumulated by the Office of the Administrator and master files of an electronic information system used to track these records.

2. Department of the Army, Agency-wide (N1–AU–09–9, 1 item, 1 temporary item). Master files associated with an electronic information system used to track audits and audit follow-up, including administrative matters associated with audits.

3. Department of the Army, Agency-wide (N1–AU–09–23, 1 item, 1 temporary item). Master files associated with an electronic information system used for after action reviews of battle training exercises.

4. Department of the Army, Agency-wide (N1–AU–09–24, 1 item, 1 temporary item). Master files associated with an electronic information system used by installation training centers for battle simulation exercises.

5. Department of the Army, Agency-wide (N1–AU–09–25, 1 item, 1 temporary item). Master files associated with an electronic information system used to study and analyze battle training exercises.

6. Department of Commerce, National Telecommunications and Information Administration (N1–417–08–1, 6 items, 6 temporary items). Electronic and paper records relating to the digital television converter box coupon program.

7. Department of Defense, Defense Commissary Agency (N1–506–09–1, 1 item, 1 temporary item). Master files of an electronic information system that contains information concerning agency employees, such as pay grade, job series, race, and years of service.

8. Department of Defense, Defense Security Service (N1–446–09–2, 1 item, 1 temporary item). Registers, forms, and other records used to document receipt, disclosure, and disposal of Top Secret documents that contain compartmented information.

9. Department of Health and Human Services, Food and Drug Administration (N1–88–09–3, 14 items, 14 temporary items). Master files for electronic information systems used for regulatory and administrative workflow management, records relating to regulated imports, files on regulated firms and facilities, and laboratory analytical documentation and reports.

10. Department of Homeland Security, National Protection and Programs Directorate (N1–563–08–35, 3 items, 3 temporary items). Master files and outputs of an electronic information system used to identify individuals who have remained in the United States beyond their authorized stay.

11. Department of the Interior, Office of the Secretary (N1–48–08–5, 2 items, 1 temporary item). Travel records of high level agency officials other than the Secretary of the Interior, including invitations, travel vouchers, itineraries, and briefing books. Travel records accumulated by the Secretary of the Interior are proposed for permanent retention.

12. Department of the Interior, National Business Center (N1–48–08–4, 11 items, 11 temporary items). Electronic records relating to such payroll matters as benefits, debt management, leave and earnings, and the creation of W–2 forms.

13. Department of the Interior, National Business Center (N1–48–08–7, 1 item, 1 temporary item). Electronic records containing data relating to safety and health matters collected from the interagency wildland fire community.

14. Department of the Interior, National Business Center (N1–48–08–19, 1 item, 1 temporary item). Electronic records relating to management of the National Fire Plan, which relates to such matters as hazardous fuel reduction, burned area rehabilitation, and community assistance activities. These records are duplicative of records maintained by the Department's Office of Wildland Fire Coordination.

15. Department of the Interior, Bureau of Land Management (N1–49–08–2, 7 items, 6 temporary items). Records relating to the development and management, including quality assurance, of databases relating to safety and environmental matters. Also included are master files containing data relating to inspections of agency facilities and equipment and corrective actions needed. Proposed for permanent retention are master files of an electronic information system used in connection with the management and cleanup of abandoned mines and other hazardous waste sites.

16. Department of Justice, Bureau of Prisons (N1–129–09–15, 1 item, 1 temporary item). Records included in an electronic information system used to document inmates' medical histories and medical care.

17. Department of Justice, Bureau of Prisons (N1–129–09–16, 1 item, 1 temporary item). Master files of an electronic information system used to track inmates who are released early, contingent on successful completion of a drug abuse treatment program.

18. Department of the Navy, Naval Criminal Investigative Service (N1–NU–09–4, 2 items, 2 temporary items). Records relating to registering or granting permits for boats, weapons, hunting and fishing, and similar matters. Also included are copies of polygraph examination records accumulated during criminal investigations.

19. Department of State, Bureau of Population, Refugees, and Migration (N1–59–09–7, 2 items, 2 temporary items). Master files and outputs of an electronic information system used in connection with such activities as the development of the Bureau's budget requests, monitoring disbursements, and reporting to the Department, Congress, and the Office of Management and Budget.

20. Department of Transportation, Federal Highway Administration (N1–406–09–5, 4 items, 2 temporary items). Data concerning motor vehicle registrations and the issuance of drivers' licenses that is on the agency's Web site as well as data that is published in the agency's annual highway statistics report. Master files of the electronic information system that contains this data are proposed for permanent retention along with outputs that are not published in the annual highway statistics report. The annual published report has been approved for permanent retention in a separate schedule.

21. Department of the Treasury, Departmental Offices (N1–56–09–2, 3 items, 3 temporary items). Master files, inputs, and outputs of an electronic information system used to manage the Federal Financing Bank's loan portfolio.

22. Department of the Treasury, Internal Revenue Service (N1–58–09–8, 2 items, 2 temporary items). Applications for tax credits for developing and implementing clean coal technologies.

23. Environmental Protection Agency, Agency-wide (N1–412–09–5, 3 items, 2 temporary items). Records relating to environmental achievement awards, consisting of records of routine awards, as well as non-substantive documentation relating to significant awards, such as records relating to arrangements for and summaries of awards ceremonies. Major documentation of significant awards, including Presidential awards, is proposed for permanent retention.

24. Federal Communications Commission, Office of Media Relations (N1–173–09–1, 5 items, 5 temporary items). Records relating to the agency's public Web site, including Web content and management and operations records.

25. Federal Maritime Commission, Office of the Inspector General (N1–358–09–1, 1 item, 1 temporary item). Master files of an electronic information system that is used for tracking audits and evaluations.

26. Office of the Director of National Intelligence, National Counterterrorism Center (N1–576–09–1, 1 item, 1 temporary item). Master files of an electronic information system that contains data relating to individuals engaged in or suspected of involvement in terrorist activities.

27. Railroad Retirement Board, Office of Programs (N1–184–09–1, 1 item, 1 temporary item). Records maintained in the agency's claims imaging system, consisting of applications for benefits under the Railroad Retirement Act and Railroad Unemployment Insurance Act and related records. This schedule only covers records maintained in this system, which was implemented in October 2001. Older applications for retirement benefits that pre-date this system have been appraised as permanent and will be scheduled separately.

Dated: April 30, 2009.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. E9–10490 Filed 5–5–09; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Arts Advisory Panel

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that six meetings of the Arts Advisory Panel to the National Council on the Arts will be held by teleconference from the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC, 20506. These are closed meetings to review applications for funding under the American Recovery and Reinvestment Act of 2009 as follows (ending times are approximate):

Music: May 28, 2009, from 11 p.m. to 12 p.m.

Music: May 28, 2009, from 1:30 p.m. to 2:30 p.m.

Music: May 28, 2009, from 2:30 p.m. to 3:30 p.m.

Opera: May 28, 2009, from 3:30 p.m. to 4:30 p.m.

Opera: May 19, 2009, from 4:30 p.m. to 5:30 p.m.

Additionally, the Museums meeting originally announced for May 20, 2009 from 1 p.m. to 2 p.m. will be held from 12 p.m. to 1 p.m.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 28, 2008, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels that are open to the public, and if time allows, may be permitted to participate in the panel's discussions at the discretion of the panel chairman. If you need special accommodations due to a disability, please contact the Office of AccessAbility, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682–5532, TDY–TDD 202/682–5496, at least seven (7) days prior to the meeting.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC, 20506, or call 202/682–5691.

Dated: April 30, 2009

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. E9–10399 Filed 5–5–09; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL ENDOWMENT FOR THE ARTS

RIN 3135–AA23

Protocol for Categorical Exclusions Supplementing the Council on Environmental Quality Regulations Implementing the Procedural Provisions of the National Environmental Policy Act for Certain American Recovery and Reinvestment Act Projects

AGENCY: National Endowment for the Arts.

ACTION: Notice of final action and request for comments.

SUMMARY: The National Endowment for the Arts has established a protocol that provides for categorical exclusions under the National Environmental Policy Act (NEPA) for projects funded under the American Recovery and Reinvestment Act (ARRA) that focus on the preservation of jobs (salary support, full or partial, for one or more positions, including support for contracted positions) in the nonprofit arts sector that are threatened by declines in philanthropic and other support during the current economic downturn. The proposed changes would better align NEA implementation of the CEQ NEPA

regulations by providing for the efficient and timely environmental review of specific ARRA job preservation actions.

DATES: Submit comments on or before June 5, 2009. This Protocol is immediately effective upon publication. All comments will be reviewed and considered to determine whether there is a need for potential amendment to the protocol.

ADDRESSES: Karen Elias, Acting General Counsel, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Room 518, Washington, DC 20506; telefax at (202)-682–5572; TDD at (202)-682–5496; or by electronic mail at *eliask@arts.gov.*

FOR FURTHER INFORMATION CONTACT: Karen Elias, (202)-682–5418.

SUPPLEMENTARY INFORMATION: The NEA follows the regulations of the Council on Environmental Quality (CEQ) for complying with NEPA. Projects that focus on preservation of jobs in the nonprofit arts sector and are to be awarded ARRA funds are one type of grant administered by the NEA. The NEA's statutory authority to make grants is at 20 U.S.C. 951, *et seq.* and includes competitive grants for a variety of projects in various arts forms. The grants provided for under the American Recovery and Reinvestment Act (ARRA) are a particular category of activity that has been reviewed and determined not to have individual or cumulative significant effects on the human environment and therefore are the appropriate subject of a categorical exclusion under NEPA. These grants maintain the jobs and contract support that was in place prior to the economic downturn and do not provide for any new construction or activities with potential environmental effects. The protocol provides for a review to determine whether there are extraordinary circumstances and, in the absence of such circumstances, provide for the grant to proceed without preparation of an Environmental Assessment (EA) or Environmental Impact Study (EIS) under NEPA.

The NEA plans to publish proposed NEPA regulations later this year and the protocol for the categorical exclusion of NEA action on ARRA grant proposals will be included in those proposed NEA NEPA regulations.

Regulatory Ceritifications:

Executive Order 12866

This Protocol has been drafted and reviewed in accordance with Executive Order 12866, ''Regulatory Planning and Review.'' The Office of Management and Budget has determined that this Protocol is not a ''significant regulatory action'' under Executive Order 12866; and accordingly, this Protocol has not been reviewed by the Office of Management and Budget. This Protocol affects NEA internal procedures. Whatever costs that may result from this Protocol should be outweighed by the reduction in delay and excessive paperwork from these procedures.

Executive Order 13121

This Protocol only affects the internal procedures of the NEA and accordingly, will not have substantial direct effects on the States, relationships between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this Protocol will not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988

This Protocol meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

Regulatory Flexibility Act

The Acting Chairman of the NEA, in accordance with the Regulatory Flexibility Act [5 U.S.C. 605(b)], has reviewed this Protocol and approved it. Because this Protocol only affects the internal procedures of the NEA, it will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This Protocol will not result in an expenditure of $100,000,000 or more in any one year by State, local, and tribal governments, in the aggregate, or by the private sector, nor will it significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This Protocol is not a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This Protocol will not result in an annual effect on the economy of $100,000,000 or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Environmental Impact

This Protocol supplements CEQ regulations and provides guidance to NEA employees regarding procedural requirements for the application of NEPA provisions to ARRA-funded grants. The CEQ does not direct agencies to prepare a NEPA analysis or document before establishing agency procedures that supplement the CEQ regulations for implementing NEPA. Agency NEPA procedures are procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3.

For the reasons set out in the preamble, the National Endowment for the Arts establishes the following Protocol:

Protocol for Categorical Exclusion of Recovery Projects

Purpose: Establishment of National Environmental Policy Act (NEPA) Categorical Exclusions for National Endowment for the Arts American Recovery and Reinvestment Act (ARRA) Grants.

Policy: The National Endowment for the Arts follows the regulations of the Council on Environmental Quality (CEQ) for complying with NEPA. Pursuant to these regulations, NEA establishes the following categorical exclusion for projects that focus on the preservation of jobs (salary support, full or partial, for one or more positions, including support for contracted positions) in the nonprofit arts sector that are threatened by declines in philanthropic and other support during the current economic downturn. Such ARRA grants are one type of grant administered by the NEA. The NEA's statutory authority to make grants is at 20 U.S.C. 951, *et seq.,* and includes competitive grants for a variety of projects in various art forms. Awards can be for activities such as performing arts, arts education, arts touring projects (dance, theater, musical theater, music and opera), museum and visual arts exhibitions. Outdoor projects may include short-term arts or music festivals, redesigning public parks and other public spaces. The ARRA grants are a particular category of activity that has been determined not to have individual or cumulative significant effects on the human environment, and absent extraordinary circumstances (attached), are excluded from preparation of an Environmental

Assessment (EA) or Environmental Impact Study (EIS) under NEPA. The extraordinary circumstances are considered prior to grants approval.

Applicability: This protocol applies to all grants awarded with ARRA funds by the National Endowment for the Arts. The protocol will be effective immediately and we will consider comments submitted on the protocol when developing the NEA NEPA regulation that will include this categorical exclusion.

Responsibilities

The Chairman of the NEA has the final authority over the NEA's responsibilities over the NEPA process and has approved this protocol and will approve the NEA NEPA regulation.

The Senior Deputy Chairman is the Senior Environmental Advisor to the Chairman and is responsible for NEPA policy, guidance, and oversight. The Senior Deputy Chairman will oversee the application of the categorical exclusion and development of the NEA NEPA regulation. In the absence of the Senior Deputy Chairman, the General Counsel will oversee the application of the categorical exclusion and development of the NEA NEPA regulation.

The General Counsel is responsible for providing legal guidance as to NEPA, including correspondence from CEQ and other agencies concerning matters related to NEPA.

Extraordinary Circumstances for ARRA Grant Categorical Exclusion

Any of the following circumstances preclude the use of this CE:

(a) Reasonable likelihood of significant effects on public health, safety, or the environment.

(b) Reasonable likelihood of significant environmental effects (direct, indirect, and cumulative).

(c) Imposition of uncertain or unique environmental risks.

(d) Greater scope or size than is normal for this category of action.

Dated: *April 30, 2009.*

Kathy Plowitz-Worden,

Panel Coordinator, Panel Operations, National Endowment for the Arts.

[FR Doc. E9–10398 Filed 5–5–09; 8:45 am]

BILLING CODE 7537–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–244; NRC–2009–0192]

R.E. Ginna Nuclear Power Plant, LLC; R.E. Ginna Nuclear Power Plant Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and of Indirect Transfer of Licenses Pursuant to 10 CFR 50.80 and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering the issuance of an Order under 10 CFR 50.80 approving the indirect transfer of Renewed Facility Operating License, No. DPR–18, for the R.E. Ginna Nuclear Power Plant, currently held by R.E. Ginna Nuclear Power Plant, LLC, as owner and licensed operator. R.E. Ginna Nuclear Power Plant, LLC, is owned by Constellation Nuclear Power Plants, Inc., which is owned by Constellation Energy Nuclear Group, LLC (CENG). CENG is a wholly-owned subsidiary of Constellation Energy Group, Inc. (CEG).

According to an application dated January 22, 2009, filed by CENG, on behalf of R.E. Ginna Nuclear Power Plant, LLC, and EDF Development, Inc. (EDF Development), as supplemented by letters dated February 26 and April 8, 2009, the applicants seek approval pursuant to 10 CFR 50.80 of the indirect transfer of control of the subject license held by R.E. Ginna Nuclear Power Plant, LLC, to the extent such would result from certain proposed corporate restructuring actions in connection with a planned investment by EDF Development whereby it would acquire a 49.99% ownership interest in CENG. EDF Development is a U.S. corporation organized under the laws of the State of Delaware and a wholly-owned subsidiary of E.D.F. International S.A., a public limited company organized under the laws of France, which is in turn a wholly-owned subsidiary of Électricité de France S.A., a French limited company.

Following the proposed transaction, CEG will hold a 50.01% ownership interest in CENG through two new intermediate parent companies which will be formed for non-operational purposes. In addition, the intermediate holding company, Constellation Nuclear Power Plants, Inc., which exists between CENG and R.E. Ginna Nuclear Power Plant, LLC, will be converted from a corporation to a limited liability company. No physical changes to the facilities or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed underlying transaction, i.e., the proposed corporate restructuring, will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and Orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention through the NRC E-filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)–(viii).

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, which the NRC promulgated in August 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve 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 petitioner/requestor should contact the Office of the Secretary by e-mail at *HEARING.DOCKET@NRC.GOV,* or by calling (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/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* 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.*

Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it 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 filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE 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 EIE 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 may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The electronic filing Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MHSD.Resource@nrc.gov.*

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.

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, an Atomic Safety and Licensing Board, or a 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. 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 submissions.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

Within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments are not subject to the E-filing rule and should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice. Comments may also be sent by e-mail to *HEARINGDOCKET@NRC.GOV.*

For further details with respect to this indirect license transfer application, see the application dated January 22, 2009, available for public inspection at the Commission'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 Agency wide Documents Access and Management System's (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 by e-mail to *pdr.resource@nrc.gov.*

Attorneys for applicants: Daniel F. Stenger, Hogan & Hartson LLP, 555 Thirteenth Street, NW., Washington, DC 20004, *tel:* 202.637.5691, *e-mail: DFStenger@hhlaw.com* (counsel for CENG); and John E. Matthews, Morgan, Lewis, & Bockius, 1111 Pennsylvania Ave., NW., Washington, DC 20004, *tel.* 202.739.5524, *e-mail: jmatthews@morganlewis.com* (counsel for EDF Development).

Dated at Rockville, Maryland this 28th day of April 2009.

For the Nuclear Regulatory Commission.

Douglas V. Pickett,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–10456 Filed 5–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0193; Docket Nos. 50–220 and 50–410]

Nine Mile Point Nuclear Station, LLC; Nine Mile Point Nuclear Station, Unit Nos. 1 and 2; Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and of Indirect Transfer of Licenses Pursuant to 10 CFR 50.80 and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering the issuance of an Order under 10 CFR 50.80 approving the indirect transfer of Renewed Facility Operating Licenses, Nos. DPR–63 and NPF–69, for the Nine Mile Point Nuclear Station, Unit Nos. 1 and 2, respectively, currently held by Nine Mile Point Nuclear Station, LLC, as owner and licensed operator. Nine Mile Point Nuclear Station, LLC, is currently owned by Constellation Nuclear Power Plants, Inc., which is owned by Constellation Energy Nuclear Group, LLC (CENG). CENG is a wholly-owned subsidiary of Constellation Energy Group, Inc. (CEG).

According to an application dated January 22, 2009, filed by CENG, on behalf of Nine Mile Point Nuclear Station, LLC, and EDF Development, Inc. (EDF Development), as supplemented by letters dated February 26 and April 8, 2009, the applicants seek approval pursuant to 10 CFR 50.80 and 10 CFR 72.56 of the indirect transfer of control of the subject licenses held by Nine Mile Point Nuclear Station, LLC, to the extent such would result from certain proposed corporate restructuring actions in connection with a planned investment by EDF Development whereby it would acquire a 49.99% ownership interest in CENG. EDF Development is a U.S. corporation organized under the laws of the State of Delaware and a wholly-owned subsidiary of E.D.F. International S.A., a public limited company organized under the laws of France, which is in turn a wholly-owned subsidiary of Électricité de France S.A., a French limited company.

Following the proposed transaction, CEG will hold a 50.01% ownership interest in CENG through two new intermediate parent companies which will be formed for non-operational purposes. In addition, the intermediate holding company, Constellation Nuclear Power Plants, Inc., which exists between CENG and Nine Mile Point Nuclear Station, LLC, will be converted from a corporation to a limited liability company. No physical changes to the facilities or operational changes are being proposed in the application.

Pursuant to 10 CFR 50.80, no license, or any right thereunder, shall be transferred, directly or indirectly, through transfer of control of the license, unless the Commission shall give its consent in writing. The Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed transaction, i.e., the proposed corporate restructuring, will not affect the qualifications of the licensee to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and Orders issued by the Commission pursuant thereto.

The filing of requests for hearing and petitions for leave to intervene, and written comments with regard to the license transfer application, are discussed below.

Within 20 days from the date of publication of this notice, any person(s) whose interest may be affected by the Commission's action on the application may request a hearing and intervention through the NRC E-filing system. Requests for a hearing and petitions for leave to intervene should be filed in accordance with the Commission's rules of practice set forth in Subpart C ''Rules of General Applicability: Hearing Requests, Petitions to Intervene, Availability of Documents, Selection of Specific Hearing Procedures, Presiding Officer Powers, and General Hearing Management for NRC Adjudicatory Hearings,'' of 10 CFR Part 2. In particular, such requests and petitions must comply with the requirements set forth in 10 CFR 2.309. Untimely requests and petitions may be denied, as provided in 10 CFR 2.309(c)(1), unless good cause for failure to file on time is established. In addition, an untimely request or petition should address the factors that the Commission will also consider, in reviewing untimely requests or petitions, set forth in 10 CFR 2.309(c)(1)(i)–(viii).

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, which the NRC promulgated in August 2007 (72 FR 49139). The E-Filing process requires participants to submit and serve 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 petitioner/requestor should contact the Office of the Secretary by e-mail at *HEARING.DOCKET@NRC.GOV,* or by calling (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/or (2) creation of an electronic docket for the proceeding (even in instances in which the petitioner/requestor (or its counsel or representative) already holds an NRC-issued digital ID certificate). Each petitioner/requestor will need to download the Workplace Forms Viewer™ to access the Electronic Information Exchange (EIE), a component of the E-Filing system. The Workplace Forms Viewer™ is free and is available at *http://www.nrc.gov/site-help/e-submittals/install-viewer.html.* 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.* Once a petitioner/requestor has obtained a digital ID certificate, had a docket created, and downloaded the EIE viewer, it 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 filer submits its documents through EIE. To be timely, an electronic filing must be submitted to the EIE 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 EIE 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 may seek assistance through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html* or by calling the NRC technical help line, which is available between 8:30 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays. The electronic filing Help Desk can be contacted by telephone at 1–866–672–7640 or by e-mail at *MHSD.Resource@nrc.gov.*

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.

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, an Atomic Safety and Licensing Board, or a 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. 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 submissions.

The Commission will issue a notice or order granting or denying a hearing request or intervention petition, designating the issues for any hearing that will be held and designating the Presiding Officer. A notice granting a hearing will be published in the **Federal Register** and served on the parties to the hearing.

Within 30 days from the date of publication of this notice, persons may submit written comments regarding the license transfer application, as provided for in 10 CFR 2.1305. The Commission will consider and, if appropriate, respond to these comments, but such comments will not otherwise constitute part of the decisional record. Comments are not subject to the E-filing rule and should be submitted to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, and should cite the publication date and page number of this **Federal Register** notice. Comments may also be sent by e-mail to *HEARINGDOCKET@NRC.GOV.*

For further details with respect to this indirect license transfer application, see the application dated October 3, 2008, available for public inspection at the Commission'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 Agency wide Documents Access and Management System's (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 by e-mail to *pdr.resource@nrc.gov.*

Attorneys for applicants: Daniel F. Stenger, Hogan & Hartson LLP, 555 Thirteenth Street, NW., Washington, DC 20004, tel: 202.637.5691, e-mail: *DFStenger@hhlaw.com* (counsel for CENG); and John E. Matthews, Morgan, Lewis, & Bockius, 1111 Pennsylvania Ave., NW., Washington, DC 20004, tel. 202.739.5524, e-mail: *jmatthews@morganlewis.com* (counsel for EDF Development).

Dated at Rockville, Maryland this 28th day of April 2009.

For the Nuclear Regulatory Commission.

Richard V. Guzman,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E9–10455 Filed 5–5–09; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Sunshine Act Meeting

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of May 4, 11, 18, 25, June 1, 8, 2009.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of May 4, 2009

There are no meetings scheduled for the week of May 4, 2009.

Week of May 11, 2009—Tentative

Thursday, May 14, 2009

9 a.m.
Briefing on the Results of the Agency Action Review Meeting (Public Meeting). (Contact: Shaun Anderson, 301–415–2039.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of May 18, 2009—Tentative

There are no meetings scheduled for the week of May 18, 2009.

Week of May 25, 2009—Tentative

Wednesday, May 27, 2009

9:30 a.m.
Briefing on External Safety Culture (Public Meeting). (Contact: Stewart Magruder, 301–415–8730.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Wednesday, May 27, 2009

1:30 p.m.
Briefing on Internal Safety Culture (Public Meeting). (Contact: June Cai, 301–415–5192.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Thursday, May 28, 2009

9:30 a.m.
Briefing on Fire Protection Closure Plan (Public Meeting). (Contact: Alex Klein, 301–415–2822.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 1, 2009—Tentative

Wednesday, June 3, 2009

9:30 a.m.
Briefing on New Reactor Issues—Component Fabrication and Oversight—Part 1 (Public Meeting).
1:30 p.m.
Briefing on New Reactor Issues—Component Fabrication and Oversight—Part 2 (Public Meeting).

(Contact for both parts: Roger Rihm, 301–415–7807.)

Both parts of this meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Thursday, June 4, 2009

9:30 a.m.

Briefing on Digital Instrumentation and Control (Public Meeting). (Contact: Steve Arndt, 301–415–6502.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

1:30 p.m.

Meeting with the Advisory Committee on Reactor Safeguards (Public Meeting). (Contact: Tanny Santos, 301–415–7270.)

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of June 8, 2009—Tentative

There are no meetings scheduled for the week of June 8, 2009.

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/about-nrc/policy-making/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify the NRC's Disability Program Coordinator, Rohn Brown, at 301–492–2279, TDD: 301–415–2100, or by e-mail at *rohn.brown@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: April 30, 2009.

Rochelle C. Bavol,

Office of the Secretary.

[FR Doc. E9–10552 Filed 5–4–09; 11:15 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2009–0190]

Withdrawal of Regulatory Guide

AGENCY: Nuclear Regulatory Commission.

ACTION: Withdrawal of Regulatory Guide 4.8.

FOR FURTHER INFORMATION CONTACT: Robert G. Carpenter, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *telephone:* 301–251–7483 or e-mail to *Robert.Carpenter@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC or Commission) is withdrawing Regulatory Guide 4.8, ''Environmental Technical Specifications for Nuclear Power Plants,'' published in December 1975. Regulatory Guide 4.8 provides guidance to applicants on the preparation of proposed environmental technical specifications and includes a standard format and an identification of their principal content. The NRC is withdrawing this regulatory guide because it is no longer needed.

Regulatory Guide 4.8 was an acceptable method of meeting the requirements of Title 10 of the *Code of Federal Regulations,* Part 50, ''Domestic Licensing of Production and Utilization Facilities,'' which states that each operating license for a nuclear power plant issued by the NRC will contain such conditions and limitations as the Commission deems appropriate and necessary. Certain environmental conditions and limitations were incorporated into facility operating licenses as environmental technical specifications. Regulatory Guide 4.8 is no longer needed because environmental technical specifications are no longer used. The information is now contained in Environmental Protection Plans that generally appear in Appendix B to the operating license.

II. Further Information

The withdrawal of Regulatory Guide 4.8 does not alter any prior or existing licensing commitments based on its use. The guidance provided in this regulatory guide is no longer necessary. Regulatory guides may be withdrawn when their guidance is superseded by congressional action or no longer provides useful information.

Regulatory guides are available for inspection or downloading through the NRC's public Web site under ''Regulatory Guides'' in the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections.* Regulatory guides are also available for inspection at the NRC's Public Document Room (PDR), Room O–1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852–2738. The PDR's mailing address is U.S. NRC PDR, Washington, DC 20555–0001. You can reach the staff by telephone at 301–415–4737 or 800–397–4209, by fax at 301–415–3548, and by e-mail to *pdr.resource@nrc.gov.*

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

Dated at Rockville, Maryland, this 23rd day of March 2009.

For the Nuclear Regulatory Commission.

Andrea D. Valentin,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. E9–10457 Filed 5–5–09; 8:45 am]

BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration # 11726 and # 11727]

Arkansas Disaster # AR–00029

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for the State of Arkansas (FEMA–1834–DR), dated 04/27/2009.

Incident: Severe storms and tornadoes.

Incident Period: 04/09/2009.

Effective Date: 04/27/2009.

Physical Loan Application Deadline Date: 06/26/2009.

Economic Injury (EIDL) Loan Application Deadline Date: 01/27/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/27/2009, applications for disaster loans may be filed at the address listed

above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties (Physical Damage and Economic Injury Loans): Miller, Polk, Sevier.

Contiguous Counties (Economic Injury Loans Only):

Arkansas: Hempstead, Howard, Lafayette, Little River, Montgomery, Pike, Scott.

Louisiana: Bossier, Caddo.

Oklahoma: Le Flore, McCurtain.

Texas: Bowie, Cass.

The Interest Rates are:

For Physical Damage:	
Homeowners with Credit Available Elsewhere	4.375
Homeowners without Credit Available Elsewhere	2.187
Businesses with Credit Available Elsewhere	6.000
Other (Including Non-Profit Organizations) with Credit Available Elsewhere	4.500
Businesses and Non-Profit Organizations without Credit Available Elsewhere	4.000
For Economic Injury:	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	4.000

The number assigned to this disaster for physical damage is 11726C and for economic injury is 117270.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. E9–10473 Filed 5–5–09; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–9030; 34–59850/April 30, 2009]

Order Making Fiscal Year 2010 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b), and 31(c) of the Securities Exchange Act of 1934

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 (''Securities Act'') requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 (''Exchange Act'') requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3] Finally, Sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees to the Commission on transactions in specified securities.[4]

The Investor and Capital Markets Fee Relief Act (''Fee Relief Act'')[5] amended Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.[6]

II. Fiscal Year 2010 Annual Adjustment to the Fee Rates Applicable Under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act

Section 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.[7] In those same fiscal years, Sections 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.

Section 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2010. Specifically, the Commission must adjust the fee rate under Section 6(b) to a ''rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2010], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2010].'' That is, the adjusted rate is determined by dividing the ''target offsetting collection amount'' for fiscal year 2010 by the ''baseline estimate of the aggregate maximum offering prices'' for fiscal year 2010.

Section 6(b)(11)(A) specifies that the ''target offsetting collection amount'' for fiscal year 2010 is $334,000,000. Section 6(b)(11)(B) defines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2010 as ''the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2010] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget. * * *''

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2010, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office (''CBO'') and Office of Management and Budget (''OMB'') to project aggregate offering price for purposes of the fiscal year 2009 annual adjustment. Using this methodology, the Commission determines the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2010 to be $4,683,504,368,794.[8] Based on this estimate, the Commission calculates the fee rate for fiscal 2010 to be $71.30 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] 15 U.S.C. 78ee(b) and (c). In addition, Section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

[5] Public Law No. 107–123, 115 Stat. 2390 (2002).

[6] *See* 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Section 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

[7] The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the ''target offsetting collection amount'' specified in Section 6(b)(11)(A) for that fiscal year.

[8] Appendix A explains how we determined the ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2010 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2010 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its ''baseline estimate of the aggregate maximum offering price'' for fiscal year 2010.

III. Fiscal Year 2010 Annual Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Exchange Act

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to Section 31(j)(2),[9] which currently is $25.70 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange. Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Section 31(j)(1) requires the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011.[10]

Section 31(j)(1) specifies the method for determining the annual adjustment for fiscal year 2010. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a ''uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2010], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the target offsetting collection amount for [fiscal year 2010].''

Section 31(*l*)(1) specifies that the ''target offsetting collection amount'' for fiscal year 2010 is $1,161,000,000. Section 31(*l*)(2) defines the ''baseline estimate of the aggregate dollar amount of sales'' as ''the baseline estimate of the aggregate dollar amount of sales of securities * * * to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2010] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget. * * *''

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2010, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.[11] Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2010 to be $84,822,877,437,603. Based on this estimate, and an estimated collection of $9,966 in assessments on security futures transactions under Section 31(d) in fiscal year 2010, the uniform adjusted rate for fiscal year 2010 is $12.70 per million.[12]

IV. Effective Dates of the Annual Adjustments

Section 6(b)(8)(A) of the Securities Act provides that the fiscal year 2010 annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act shall take effect on the later of October 1, 2009, or five days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted.[13] Sections 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under Sections 13(e) and 14(g) of the Exchange Act.[14]

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2010 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2009, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted.

V. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act,[15]

It is hereby ordered that the fee rates applicable under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $71.30 per million effective on the later of October 1, 2009, or five days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted; and

It is further ordered that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be $12.70 per million effective on the later of October 1, 2009, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2010 is enacted.

By the Commission.

Elizabeth M. Murphy,

Secretary.

Appendix A

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the ''aggregate maximum offering prices,'' which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2010, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2009, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Maximum Offering Prices for Fiscal Year 2010

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 1999–March 2009). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average

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[9] Order Making Fiscal 2009 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934, Rel. No. 34–59477 (February 27, 2009), 74 FR 9644 (March 5, 2009).

[10] The annual adjustments, as well as the mid-year adjustments required in specified circumstances under Section 31(j)(2) in fiscal years 2002 through 2011, are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the ''target offsetting collection amount'' specified in Section 31(*l*)(1) for that fiscal year.

[11] Appendix B explains how we determined the ''baseline estimate of the aggregate dollar amount of sales'' for fiscal year 2010 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2010 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its ''baseline estimate of the aggregate dollar amount of sales'' for fiscal year 2010.

[12] The calculation of the adjusted fee rate assumes that the current fee rate of $25.70 per million will apply through October 31, 2009, due to the operation of the effective date provision contained in Section 31(j)(4)(A) of the Exchange Act.

[13] 15 U.S.C. 77f(b)(8)(A).

[14] 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

[15] 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more ''typical'' value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 1999 to March 2009.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(AAMOP_t) - \log(AAMOP_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are $\alpha = 0.0003187$ and $\beta = -0.88747$.

6. For the month of April 2009 forecast $\Delta_{t=4/09} = \alpha + \beta e_{t=3/09}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for June 2009 is given by $FLAAMOP_{t=6/09} = \log(AAMOP_{t=3/09}) + \Delta_{t=4/09} + \Delta_{t=5/09} + \Delta_{t=6/09}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For June 2009, this gives a forecast AAMOP of $18.4 Billion (Column I), and a forecast AMOP of $404.4 Billion (Column J).

10. Iterate this process through September 2010 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2010 of $4,683,504,368,794.

B. Using the Forecasts From A To Calculate the New Fee Rate

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/09 and 9/30/10 to be $4,683,504,368,794.

2. The rate necessary to collect the target $334,000,000 in fee revenues set by Congress is then calculated as: $334,000,000 ÷ $4,683,504,368,794 = 0.00007131.

3. Round the result to the seventh decimal point, yielding a rate of .0000713 (or $71.30 per million).

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Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/09 to 9/30/10 ($Millions)	4,683,504
b. Implied fee rate ($334 Million / a)	$71.30

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in $Millions	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Mar-99	23	415,145	18,050	23.616					
Apr-99	21	431,280	20,537	23.746	0.129				
May-99	20	229,082	11,454	23.162	-0.584				
Jun-99	22	367,943	16,725	23.540	0.379				
Jul-99	21	332,623	15,839	23.486	-0.054				
Aug-99	22	240,157	10,916	23.114	-0.372				
Sep-99	21	236,011	11,239	23.143	0.029				
Oct-99	21	216,883	10,328	23.058	-0.085				
Nov-99	21	372,582	17,742	23.599	0.541				
Dec-99	22	319,846	14,538	23.400	-0.199				
Jan-00	20	282,165	14,108	23.370	-0.030				
Feb-00	20	665,367	33,268	24.228	0.858				
Mar-00	23	550,107	23,918	23.898	-0.330				
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				
Jun-00	22	406,409	18,473	23.640	0.410				
Jul-00	20	230,894	11,545	23.169	-0.470				
Aug-00	23	257,797	11,209	23.140	-0.030				
Sep-00	20	332,120	16,606	23.533	0.393				
Oct-00	22	362,493	16,477	23.525	-0.008				
Nov-00	21	317,653	15,126	23.440	-0.086				
Dec-00	20	246,006	12,300	23.233	-0.207				
Jan-01	21	462,726	22,035	23.816	0.583				
Feb-01	19	388,304	20,437	23.741	-0.075				
Mar-01	22	523,443	23,793	23.893	0.152				
Apr-01	20	289,212	14,461	23.395	-0.498				
May-01	22	274,298	12,468	23.246	-0.148				

Jun-01	21	348,268	16,584	23.532	0.285				
Jul-01	21	264,590	12,600	23.257	-0.275				
Aug-01	23	245,591	10,678	23.091	-0.165				
Sep-01	15	178,524	11,902	23.200	0.108				
Oct-01	23	260,719	11,336	23.151	-0.049				
Nov-01	21	286,199	13,629	23.335	0.184				
Dec-01	20	395,230	19,762	23.707	0.372				
Jan-02	21	401,290	19,109	23.673	-0.034				
Feb-02	19	476,837	25,097	23.946	0.273				
Mar-02	20	380,160	19,008	23.668	-0.278				
Apr-02	22	282,947	12,861	23.277	-0.391				
May-02	22	215,645	9,802	23.006	-0.272				
Jun-02	20	277,757	13,888	23.354	0.348				
Jul-02	22	208,638	9,484	22.973	-0.381				
Aug-02	22	265,750	12,080	23.215	0.242				
Sep-02	20	109,565	5,478	22.424	-0.791				
Oct-02	23	179,374	7,799	22.777	0.353				
Nov-02	20	243,590	12,179	23.223	0.446				
Dec-02	21	212,838	10,135	23.039	-0.184				
Jan-03	21	201,839	9,611	22.986	-0.053				
Feb-03	19	144,642	7,613	22.753	-0.233				
Mar-03	21	444,331	21,159	23.775	1.022				
Apr-03	21	142,373	6,780	22.637	-1.138				
May-03	21	328,792	15,657	23.474	0.837				
Jun-03	21	281,580	13,409	23.319	-0.155				
Jul-03	22	304,383	13,836	23.351	0.031				
Aug-03	21	328,351	15,636	23.473	0.122				
Sep-03	21	459,563	21,884	23.809	0.336				
Oct-03	23	285,039	12,393	23.240	-0.569				
Nov-03	19	257,779	13,567	23.331	0.091				
Dec-03	22	244,998	11,136	23.133	-0.197				
Jan-04	20	369,784	18,489	23.640	0.507				
Feb-04	19	221,517	11,659	23.179	-0.461				
Mar-04	23	448,543	19,502	23.694	0.514				

Apr-04	21	260,029	12,382	23.240	-0.454							
May-04	20	227,239	11,362	23.154	-0.086							
Jun-04	21	370,668	17,651	23.594	0.441							
Jul-04	21	305,519	14,549	23.401	-0.193							
Aug-04	22	179,688	8,168	22.823	-0.577							
Sep-04	21	357,007	17,000	23.556	0.733							
Oct-04	21	254,489	12,119	23.218	-0.338							
Nov-04	21	363,406	17,305	23.574	0.356							
Dec-04	22	570,918	25,951	23.979	0.405							
Jan-05	20	375,484	18,774	23.656	-0.324							
Feb-05	19	338,922	17,838	23.605	-0.051							
Mar-05	22	590,862	26,857	24.014	0.409							
Apr-05	21	282,018	13,429	23.321	-0.693							
May-05	21	323,652	15,412	23.458	0.138							
Jun-05	22	517,022	23,501	23.880	0.422							
Jul-05	20	457,487	22,874	23.853	-0.027							
Aug-05	23	605,534	26,328	23.994	0.141							
Sep-05	21	312,281	14,871	23.423	-0.571							
Oct-05	21	258,956	12,331	23.235	-0.187							
Nov-05	21	192,736	9,178	22.940	-0.295							
Dec-05	21	308,134	14,673	23.409	0.469							
Jan-06	20	526,550	26,328	23.994	0.585							
Feb-06	19	301,446	15,866	23.487	-0.506							
Mar-06	23	1,211,344	52,667	24.687	1.200							
Apr-06	19	407,345	21,439	23.788	-0.899							
May-06	22	260,121	11,824	23.193	-0.595							
Jun-06	22	375,296	17,059	23.560	0.367							
Jul-06	20	232,654	11,633	23.177	-0.383							
Aug-06	23	310,050	13,480	23.325	0.147							
Sep-06	20	236,782	11,839	23.195	-0.130							
Oct-06	22	213,342	9,697	22.995	-0.200							
Nov-06	21	292,456	13,926	23.357	0.362							
Dec-06	20	349,512	17,476	23.584	0.227							
Jan-07	20	372,740	18,637	23.648	0.064							

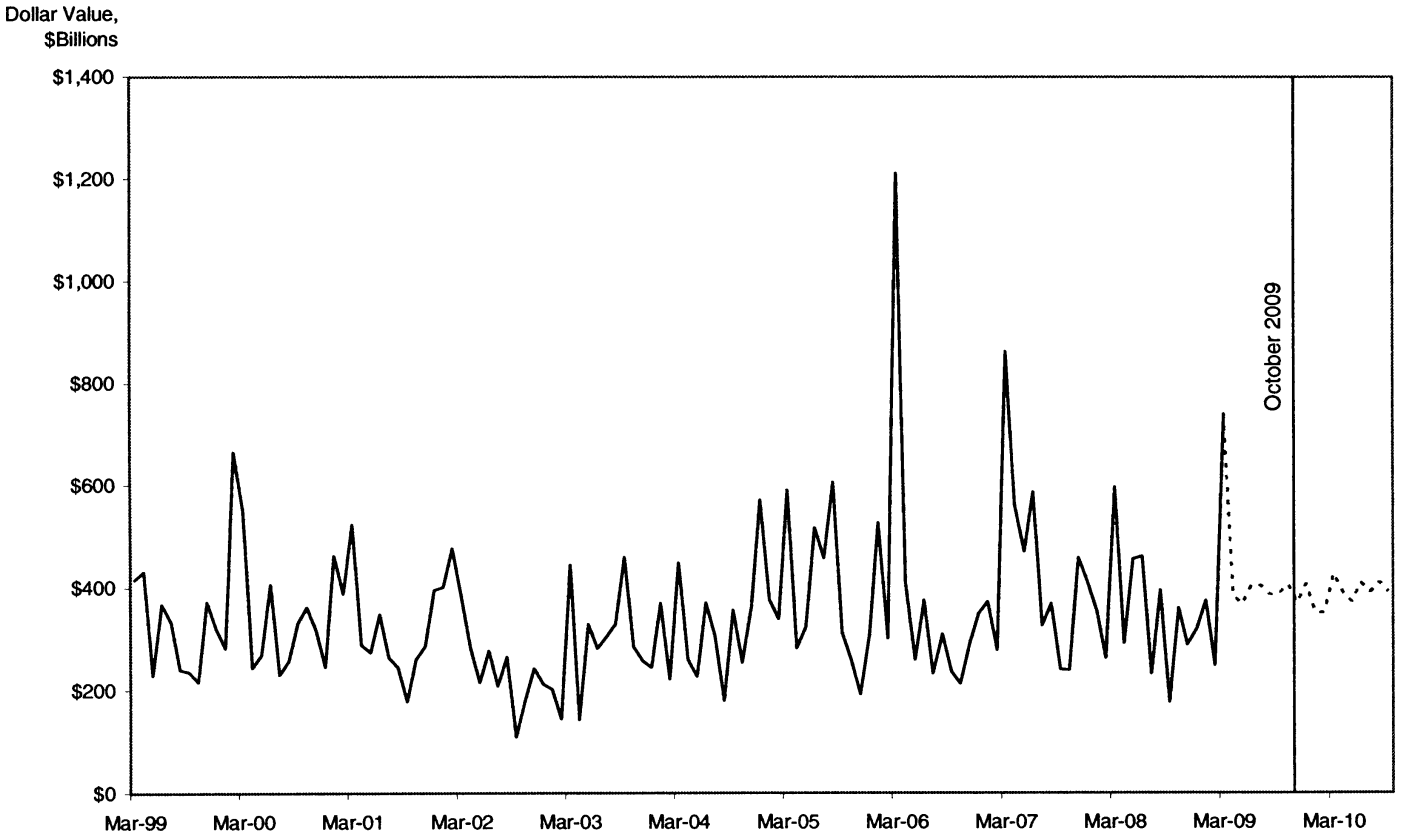
Feb-07	19	278,753	14,671	23.409	-0.239						
Mar-07	22	862,786	39,218	24.392	0.983						
Apr-07	20	562,103	28,105	24.059	-0.333						
May-07	22	470,843	21,402	23.787	-0.272						
Jun-07	21	586,822	27,944	24.053	0.267						
Jul-07	21	326,612	15,553	23.468	-0.586						
Aug-07	23	369,172	16,051	23.499	0.032						
Sep-07	19	241,059	12,687	23.264	-0.235						
Oct-07	23	239,652	10,420	23.067	-0.197						
Nov-07	21	458,654	21,841	23.807	0.740						
Dec-07	20	410,200	20,510	23.744	-0.063						
Jan-08	21	354,433	16,878	23.549	-0.195						
Feb-08	20	263,410	13,171	23.301	-0.248						
Mar-08	20	596,923	29,846	24.119	0.818						
Apr-08	22	292,534	13,297	23.311	-0.809						
May-08	21	456,077	21,718	23.801	0.491						
Jun-08	21	461,087	21,957	23.812	0.011						
Jul-08	22	232,896	10,586	23.083	-0.730						
Aug-08	21	395,440	18,830	23.659	0.576						
Sep-08	21	177,636	8,459	22.858	-0.800						
Oct-08	23	360,494	15,674	23.475	0.617						
Nov-08	19	288,911	15,206	23.445	-0.030						
Dec-08	22	319,584	14,527	23.399	-0.046						
Jan-09	20	375,065	18,753	23.655	0.255						
Feb-09	19	249,666	13,140	23.299	-0.356						
Mar-09	22	739,931	33,633	24.239	0.940						
Apr-09	21					23.565	0.365	18,337			385,086
May-09	20					23.566	0.368	18,359			367,175
Jun-09	22					23.566	0.370	18,380			404,363
Jul-09	22					23.566	0.372	18,402			404,834
Aug-09	21					23.567	0.374	18,423			386,883
Sep-09	21					23.567	0.377	18,444			387,333
Oct-09	22					23.567	0.379	18,466			406,250
Nov-09	20					23.568	0.381	18,487			369,748

Dec-09	22					23.568	0.383	18,509	407,197
Jan-10	19					23.568	0.386	18,531	352,080
Feb-10	19					23.569	0.388	18,552	352,490
Mar-10	23					23.569	0.390	18,574	427,195
Apr-10	21					23.569	0.392	18,595	390,502
May-10	20					23.570	0.394	18,617	372,339
Jun-10	22					23.570	0.396	18,639	410,050
Jul-10	21					23.570	0.399	18,660	391,867
Aug-10	22					23.571	0.401	18,682	411,006
Sep-10	21					23.571	0.403	18,704	392,781

Figure A

Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)

(Dashed Line Indicates Forecast Values)



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Appendix B

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may adjust semi-annually.[16] In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and certain over-the-counter markets over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2010, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2009, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Dollar Amount of Sales for Fiscal Year 2010

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 1999–March 2009). The monthly aggregate dollar amount of sales (exchange plus certain over-the-counter markets) is presented in column C of Table B.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.010 and the standard deviation is 0.130. Assuming the monthly percentage change in ADS follows a random walk, calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 1.8%.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2009 ($267,521,624,488) to forecast ADS for April 2009 ($272,427,017,936 = $267,521,624,488 × 1.018).[17] Multiply by the number of trading days in April 2009 (21) to obtain a forecast of the total dollar volume for the month ($5,720,967,376,649). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table B. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log (ADS_t/ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \ldots, \Delta_{120}\}$. These are given by $\mu = 0.010$ and $\sigma = 0.130$, respectively.

[16] Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

[17] The value 1.018 has been rounded. All computations are done with the unrounded value.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t/ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.018 \times ADS_{t-1}$.

6. For April 2009, this gives a forecast ADS of $1.018 \times \$267,521,624,488 = \$272,427,017,936$. Multiply this figure by the 21 trading days in April 2009 to obtain a total dollar volume forecast of $5,720,967,376,649.

7. For May 2009, multiply the April 2009 ADS forecast by 1.018 to obtain a forecast ADS of $277,422,358,822. Multiply this figure by the 20 trading days in May 2009 to obtain a total dollar volume forecast of $5,548,447,176,435.

8. Repeat this procedure for subsequent months.

B. Using the Forecasts From A To Calculate the New Fee Rate

1. Use Table B to estimate fees collected for the period 10/1/09 through 10/31/09. The projected aggregate dollar amount of sales for this period is $6,683,755,563,790. Projected fee collections at the current fee rate of 0.0000257 are $171,772,518.

2. Estimate the amount of assessments on securities futures products collected during 10/1/09 and 9/30/10 to be $9,966 by projecting a 1.8% monthly increase from a base of $663 in March 2009.

3. Subtract the amounts $171,772,518 and $9,966 from the target offsetting collection amount set by Congress of $1,161,000,000 leaving $989,217,516 to be collected on dollar volume for the period 11/1/09 through 9/30/10.

4. Use Table B to estimate dollar volume for the period 11/1/09 through 9/30/10. The estimate is $78,139,121,873,813. Finally, compute the fee rate required to produce the additional $989,217,516 in revenue. This rate is $989,217,516 divided by $78,139,121,873,813 or 0.0000126597.

5. Round the result to the seventh decimal point, yielding a rate of .0000127 (or $12.70 per million).

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Table B. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/09 to 10/31/09 ($Millions)	6,683,756
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/09 to 9/30/10 ($Millions)	78,139,122
c. Estimated collections in assessments on securities futures products in FY 2010 ($Millions)	0.010
d. Implied fee rate (($1,161,000,000 - 0.0000257*a - c) /b)	$12.70

Data

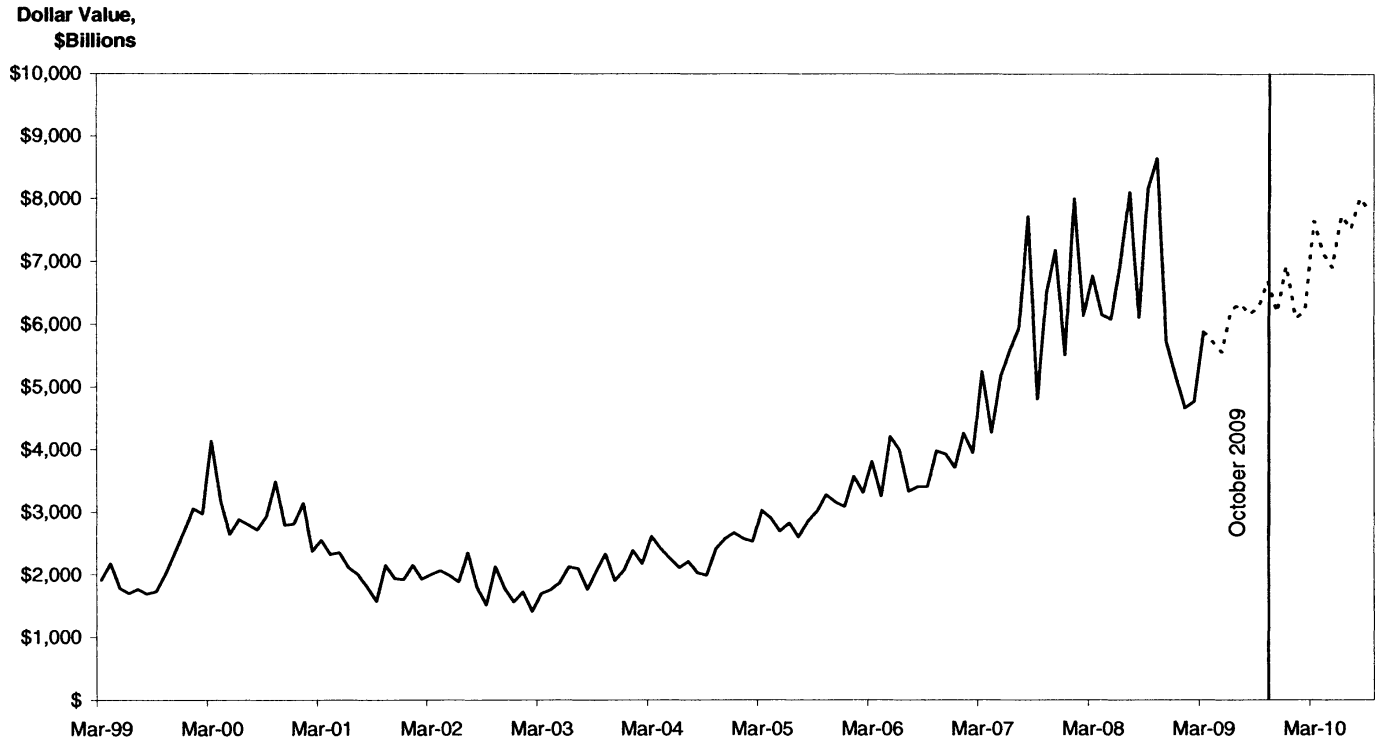
(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-99	23	1,908,967,664,074	82,998,594,090	-		
Apr-99	21	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	2,686,788,531,991	122,126,751,454	0.088		
Jan-00	20	3,057,831,397,113	152,891,569,856	0.225		
Feb-00	20	2,973,119,888,063	148,655,994,403	-0.028		
Mar-00	23	4,135,152,366,234	179,789,233,315	0.190		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		
Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		

Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		
Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,847,200,448	129,092,360,022	0.060		
Feb-05	19	2,532,202,408,589	133,273,810,978	0.032		
Mar-05	22	3,030,474,897,226	137,748,858,965	0.033		
Apr-05	21	2,906,386,944,434	138,399,378,306	0.005		
May-05	21	2,697,414,503,460	128,448,309,689	-0.075		
Jun-05	22	2,825,962,273,624	128,452,830,619	0.000		
Jul-05	20	2,604,021,263,875	130,201,063,194	0.014		
Aug-05	23	2,846,115,585,965	123,744,155,912	-0.051		
Sep-05	21	3,009,640,645,370	143,316,221,208	0.147		
Oct-05	21	3,279,847,331,057	156,183,206,241	0.086		
Nov-05	21	3,163,453,821,548	150,640,658,169	-0.036		
Dec-05	21	3,090,212,715,561	147,152,986,455	-0.023		
Jan-06	20	3,573,372,724,766	178,668,636,238	0.194		
Feb-06	19	3,314,259,849,456	174,434,728,919	-0.024		
Mar-06	23	3,807,974,821,564	165,564,122,677	-0.052		
Apr-06	19	3,257,478,138,851	171,446,217,834	0.035		
May-06	22	4,206,447,844,451	191,202,174,748	0.109		
Jun-06	22	3,995,113,357,316	181,596,061,696	-0.052		
Jul-06	20	3,339,658,009,357	166,982,900,468	-0.084		
Aug-06	23	3,410,187,280,845	148,269,012,211	-0.119		
Sep-06	20	3,407,409,863,673	170,370,493,184	0.139		
Oct-06	22	3,980,070,216,912	180,912,282,587	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,263,986,570,973	213,199,328,549	0.138		
Feb-07	19	3,946,799,860,532	207,726,308,449	-0.026		
Mar-07	22	5,245,051,744,090	238,411,442,913	0.138		
Apr-07	20	4,274,665,072,437	213,733,253,622	-0.109		
May-07	22	5,172,568,357,522	235,116,743,524	0.095		
Jun-07	21	5,586,337,010,802	266,016,048,133	0.123		
Jul-07	21	5,938,330,480,139	282,777,641,911	0.061		
Aug-07	23	7,713,644,229,032	335,375,836,045	0.171		
Sep-07	19	4,805,676,596,099	252,930,347,163	-0.282		
Oct-07	23	6,499,651,716,225	282,593,552,879	0.111		
Nov-07	21	7,176,290,763,989	341,728,131,619	0.190		
Dec-07	20	5,512,903,594,564	275,645,179,728	-0.215		
Jan-08	21	7,997,242,071,529	380,821,051,025	0.323		
Feb-08	20	6,139,080,448,887	306,954,022,444	-0.216		

Mar-08	20	6,767,852,332,381	338,392,616,619	0.098		
Apr-08	22	6,150,017,772,735	279,546,262,397	-0.191		
May-08	21	6,080,169,766,807	289,531,893,657	0.035		
Jun-08	21	6,962,199,302,412	331,533,300,115	0.135		
Jul-08	22	8,104,256,787,805	368,375,308,537	0.105		
Aug-08	21	6,106,057,711,009	290,764,652,905	-0.237		
Sep-08	21	8,156,991,919,103	388,428,186,624	0.290		
Oct-08	23	8,644,538,213,244	375,849,487,532	-0.033		
Nov-08	19	5,727,999,173,523	301,473,640,712	-0.221		
Dec-08	22	5,176,041,317,640	235,274,605,347	-0.248		
Jan-09	20	4,670,179,599,178	233,508,979,959	-0.008		
Feb-09	19	4,771,424,513,087	251,127,605,952	0.073		
Mar-09	22	5,885,475,738,738	267,521,624,488	0.063		
Apr-09	21				272,427,017,936	5,720,967,376,649
May-09	20				277,422,358,822	5,548,447,176,435
Jun-09	22				282,509,296,462	6,215,204,522,163
Jul-09	22				287,689,510,414	6,329,169,229,116
Aug-09	21				292,964,711,034	6,152,258,931,719
Sep-09	21				298,336,640,039	6,265,069,440,810
Oct-09	22				303,807,071,081	6,683,755,563,790
Nov-09	20				309,377,810,339	6,187,556,206,780
Dec-09	22				315,050,697,107	6,931,115,336,350
Jan-10	19				320,827,604,406	6,095,724,483,718
Feb-10	19				326,710,439,603	6,207,498,352,458
Mar-10	23				332,701,145,038	7,652,126,335,865
Apr-10	21				338,801,698,666	7,114,835,671,980
May-10	20				345,014,114,712	6,900,282,294,237
Jun-10	22				351,340,444,334	7,729,489,775,354
Jul-10	21				357,782,776,302	7,513,438,302,342
Aug-10	22				364,343,237,685	8,015,551,229,067
Sep-10	21				371,023,994,555	7,791,503,885,662

Figure B.

Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)[1]
Methodology Developed in Consultation With OMB and CBO
(Dashed Line Indicates Forecast Values)



[1]Forecasted line is not smooth because the number of trading days varies by month.

[FR Doc. E9–10401 Filed 5–5–09; 8:45 am]
BILLING CODE 8010–01–C

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59839; File No. SR–BSECC–2009–02]

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Order Granting Approval of a Proposed Rule Change To Amend the Articles of Organization and By-Laws of Boston Stock Exchange Clearing Corporation

April 28, 2008.

I. Introduction

On February 20, 2009, Boston Stock Exchange Clearing Corporation (''BSECC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–BSECC–2009–02 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposal was published in the **Federal Register** on March 20, 2009.[2] No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The proposed rule change amends BSECC's Articles of Organization and By-Laws to increase BSECC's authorized shares and to reflect a transfer in ownership of five percent of BSECC's shares. The proposed rule change also amends BSECC's Articles of Organization and By-Laws to change its name to the NASDAQ Clearing Corporation and to make other miscellaneous changes.

On August 29, 2008, The NASDAQ OMX Group, Inc. (''NASDAQ OMX'') completed its acquisition of the Boston Stock Exchange, Incorporated (recently renamed NASDAQ OMX BX, Inc.) and several of its wholly owned subsidiaries, including BSECC. As a result, BSECC has become an indirect wholly owned subsidiary of NASDAQ OMX. On January 5, 2009, OMX AB, which is another indirect wholly owned subsidiary of NASDAQ OMX, entered into agreements with Fortis Bank Global Clearing N.V. (''Fortis'') and European Multilateral Clearing Facility N.V. (''EMCF''), pursuant to which, among other things, OMX AB (i) has acquired a 22% equity stake in EMCF and (ii) has agreed to acquire a 5% equity stake in BSECC from NASDAQ OMX BX, Inc. and in turn to transfer this stake to EMCF.

The Articles of BSECC provide that:

> All of the authorized shares of Common Stock of [BSECC] shall be issued and outstanding, and shall be held by Boston Stock Exchange, Incorporated, a Delaware corporation. Boston Stock Exchange, Incorporated may not transfer or assign any shares of stock of BSECC, in whole or in part, to any entity, unless such transfer or assignment shall be filed with and approved by the U.S. Securities and Exchange Commission under Section 19 of the Securities Exchange Act of 1934, as amended, and the rules promulgated thereunder.

Accordingly, in order to complete the transfer of shares of BSECC contemplated by the agreements, BSECC must amend its Articles to specify an additional stockholder in BSECC and must obtain Commission approval for

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 59571 (March 12, 2009), 74 FR 11983.

the transfer of stock. In addition, BSECC is proposing to amend its Articles and its By-Laws to change its name to NASDAQ Clearing Corporation and to adopt other miscellaneous changes.

EMCF is a central counterparty clearinghouse for European equity trading on exchanges and multilateral trading facilities, including NASDAQ OMX Europe Ltd., Chi-X Europe Ltd., and BATS Trading Europe Ltd. In addition, EMCF has agreed to provide central counterparty clearing services to NASDAQ OMX exchanges in Stockholm, Helsinki, Copenhagen, and Iceland. EMCF clears stocks traded on multiple European markets, including stocks comprising the AEX, DAX, FTSE100, CAC40, and SMI20 indexes. Services offered by EMCF include novation, gross trade netting, settlement, margining, and fails and buy-in management. EMCF is headquartered in the Netherlands and is subject to voluntary supervision by De Nederlandsche Bank and Autoriteit Financiele Markten. In addition to OMX AB, EMCF's stockholders are Fortis Bank Nederland (Holding) N.V. and Fortis Bank Global Clearing N.V. NASDAQ OMX and EMCF's other stockholders will seek to further broaden EMCF's ownership structure to include order flow providers and financial institutions. It is expected that this will increase the commitment of banks and flow providers towards EMCF, decrease EMCF's dependence on one shareholder, and demonstrate to the market that EMCF is a solid company with firm backing of shareholders with high standing and is a company that looks after the interests of all its interested parties. Also, a key purpose of the diversified shareholders' base is to facilitate the further development of EMCF into becoming the leading central counterparty services provider for European cash equities.

Under the Share Transfer Agreement dated January 5, 2009, among Fortis, OMX AB, and EMCF, OMX AB has agreed, subject to Commission approval, to transfer a 5% stake in BSECC to EMCF. The transfer of BSECC's shares is a portion of the consideration to be paid by OMX AB for obtaining a 22% stake in EMCF. Accordingly, OMX AB must obtain the shares from NASDAQ OMX BX, Inc. prior to transferring them to EMCF. OMX AB has agreed to undertake to use reasonable endeavors to obtain Commission approval for the transfer as soon as possible and in any event by July 5, 2009.

Currently, the authorized share capital of BSECC is 150 shares, each with a par value of $100. Because 5% of the 150 BSECC shares is 7.5 shares, BSECC must increase its authorized share capital and pay a 2 for 1 stock dividend to NASDAQ OMX BX, Inc. so that NASDAQ OMX BX, Inc. will own 300 shares of BSECC and be able to transfer 15 of them. Accordingly, BSECC proposes to amend its Articles in order to increase its authorized share capital to 300 shares. BSECC proposes to amend its Articles to reflect either OMX AB or EMCF as one of its stockholders and to reflect the name change of the Boston Stock Exchange to NASDAQ OMX BX, Inc.

The amended provisions would state:

> All of the authorized shares of Common Stock of [BSECC] shall be issued and outstanding, and shall be held by NASDAQ OMX BX, Inc., a Delaware corporation, and either OMX AB, a corporation organized under the laws of Sweden, or European Multilateral Clearing Facility, N.V., a public company with limited liability incorporated under the laws of the Netherlands.

The language in the Articles providing that a stockholder may not transfer or assign shares of stock of BSECC without approval of the Commission would remain in place so that all of the stockholders of BSECC would be bound by that restriction.

The Share Transfer Agreement also provides that under certain circumstances, EMCF may transfer the shares of BSECC back to OMX AB or NASDAQ OMX BX, Inc., thereby unwinding this aspect of the transaction. In order to avoid the need to seek approval for such an unwinding in the future, BSECC requests that the Commission approve at this time both the initial transfer and any future unwinding.

Finally, at the time of the transfer EMCF and NASDAQ OMX BX, Inc. will enter into a Shareholders Agreement to govern their relationship with respect to BSECC. The key provisions of the Shareholders Agreement are as follows. First, EMCF will grant BSECC a right of first refusal to purchase all or any portion of its shares that EMCF may propose to transfer. Second, if NASDAQ OMX BX, Inc. proposes to transfer any of its shares of BSECC to any person, it must provide EMCF with the right to substitute EMCF's shares in such transfer in proportion to EMCF's percentage share of ownership in BSECC. Third, if NASDAQ OMX BX, Inc. proposes to enter into a transaction under which it would no longer own a majority of BSECC's outstanding shares or a sale of all or substantially all of the assets of BSECC (''Sale Transaction''), EMCF will in most circumstances take such actions as are necessary to support the consummation of the Sale Transaction. Fourth, if BSECC issues new securities it must first offer them to NASDAQ OMX BX, Inc. and EMCF. Finally, the Shareholders Agreement provides for rights of the stockholders to obtain information from BSECC about its financial performance and operations.

Because the share transfers described by the Shareholders Agreement would require Commission approval under the Articles, the Agreement also provides that ''[n]othing in the Agreement shall be construed to authorize [BSECC] or any stockholder of [BSECC] to transfer any share or other interests in [BSECC] unless such transfer is approved in accordance with the restrictions contained in the [Articles] of [BSECC] and such other restrictions as may be imposed by the * * * Commission or other governmental authority having jurisdiction over [BSECC].''

BSECC is also changing its name from Boston Stock Exchange Clearing Corporation to NASDAQ Clearing Corporation. The change reflects BSECC's changed status as a subsidiary of NASDAQ OMX. In addition, BSECC is making the following miscellaneous changes to its Articles and By-Laws. First, BSECC is restating its Articles to consolidate prior amendments into a single document. Under Massachusetts law, the form for restatement of the Articles necessitates nonsubstantive changes to citations to Massachusetts statutes in the title of the Articles, changes to prefatory language in Article IV of the Articles, and the addition of nonsubstantive language regarding date of effectiveness as a new Article VII. Second, BSECC is amending the Articles and By-Laws to reflect the change in the name of Boston Stock Exchange, Incorporated to NASDAQ OMX BX, Inc. Finally, BSECC is correcting several typographical errors in Article X of the By-Laws.

III. Discussion

Section 17A(b)(3)(C) of the Act requires, among other things, that a clearing agency's rules assure the fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs.[3] The Commission previously determined that Nasdaq OMX's acquisition of BSECC as an indirect wholly-owned subsidiary would not affect BSECC's ability to meet the requirements of Section 17A(b)(3)(C) because BSECC's By-Laws relating to the selection, composition, powers, and duties of the BSECC Board, committees, and officers of BSECC would remain essentially unchanged after the

[3] 15 U.S.C. 78q–1(b)(3)(C).

acquisition.[4] Similarly, the proposal to transfer a 5% interest in BSECC to EMCF does not require modification to BSECC's By-Laws, other than to include EMCF as an authorized shareholder and to make other minor changes discussed above, and should not alter the effectiveness of the By-Laws to assure fair representation of BSECC's shareholders and participants. Furthermore, we note that the proposed rule change does not alter the provisions of NASDAQ OMX's Certificate and NASDAQ OMX's By-Laws that are designed to maintain the independence of each of its SRO subsidiaries' self-regulatory functions, enable each SRO subsidiary to operate in a manner that complies with the federal securities laws, and facilitate the ability of each SRO subsidiary and the Commission to fulfill their regulatory and oversight obligations under the Act. For these reasons, we find that the proposed rule change is designed to allow BSECC to continue to meet the requirement under Section 17A(b)(3)(C) that it assure the fair representation of its shareholders and participants in the selection of its directors and administration of its affairs.[5] In addition, the amendments to the BSECC's Articles and By-Laws to change the name of BSECC, consolidate prior amendments, and correct certain errors are non-substantive amendments which should not affect BSECC's obligations under Section 17A.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.[6]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–BSECC–2009–02) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[7]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10464 Filed 5–5–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59846; File No. SR–NYSEArca–2009–34]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Amending Rule 6.76A Order Execution–OX

April 29, 2009.

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 April 21, 2009, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.76A to allow marketable orders to be exposed to market participants for a brief period of time before routing to an away market center for execution at the National Best Bid/Offer (''NBBO''). The text of the proposed rule change is attached as Exhibit 5 to the 19b–4 form. A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com*, at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to provide marketable orders an opportunity for execution on NYSE Arca before being routed to an away market center at the NBBO.

Currently, if an order that is marketable against the NBBO is received, it is matched against any possible contra side interest in the Display Order process and in the Working Order Process, including any available Tracking Orders. If the order is still unexecuted, or if only partially unexecuted, the order is then routed away to the market or markets at the NBBO.

The proposed rule change will provide for the NYSE Arca System to expose the order, at the NBBO price, to any OTP Holders who wish to subscribe to such notices, for a brief period of time (the ''exposure period'') not to exceed one second.

During the exposure period, orders and quotes that are equal to the NBBO and on the opposite side of the market will be matched against the exposed order and immediately executed as they are received. Orders and quotes that are better than the NBBO and on the opposite side of the market will also be matched against the exposed order, and immediately executed as they are received at the exposed price. At the end of the exposure period, the System will again attempt to match the balance of the order, if any, against any available Tracking Orders. If the order is still unexecuted, or if only partially unexecuted, it will be routed to the market(s) at the NBBO for execution.

Marketable orders that are on the same side of the market as the exposed order will join the exposure period through a size update to the exposure message, but will not extend the exposure period.

Any update to the NBBO during the exposure period that unlocks the exposed order will cause the exposure period to terminate, and any unexecuted portion of the order will either be (i) Matched against contra interest in the Display Process and the Working Order Process, and, if still not completely executed, (ii) immediately routed to the new NBBO market(s); or, (iii) if no

[4] Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR–BSE–2008–02; SR–BSE–2008–23; SR–BSE–2008–25; SR–BSECC–2008–01).

[5] This order grants approval to the current transfer of ownership from BSECC to EMCF only. It does not as requested by BSECC in its filing approve potential unwinds of the transfer of ownership that may occur in the future.

[6] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

longer marketable the order will be placed in the Consolidated Book.

Conversely, an update to the NBBO that crosses the exposed price will also bring the exposure period to an immediate end, and the order will be routed away.

Example 1:

NYSE Arca market—3.00–3.30

CBOE market (NBBO)—3.00–3.20

NYSE Arca receives an order to Buy paying 3.30. The order is exposed for one second prior to routing to CBOE.

200 milliseconds after the start of the exposure, CBOE offer moves to 3.30. The exposure period terminates, and the order is executed against the NYSE Arca 3.30 offer.

Example 2:

NYSE Arca market—3.00–3.30

CBOE market (NBBO)—3.00–3.20

NYSE Arca receives an order to Buy paying 3.30. The order is exposed for one second prior to routing to CBOE.

200 milliseconds after the start of the exposure period, ISE posts an offer at 3.10. Again, the exposure period terminates, and the order is immediately routed to the ISE to trade against the 3.10 offer.

NYSE Arca Users who do not wish to have an order exposed prior to routing may use the NOW order type to trade with markets at the NBBO. Users who wish to avoid both exposure and routing may use other order types available on NYSE Arca, including but not limited to, IOC orders and PNP orders.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act, in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest, as it will provide greater opportunities for investors to receive executions on the NYSE Arca System, rather than being routed away, so as to enhance the efficiency of order handling, and also provides Users the opportunity to match prices at other markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[4] and Rule 19b–4(f)(6) thereunder.[5] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6)(iii) thereunder.[7]

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–NYSEArca–2009–34 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2009–34. 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 Section, 100 F Street, NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at NYSE Arca's principal office and on its Internet Web site at *http://www.nyse.com*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–34 and should be submitted on or before May 27, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10449 Filed 5–5–09; 8:45 am]

BILLING CODE 8010–01–P

[4] 15 U.S.C. 78s(b)(3)(A)(iii).

[5] 17 CFR 240.19b–4(f)(6).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59844; File No. SR–NYSE–2009–31]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Regarding Initial and Annual Listing Fees for Securities Listed and Traded on the NYSE Bonds System

April 29, 2009.

I. Introduction

On March 16, 2009, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change regarding initial and annual listing fees for securities listed pursuant to Section 102.03 of the NYSE Listed Company Manual (''Manual'') and traded on the NYSE Bonds system. The proposal was published in the **Federal Register** on March 26, 2009.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Background

Currently, Rule 902.08 of the Manual imposes a one-time listing fee of $15,000 for bonds and other fixed income debt securities that list on the Exchange pursuant to Section 102.03. The Exchange has proposed to amend Rule 902.08 to eliminate the one-time listing fee and replace it with an initial listing fee of $5,000 and an annual listing fee of $5,000. The proposal also would clarify that *non-listed* debt of NYSE equity issuers and affiliated companies[4] would continue to be eligible to trade on NYSE Bonds without a fee. However, new language to Rule 902.08 clarifies that NYSE equity issuers and affiliated companies that determine to list debt securities on the Exchange would be subject to the $5,000 initial and annual listing fees. The proposal further clarifies that only *domestic* debt of issuers exempt from registration under the Act is not subject to a listing fee.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[5] In particular, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,[6] which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission notes that the Exchange's proposed fee of $5,000 for both initial and annual listing is consistent with a similar fee for Equity-Linked Debt Securities traded on NYSE Bonds, which the Commission previously approved,[7] and that no commenters objected to the proposal. The Commission also believes that the proposed clarifications to Rule 902.08 of the Manual are reasonable and consistent with the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[8] that the proposed rule change (SR–NYSE–2009–31) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10427 Filed 5–5–09; 8:45 am]

BILLING CODE 8010–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59608 (March 19, 2009), 74 FR 13278 (March 26, 2009) (''Notice'').

[4] *See* NYSE Rules 1400 and 1401. *See also* Securities Exchange Act Release No. 54767 (November 16, 2006), 71 FR 67680 (November 22, 2006) (SR–NYSE–2004–69) (permitting Exchange trading of debt securities that are not registered under the Act, but are issued by NYSE-listed companies or their wholly-owned subsidiaries and that meet other conditions).

[5] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b)(4).

[7] *See* Securities Exchange Act Release No. 59559 (March 11, 2009), 74 FR 11391 (March 17, 2009) (SR–NYSE–2009–03).

[8] 15 U.S.C. 78s(b)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59841; File No. SR–Phlx-2009–38]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Payment for Order Flow

April 29, 2009.

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 April 23, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. Phlx filed the proposal pursuant to Section 19(b)(3)(A)[3] of the Act and Rule 19b–4(f)(2)[4] thereunder. 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 make permanent its payment for order flow pilot program (''Pilot''), which is currently in effect until May 27, 2009.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of making permanent the Exchange's payment for order flow program (''Pilot'') is to remain competitive with other options exchanges that administer payment for order flow programs.[5] The Pilot is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See e.g.,* Securities Exchange Act Release Nos. 57094 (January 3, 2008), 73 FR 1653 (January 9, 2008) (SR–CBOE–2007–154); 55895 (June 11, 2007), 72 FR 33549 (June 18, 2007) (SR–ISE–2007–38);

Continued

currently set to expire on May 27, 2009. The Exchange seeks to make the Pilot permanent because the Directed Order Flow Program is now permanent. The Directed Order Flow program was set to expire on May 27, 2008, when the Exchange filed to make that program permanent.[6] The Pilot was also set to expire on May 27, 2008, when the Exchange filed to extend the Pilot for an additional year.[7] At this time, the Exchange proposes to make the Pilot permanent because of the permanent status of the Directed Order Flow Program. The Pilot has been in effect for several years.[8]

Currently, the following payment for order flow fees are in effect at the Exchange: [9] (1) Equity options (other than those equity options that trade as part of the Exchange's Penny Pilot Program); [10] and options on: (i) The Russell 2000® Index [11] traded under the symbol RUT; (ii) the one-tenth value Russell 2000® Index traded under the symbol RMN; (iii) the full value of the Nasdaq 100 Index [12] traded under the symbol NDX; (iv) and the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX, are all assessed $0.70 per contract; and (2) equity options that trade as part of the Exchange's Penny Pilot Program are assessed $0.25 per contract. Trades resulting from either Directed or non-Directed Orders [13] that are delivered electronically and executed on the Exchange are assessed a payment for order flow fee,[14] while non-electronically-delivered orders (*i.e.* represented by a floor broker) are not assessed a payment for order flow fee.[15] Additionally, payment for order flow fees are not assessed on transactions executed on the Exchange that correspond with an outbound Linkage Principal Acting as Agent (''P/A'') order.[16]

The Exchange's Directed Order Flow Program [17] enables Exchange specialists, Streaming Quote Traders (''SQTs'') [18] and Remote Streaming Quote Traders (''RSQTs'') [19] assigned in option trading on Phlx XL [20] to receive Directed Orders in accordance with the provisions of Exchange Rule 1080(1). When a Directed Order is received from a member or member organization (''Order Flow Provider'' or ''OFP''), the specialist, SQT or RSQT to whom the order is directed (the ''Directed Participant'') would be assessed a payment for order flow fee if the Directed Order is from a Customer. Pursuant to Rule 1080(l), OFPs must transmit Directed Orders to a particular specialist, SQT or RSQT through AUTOM.[21] If the Exchange's disseminated best bid or offer is at the National Best Bid or Offer when the Directed Order is received, the Directed Order is automatically executed on Phlx XL and allocated to the orders and quotes represented in the Exchange's quotation. A Directed Specialist, SQT or RSQT will receive a participation allocation pursuant to Rule 1014(g)(viii) if the Directed Specialist, SQT or RSQT was quoting at the NBBO at the time that the Directed Order was received. Otherwise, the automatic execution will be allocated to those quotations and orders at the NBBO pursuant to Rule 1014(g)(vii). When the Exchange is not quoting at the NBBO, the Directed Order will be manually handled by the specialist in accordance with the Exchange's rules. The Exchange's Directed Order Flow Pilot Program became permanent in 2008.[22]

55328 (February 21, 2007), 72 FR 9050 (February 28, 2007) (SR–Amex-2007–16); and 53341 (February 21, 2006), 71 FR 10085 (February 28, 2006) (SR–Amex-2006–15).

[6] *See* Securities Exchange Act Release No. 57844 (May 21, 2008), 73 FR 30988 (May 29, 2008) (SR–Phlx-2008–39).

[7] *See* Securities Exchange Act Release No. 57851 (May 22, 2008), 73 FR 31177 (May 20, 2008) (SR–Phlx-2008–38).

[8] The program took effect on July 1, 2005. *See e.g.,* Securities Exchange Act Release Nos. 52114 (July 22, 2005), 70 FR 44138 (August 1, 2005) (SR–Phlx-2005–44); 57851 (May 22, 2008), 73 FR 31177 (May 20, 2008)(SR–Phlx-2008–38); 55891 (June 11, 2007), 72 FR 333271 (June 15, 2007)(SR–Phlx-2007–39); 53754 (May 3, 2006), 71 FR 27301 (May 10, 2006) (SR–Phlx-2006–25); 53078 (January 9, 2006), 71 FR 2289 (January 13, 2006) (SR–Phlx–2005–88); and 52568 (October 6, 2005), 70 FR 60120 (October 14, 2005) (SR–Phlx-2005–58).

[9] *See e.g.,* Securities Exchange Act Release Nos. 53841 (May 19, 2006), 71 FR 30461 (May 26, 2006) (SR–Phlx–2006–33); 54297 (August 9, 2006), 71 FR 47280 (August 16, 2006) (SR–Phlx–2006–47); 54485 (September 22, 2006), 71 FR 57017 (September 28, 2006) (SR–Phlx–2006–56); 55290 (February 13, 2007), 72 FR 8051 (February 22, 2007) (SR–Phlx–2007–05); 55473 (March 14, 2007), 72 FR 13338 (March 21, 2007) (SR–Phlx–2007–12); 55891 (June 11, 2007), 72 FR 33271 (June 15, 2007) (SR–Phlx–2007–39); 58049 (June 27, 2008); and 73 FR 38286 (July 3, 2008) (SR–Phlx–2008–46).

[10] The current Penny Pilot Program, in effect through June 3, 2009, permits certain options series to be quoted and traded in increments of $0.01. *See* Securities Exchange Act Release No. 59631 (March 26, 2009), 74 FR 15022 (April 2, 2009) (SR–Phlx–2009–25).

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[13] The term ''Directed Order'' means any customer order to buy or sell which has been directed to a particular specialist, Remote Streaming Quote Trader or Streaming Quote Trader by an Order Flow Provider. See Exchange Rule 1080(l).

[14] Specialists and Directed ROTs who participate in the Exchange's payment for order flow program are assessed a payment for order flow fee, in addition to ROTs. Therefore, the payment for order flow fee is assessed, in effect, on equity option transactions between a customer and an ROT, a customer and a Directed ROT, or a customer and a specialist.

[15] Electronically-delivered orders do not include orders delivered through the Floor Broker Management System pursuant to Exchange Rule 1063.

[16] *See* Securities Exchange Act Release No. 57313 (February 12, 2008), 73 FR 9398 (February 20, 2008) (SR–Phlx–2008–10).

[17] *See* Securities Exchange Act Release Nos. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR–Phlx–2004–91); 53870 (May 25, 2006), 71 FR 31251 (June 1, 2006) (SR–Phlx–2006–27); 55803 (May 23, 2007), 72 FR 30413 (May 31, 2007) (SR–Phlx–2007–37); and 57844 (May 21, 2008), 73 FR 30988 (May 29, 2008) (SR–Phlx–2008–39).

[18] An SQT is an Exchange Registered Options Trader (''ROT'') who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Exchange Rule 1014(b)(ii)(A).

[19] An RSQT is a participant in the Exchange's electronic trading system, Phlx XL who has received permission from the Exchange to trade in options for his own account, and to generate and submit option quotations electronically from off the floor of the Exchange through AUTOM in eligible options to which such RSQT has been assigned. *See* Exchange Rule 1014(b)(ii)(B).

[20] Phlx XL is the Exchange's electronic options trading platform.

[21] AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution features, AUTO–X, Book Sweep and Book Match. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor. AUTOM is today more commonly referred to as Phlx XL. *See* Exchange Rule 1080.

[22] *See* Securities Exchange Act Release No. 57844 (May 21, 2008), 73 FR 30988 (May 29, 2008) (SR–Phlx–2009–39) (permanent approval of the Exchange's Directed Order Program).

In light of the Exchange's proposal to make the Pilot permanent, the Exchange also proposes to amend endnote 30 of the Exchange's fee schedule to remove the following language: ''[t]he payment for order flow fees will remain in effect as a pilot program that is scheduled to expire on May 27, 2009.'' The Exchange is not making any other changes to the Pilot at this time.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act,[23] in general, and furthers the objectives of Section 6(b)(4) of the Act [24] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. In particular, the Exchange believes that continuing the payment for order flow program and making it permanent should allow the Exchange to remain competitive.

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 [25] and paragraph (f)(2) of Rule 19b–4 [26] 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–Phlx–2009–38 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2009–38. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2009–38 and should be submitted on or before May 27, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10446 Filed 5–5–09; 8:45 am]

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[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(4).

[25] 15 U.S.C. 78s(b)(3)(A)(ii).

[26] 17 CFR 240.19b–4(f)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59842; File No. SR–Phlx–2009–37]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of Proposed Rule Change Relating to Quoting Requirements for Streaming Quote Traders, Remote Streaming Quote Traders and Specialists

April 29, 2009.

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 April 21, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to make specified technical adjustments to the quoting requirements for streaming quote traders, remote streaming quote traders and specialists contained in Exchange Rule 1014.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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

The purpose of the proposed rule change is to make minor adjustments to the quoting requirements for Streaming Quote Traders (''SQTs''), Remote Streaming Quote Traders (''RSQTs'') and specialists contained in Exchange Rule 1014.[3] Currently, Rule 1014 requires an SQT and an RSQT (other than a DSQT or a DRSQT) to quote continuous, two-sided markets in not less than 60% of the series in each option in which such SQT or RSQT is assigned. The same rule requires a DSQT and a DRSQT on any given day to quote continuous, two-sided markets in not less than 99% of the series listed on the Exchange in at least 60% of the options in which such DSQT or DRSQT is assigned. Moreover, whenever on a given trading day a DSQT or DRSQT enters a quotation in an option in which such DSQT or DRSQT is assigned, the DSQT or DRSQT must maintain continuous quotations for not less than 99% of the series of the option listed on the Exchange until the close of that trading day. Finally, Rule 1014 requires each specialist to quote continuous, two-sided markets in not less than 99% of the series in each option in which such specialist is assigned.

Currently, any of the ''continuous'' quoting requirements referenced above may be deemed unsatisfied whenever there is an interruption in quoting during the trading day, no matter how brief in duration. The Exchange is, therefore, proposing to replace the continuous quoting requirement with a reference to the portion of the trading day when a quote must be available. Specifically, a market participant that is currently subject to any of the above-described continuous quoting obligations would, instead, be required to maintain a two-sided quote in a series for a total time equal to at least 90% (or higher, if so announced by the Exchange in advance) of the duration of the trading day. For example, on a normal trading day, which lasts 390 minutes (from 9:30 a.m. to 4 p.m.), quoting in a series would need to be maintained for the total of at least 351 minutes in order to meet the 90%-of-the-trading-day threshold.

In a shortened trading session, the total number of minutes the quote must be maintained would be lowered proportionately (and the same percentage threshold would apply). If a technical failure or limitation of a system of the Exchange prevents a participant from maintaining, or prevents a participant from communicating to the Exchange, timely and accurate quotes, the duration of such failure or limitation would also not be included in any of the calculations with respect to the affected quotes. The Exchange would have the ability to consider other exceptions to the quoting requirements based on demonstrated legal or regulatory requirements or other mitigating circumstances.[4]

Under the proposal, the Exchange would also have the discretion to set the threshold above 90% by publishing an appropriate advance announcement, which would then be available on the Exchange's Web site. In the illustration above, if the Exchange set the threshold, for example, at 99% (rather than 90%), then on a normal trading day, quoting would need to be maintained for 386 (rather than 351) minutes out of the total of 390 minutes.

The Exchange is also proposing to make a minor adjustment to the 99%-of-the-series provisions. As explained above, on a given trading day, each DSQT and DRSQT is required to maintain two-sided quotations for at least 99% of the listed series: (a) in at least 60% of its total option assignments, and (b) in any assignment after entering a quotation in it. A specialist must maintain quotes in at least 99% of the series in each of its option assignments. The proposed adjustment would replace the 99% requirement in all of these instances with the lesser of two alternatives: 99% of the series, or 100% minus a single call-and-put ''pair.'' The eligible pair in this case would consist of two individual options, one call and one put, which cover the same underlying instrument and have the same expiration date and exercise price. Failure to maintain a qualifying (90% of the trading day or higher, as discussed above) quote in just one call, one put, or in one call and one ''paired'' put, would not by itself (assuming all other series of a given option are being quoted as required) constitute a violation of the 99%-of-the-series requirement. The purpose of this particular modification is to make the rules more flexible with respect to those assignments that contain relatively fewer series and to avoid situations when failure to quote 90% of the trading day in merely one individual option or one pair breaches the 99% requirement.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[5] in general, and furthers the objectives of Section 6(b)(5) of the Act[6] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by removing unnecessary rigidity from the existing quotation requirements, reducing the associated burdens on the affected market participants, and ultimately making the Exchange more competitive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

[3] The terms SQTs and RSQTs are defined in Rule 1014(b)(ii)(A) and (B) and generally connote participants who have received permission from the Exchange to trade in options for their own accounts and to generate and submit option quotations electronically. The terms Directed SQTs (''DSQTs'') and Directed RSQTs (''DRSQTs'') are defined in Rule 1080(l)(i)(c) and refer to SQTs and RSQTs that receive certain customer orders (known as ''Directed Orders'') that have been directed specifically to them.

[4] Another exchange recently modified its rules to set its market makers' quoting obligation at 90% of the time that the exchange is open for business. That exchange also provided for similar automatic exceptions for technical failures and discretionary exceptions based on demonstrated legal or regulatory requirements or other mitigating circumstances. Securities Exchange Act Release No. 57186 (Jan. 22, 2008), 73 FR 4931 (Jan. 28, 2008) (approving SR–NYSEArca–2007–121).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2009–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2009–37. 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2009–37 and should be submitted on or before May 27, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10447 Filed 5–5–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59845; File No. SR–OCC–2009–08]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Stock as Margin

April 29, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on April 14, 2009, 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval of the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The proposed rule change will revise OCC's eligibility requirements for the deposit of stocks as margin.

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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

OCC is proposing to amend its rules to facilitate the deposit of common stocks as margin collateral by: (1) Reducing the minimum price for stocks from $10 to $3 and (2) eliminating the 10% concentration test for certain Exchange-Traded Funds (''ETFs'').

1. Minimum Price Test

Prior to this rule change, OCC Rule 604(b)(4) required that all stocks (''Valued Securities'') including common and preferred stocks, submitted as margin collateral had to have a market value greater than $10 per share. The dramatic fall in equity prices over the last several months has led to a significant increase in the number of stocks that are priced below $10. Approximately one year ago, eleven stocks in the S&P 500 were priced below $10. As of April 13, 2009, sixty-six stocks were priced below $10. Although OCC's $10 minimum price requirement for stock collateral was intended to exclude stocks that might be volatile, illiquid, close to delisting, *etc.*, it did so at the expense of excluding many stocks that if looked at individually would be deemed appropriate for margin collateral purposes.

Under this filing, OCC will reduce the minimum market value for stocks from $10 to $3. OCC has performed an analysis of the impact of reducing the minimum share price for common stock and has concluded that such a change can be implemented for both option and non-option securities without materially increasing risk to OCC. OCC states that its approach to valuing Valued Securities is conservative because the current 30% haircut is high relative to the haircuts that will be applied upon implementation of its Collateral in Margins project.[2] Moreover, OCC has examined the member accounts that hold the most volatile Valued Securities and found no instance where the amount of such holdings in any particular account was excessive. OCC nevertheless intends to closely monitor any account with a large amount of

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 58158 (July 15, 2008), 73 FR 42646 (July 15, 2008). Under the Collateral in Margins filing, OCC will be updating its margin requirement methodology and risk management system known as ''STANS'' to more accurately measure the risk in clearing members' accounts. Some of the changes include providing OCC with greater flexibility to determine the amount of replacement collateral when securities deposited as margin are withdrawn and eliminating certain concentration limits and minimum share prices.

OCC expects to fully implement the new Collateral in Margins methodology in the second quarter of 2010. In order to address current market conditions, OCC is proposing changes now to reduce the impact of the minimum price requirement and the 10% concentration test, both of which will be eliminated altogether for options securities when Collateral in Margins is implemented.

deposited Valued Securities that would be subject to a high haircut (*i.e.*, greater than 40%) under STANS. Preferred stocks, which will not be included in the Collateral in Margin program, will remain subject to a minimum share price of greater than $10.

2. ETF Concentration Test

OCC Rule 604(b)(4) provides that ''equity and debt issues of any one issuer shall not be valued at an amount in excess of 10% of the margin requirement in the account for which such securities are deposited.'' The main purpose of the concentration test is to protect OCC from undue exposure where a single security deposited as collateral by a member suffers a sudden and extreme fall in value or becomes illiquid. Under the concentration test, a clearing member that wants to satisfy its OCC margin requirement solely with Valued Securities must submit a portfolio that contains at least ten separate securities. The concentration test was developed before the advent of ETFs representing an ownership interest in large numbers of securities such as those based on the S&P 500, Nasdaq 100, and Russell 2000.

OCC states that it has analyzed such assets from a risk perspective and has concluded that they should be accepted as margin without regard to the concentration limits but subject to certain conditions. First, the assets acceptable for this purpose should be limited to liquid, broad-based equity index ETFs. Secondly, the applicable STANS margin interval for each deposited ETF exempted from the 10% concentration test must be less than or equal to 30%.

Because this interim proposal for limiting the applicability of the 10% concentration test is narrower than the corresponding change in the Collateral in Margins filing, OCC proposes to implement this interim proposal by adding an interpretation under Rule 604. By its terms, the interpretation will be superseded upon full implementation of the Collateral in Margins rule change, and OCC will thereafter remove it from the rule book.

OCC states that the proposed changes to OCC's rules are consistent with the purposes and requirements of Section 17A of the Act [3] because they are designed to promote the accurate and efficient clearance and settlement of transactions in securities and to safeguard assets within OCC's custody or control. The changes accomplish this purpose by facilitating the expanded use of Valued Securities as margin collateral while implementing certain limitations and monitoring procedures designed to limit risk. The proposed rule change is not inconsistent with the existing rules of OCC including any rules proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will 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 with respect to the proposed rule change. OCC will notify the Commission of any comments it receives.

III. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency and, in particular, the requirements of Section 17A of the Act.[4] Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act,[5] which requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds that are in the custody or control of the clearing agency or for which it is responsible. Although OCC is reducing the minimum share price for stocks eligible to be deposited as margin, the Commission is satisfied with OCC's analysis that such reduction is accompanied by sufficient risk-management controls to protect OCC from the risks associated with including such lower-priced stocks in members' margin accounts. The Commission also finds that allowing certain ETFs and other fund shares to be deposited as margin collateral that otherwise could not be deposited because of OCC's concentration restriction should not pose undue risks because such funds are broad based and highly liquid. Therefore, the proposed rule change should not adversely impact OCC's ability to continue to assure that the securities and funds in its custody or control or for which it is responsible are properly safeguarded.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[6] for approving the proposed rule change prior to the thirtieth day after the date of publication of notice in the **Federal Register**. The Commission believes that accelerating approval of this proposal should benefit OCC's members and investors by permitting OCC to update its margin requirements without undue delay and in a manner that will expand the securities that members may deposit as margin collateral while it implements the Collateral in Margin project without compromising OCC's ability to safeguard the funds and securities in its custody or control.

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-comment@sec.gov.* Please include File No. SR–OCC–2009–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–OCC–2009–08. 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

[3] 15 U.S.C. 78–1.

[4] 15 U.S.C. 78–1.

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 15 U.S.C. 78s(b)(2).

between the hours of 10:00 a.m. to 3:00 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.jsp*. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. OCC–2009–08 and should be submitted on or before May 27, 2009.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[7] that the proposed rule change (SR–OCC–2009–08) be, and it hereby is, approved on an accelerated basis.[8]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[9]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10448 Filed 5–5–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59835; File No. SR–NYSEArca–2009–30]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Adoption of Listing Standards for Managed Trust Securities and the Listing and Trading of Shares of the iShares® Diversified Alternatives Trust

April 28, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on April 9, 2009, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On April 24, 2009, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange, through its wholly owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities'' or ''Corporation''), proposes new NYSE Arca Equities Rule 8.700 (''Managed Trust Securities''). The Exchange also proposes to list and trade shares (''Shares'') of the iShares® Diversified Alternatives Trust (''Trust'') pursuant to this rule. The Exchange also proposes to amend NYSE Arca Equities Rule 7.34 and its Listing Fees to add references to proposed NYSE Arca Equities Rule 8.700. The text of the proposed rule change 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.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes new NYSE Arca Equities Rule 8.700 for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges (''UTP'') of Managed Trust Securities issued by a trust that is a commodity pool as defined in the Commodity Exchange Act (''CEA'') and regulations thereunder, and that is managed by a commodity pool operator (''CPO'') registered with the Commodity Futures Trading Commission (''CFTC'') and registered under the Securities Act of 1933, as amended. The trust would hold long and/or short positions in exchange traded futures and/or currency forward contracts as selected by the trust's advisor consistent with the trust's objectives, which would only include exchange traded futures contracts involving commodities, currencies, stock indices, fixed income indices, interest rates and sovereign, private and mortgage or asset backed debt instruments as disclosed in the trust's prospectus, as such may be amended from time to time. In addition, such shares would be issuable and redeemable continuously in specified aggregate amounts at net asset value (''NAV'').[4] The Exchange also proposes to amend NYSE Arca Equities Rule 7.34 (Trading Sessions) to reference securities described in proposed Rule 8.700 in Rule 7.34(a)(3)(A) relating to hours of the Exchange's Core Trading Session, in Rule 7.34(a)(4)(A) relating to trading halts for trading pursuant to UTP during the Exchange's Opening Session, and in Rule 7.34(a)(5) relating to trading halts when the NAV and/or ''Disclosed Portfolio'' is not being disseminated to all market participants at the same time.[5] In addition, the Exchange proposes to amend its listing fees by incorporating the securities described in proposed Rule 8.700 in the term ''Derivative Securities Products.''

Pursuant to this proposed rule change, the Exchange proposes to list and trade the Shares of the Trust. The

[7] 15 U.S.C. 78s(b)(2).

[8] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] E-mail from Sudhir Bhattacharyya, Vice President—Legal, NYSE Euronext, to Edward Y. Cho, Special Counsel, Division of Trading and Markets, Commission, dated April 21, 2009 (''Exchange Confirmation'').

[4] The Commission has previously approved NYSE Arca Equities rules to list and trade products based on or related to commodities. *See* Securities Exchange Act Release No. 57838 (May 20, 2008), 73 FR 30649 (May 28, 2008) (SR–NYSEArca–2008–09) (approving new NYSE Arca Equities Rule 8.204 ''Commodity Futures Trust Shares'' for to list and trade the AirShares EU Carbon Allowances Fund); Securities Exchange Act Release No. 54025 (June 21, 2006), 71 FR 36856 (June 28, 2006) (SR–NYSEArca–2006–12) (approving new NYSE Arca Equities Rule 8.203 ''Commodity-Indexed Trust Shares'' for trading pursuant to UTP the iShares GSCI Commodity-Indexed Trust); Securities Exchange Act Release No. 51067 (January 21, 2005), 70 FR 3952 (January 27, 2005) (SR–PCX–2004–132) (approving new NYSE Arca Equities Rule 8.201 ''Commodity-Based Trust Shares'' for trading pursuant to UTP the iShares COMEX Gold Trust); Securities Exchange Act Release No. 56041 (July 11, 2007), 72 FR 39114 (July 17, 2007) (SR–NYSEArca–2007–43) (approving listing of shares of iShares COMEX Gold Trust pursuant to NYSE Arca Equities Rule 8.201); Securities Exchange Act Release No. 53875 (May 25, 2006), 71 FR 32164 (June 2, 2006) (SR–NYSEArca–2006–11) (approving new NYSE Arca Equities Rule 8.300 ''Partnership Shares'' for trading pursuant to UTP the United States Oil Fund, LP); Securities Exchange Act Release No. 53736 (April 27, 2006), 71 FR 26582 (May 5, 2006) (SR–PCX–2006–22) (approving new Commentary .02 to NYSE Arca Equities Rule 8.200 ''Investment Shares'' for trading pursuant to UTP the DB Commodity Index Tracking Fund); Securities Exchange Act Release No. 58162 (July 15, 2008), 73 FR 42391 (July 21, 2008) (SR–NYSEArca–2008–73) (approving new NYSE Arca Equities Rule 8.200 ''Trust Issued Receipts'').

[5] *See* Exchange Confirmation, *supra* note 3.

Shares represent ownership of a fractional undivided beneficial interest in the net assets of the Trust. The Trust will be a commodity pool, as defined in the CEA and the applicable rules of the CFTC, and will be formed as a Delaware statutory trust.[6] Barclays Global Investors International, Inc., a Delaware corporation and an indirect subsidiary of Barclays Bank PLC, will serve as Sponsor of the Trust. The Sponsor has been registered under the CEA since October 13, 2005. The Sponsor will serve as the CPO of the Trust. The Sponsor is registered as a CPO under the CEA and is a member of the National Futures Association (''NFA'').

The Shares will conform to the initial and continued listing criteria under proposed Rule 8.700.

The Trust is required to comply with Rule 10A–3 under the Act for the initial and continued listing of the Shares.[7]

Proposed Listing Rules

Proposed Definition. Proposed Rule 8.700(c)(1) defines a ''Managed Trust Security'' as a security that is registered under the Securities Act of 1933, as amended (a) is issued by a trust that (i) is a commodity pool as defined in the CEA and regulations thereunder, and that is managed by a CPO registered with the CFTC, and (ii) holds long and/or short positions in exchange-traded futures contracts and/or currency forward contracts selected by the trust's advisor consistent with the trust's investment objectives,[8] which would only include exchange-traded futures contracts involving commodities, currencies, stock indices, fixed income indices, interest rates and sovereign, private and mortgage or asset backed debt instruments[9] and/or forward contracts on specified currencies, as disclosed in the trust's prospectus as such may be amended from time to time (b) is issued and redeemed continuously in specified aggregate amounts at the next applicable net asset value.

Proposed Rule 8.700(c)(2) defines ''Disclosed Portfolio'' as the identities and quantities of the assets held by the trust that will form the basis for the trust's calculation of the net asset value at the end of the business day. Proposed Rule 8.700(c)(3) defines ''Intraday Indicative Value'' as the estimated indicative value of a Managed Trust Security based on current information regarding the value of the assets in the Disclosed Portfolio. Finally, Proposed Rule 8.700(c)(4) defines ''Reporting Authority'' as, in respect of a particular series of Managed Trust Security, the Corporation,[10] an institution, or a reporting or information service designated by the trust or the Corporation or by the exchange that lists a particular series of Managed Trust Security (if the Corporation is trading such series pursuant to unlisted trading privileges) as the official source for calculating and reporting information relating to such series, including, but not limited to, the (i) Intraday Indicative Value, (ii) the Disclosed Portfolio, (iii) the amount of any cash distribution to holders of Managed Trust Security, (iv) net asset value, or (v) other information relating to the issuance, redemption, or trading of Managed Trust Security. A series of Managed Trust Security may have more than one Reporting Authority, each having different functions.

Designation. Proposed Rule 8.700(d) provides that the Corporation[11] may trade, either by listing or pursuant to UTP, Managed Trust Securities that are based on an underlying portfolio of exchange-traded futures and/or currency forward contracts. Each issue of Managed Trust Securities would be designated as a separate trust or series and would be identified by a unique symbol.

Proposed Initial and Continued Listing Criteria. The Managed Trust Securities will be subject to the criteria for listing and trading set forth in proposed Rule 8.700(e).

Proposed Rule 8.700(e)(1) provides that each series of Managed Trust Securities will be listed and traded on the Corporation subject to application of the initial listing criteria. Proposed Rule 8.700(e)(1)(A) provides that the Corporation[12] will establish a minimum number of Managed Trust Securities that will be required to be outstanding at the time of commencement of trading. In addition, proposed Rule 8.700(e)(1)(B) provides that the Corporation[13] will obtain a representation from the issuer of each series of Managed Trust Securities that the net asset value for the series will be calculated daily and that the net asset value and Disclosed Portfolio will be made available to all market participants at the same time.[14]

Proposed Rule 8.700(e)(2) provides that each series of Managed Trust Securities will be listed and traded subject to application of the following continued listing criteria: (1) The Intraday Indicative Value for Managed Trust Securities will be widely disseminated by one or more major market data vendors at least every 15 seconds during the time when the Managed Trust Securities trade on the Corporation; (2) the Disclosed Portfolio will be disseminated at least once daily and will be made available to all market participants at the same time;[15] and (3) the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.

The proposed continued listing criteria in proposed Rule 8.700(e)(2)(C) provides for the suspension of trading in or removal from listing of the Managed Trust Securities under any of the following circumstances:

• If, following the initial twelve (12) month period beginning upon the commencement of trading of the Shares: (a) the trust has fewer than 50,000 Shares issued and outstanding; or (b) if the market value of all Shares is less than $1,000,000; or (c) if there are fewer than 50 record and/or beneficial holders

[6] The Trust is not an investment company registered under the Investment Company Act of 1940, according to the Registration Statement on Form S–1 for the Trust, which was filed with the Commission on August 20, 2008 (File No. 333–153099) (''Registration Statement''). The information in this proposed rule change is based upon representations in the Registration Statement.

[7] 17 CFR 240.10A–3. Rule 10A–3(e)(3) provides that, in the case of a listed limited partnership or limited liability company where such entity does not have a board of directors or equivalent body, the term ''board of directors'' means the board of directors of the managing general partner, managing member or equivalent body. The Trust itself has no employees or board of directors and its operations are conducted by the Trustee, subject to the direction of the Sponsor. Accordingly, the Trust has designated a committee of the board of directors of the Sponsor to act as the audit committee of the Trust for Rule 10A–3 purposes. The Sponsor's role under the governing documents of the Trust makes the Sponsor analogous to the managing member of a limited liability company. The Exchange believes it is reasonable to interpret Rule 10A–3(e)(3) as permitting a trust to utilize a committee of the board of directors of its sponsor as the trust's audit committee for purposes of compliance with Rule 10A–3, *provided* that the sponsor's role with respect to the trust is analogous to the relationship between a managing member and a limited liability company.

[8] It should be noted that the trust holdings will be actively managed in accordance with the trust's investment objectives; therefore, products listed under proposed Rule 8.700 are ineligible for listing under any other existing Exchange rule (*e.g.,* Rules 8.203 and 8.204).

[9] E-mail from Sudhir Bhattacharyya, Vice President–Legal, NYSE Euronext, to Edward Y. Cho, Special Counsel, Division of Trading and Markets, Commission, dated April 8, 2009 (confirming that the trust may only hold exchange-traded futures contracts on sovereign, private, and mortgage- or asset-backed debt and not the debt itself).

[10] *See* Exchange Confirmation, *supra* note 3.

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.*

of the Shares for 30 consecutive trading days; or

• If the Intraday Indicative Value for the trust is no longer calculated or available or the Disclosed Portfolio is not made available to all market participants at the same time;

• If the trust issuing the Managed Trust Securities has failed to file any filings required by the Commission or if the Corporation is aware that the trust is not in compliance with the conditions of any exemptive order or no-action relief granted by the Commission to the trust with respect to the series of Managed Trust Securities; or

• If such other event shall occur or condition exists which in the opinion of the Corporation [16] makes further dealings on the Exchange inadvisable.

Proposed Rule 8.700(e)(2)(D) provides that, if the Intraday Indicative Value of a series of Managed Trust Securities is not being disseminated as required, the Corporation may halt trading during the day in which the interruption to the dissemination of the Intraday Indicative Value occurs. If the interruption to the dissemination of the Intraday Indicative Value persists past the trading day in which it occurred, the Corporation will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Fund Shares is trading on the Corporation pursuant to UTP, the Corporation will halt trading in that series as specified in NYSE Arca Equities Rule 7.34(a), as proposed to be amended. In addition, if the Exchange becomes aware that the NAV or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV or the Disclosed Portfolio is available to all market participants.

Proposed Rule 8.700(e)(2)(E) provides that the Corporation will remove the Managed Trust Securities from listing upon termination of the trust.[17]

Proposed Rule 8.700(e)(3) provides that the term of a trust is as stated in the trust's prospectus, but that the trust may be terminated earlier as may be specified in the prospectus.

Proposed Rule 8.700(e)(4) sets forth proposed requirements for the trustee of a trust: (i) The trustee of a trust must be a trust company or banking institution having substantial capital and surplus and the experience and facilities for handling corporate trust business. In cases where, for any reason, an individual has been appointed as trustee, a qualified trust company or banking institution must be appointed co-trustee, and (ii) no change is to be made in the trustee of a listed issue without prior notice to and approval of the Corporation.

Proposed Rule 8.700(e)(5) provides that voting rights will be as set forth in the applicable trust prospectus.

Proposed Rule 8.700(f) sets forth certain restrictions on ETP Holders acting as registered Market Makers in Managed Trust Securities to facilitate surveillance. Proposed Rule 8.700(f)(2)–(3) requires that the ETP Holder acting as a registered Market Maker in the Managed Trust Securities provide the Corporation with necessary information relating to its trading in the underlying commodity or applicable currency, related futures or options on futures, or any other related derivatives.[18] Proposed Rule 8.700(f)(4) prohibits the ETP Holder acting as a registered Market Maker in the Managed Trust Securities from using any material nonpublic information received from any person associated with an ETP Holder or employee of such person regarding trading by such person or employee in the underlying commodity or applicable currency, related futures or options on futures or any other related derivative (including the Managed Trust Securities).[19] In addition, Proposed Rule 8.700(f)(1) prohibits the ETP Holder acting as a registered Market Maker in the Managed Trust Securities from being affiliated with a market maker in the underlying commodity or applicable currency, related futures or options on futures or any other related derivative unless adequate information barriers are in place, as provided in Rule 7.26.[20]

Proposed Rule 8.700(g) relates to the Corporation's[21] limitation of liability. Proposed Rule 8.700(h) specifically provides that the Corporation[22] will file separate proposals under Section 19(b) of the Securities Exchange Act of 1934[23] before listing and trading separate and distinct Managed Trust Securities.

Proposed Commentary .01 to Rule 8.700 requires ETP Holders to provide all purchasers of newly issued Managed Trust Securities with a prospectus. Proposed Commentary .02 to Rule 8.700 provides that trading in the Managed Trust Securities will occur during the trading hours specified in NYSE Arca Equities Rule 7.34. Proposed Commentary .03 to Rule 8.700 provides that the Corporation's rules governing the trading of equity securities apply. Proposed Commentary .04 to Rule 8.700 provides that the Corporation will implement written surveillance procedures for Managed Trust Securities. Lastly, proposed Commentary .05 to new Rule 8.700 provides that, if the trust's advisor is affiliated with a broker-dealer, the broker-dealer shall erect a ''fire wall'' around the personnel who have access to information concerning changes and adjustments to the Disclosed Portfolio. In addition, proposed Commentary .05 further requires that personnel who make decisions on the trust's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the trust's portfolio.

Amendments to NYSE Arca Equities Rule 7.34

The Exchange proposes to amend Rule 7.34(a)(3) to add Managed Trust Securities to the list of securities for which the Core Trading Session on the Exchange concludes at 1:15 p.m., Pacific Time. In addition, Managed Trust Securities would be included under ''Derivative Securities Products'' for purposes of Rule 7.34(a)(4) relating to trading halts for trading pursuant to UTP of Derivative Securities Products on the Exchange. The Exchange also proposes to amend Rule 7.34(a)(4) to correct the punctuation at the end of the provision. Further, the Exchange proposed to amend Rule 7.34(a)(5) to add Managed Trust Securities to the list of securities for which a trading halt will occur when the NAV and/or ''Disclosed Portfolio'' is not being disseminated to all market participants at the same time.[24]

Amendments to Listing Fees

The Exchange proposes to add Managed Trust Securities to the securities included under the term ''Derivative Securities Products'' in note 3 of the NYSE Arca Equities listing fee schedule.

Description of the Trust

Barclays Global Investors, N.A., an affiliate of the Sponsor or a successor trustee, will be the trustee (the ''Trustee'') of the Trust. The Trust will be governed by the trust agreement (the ''Trust Agreement'') among the Sponsor, the Trustee and the Delaware Trustee.[25]

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *See id.*

[23] 15 U.S.C. 78s(b).

[24] *See* Exchange Confirmation, *supra* note 3.

[25] Wilmington Trust Company, a Delaware banking corporation, will serve as the Delaware Trustee of the Trust. The Delaware Trustee will not

Continued

The Trust Agreement will set out the rights of the registered holders of the Shares and the rights and obligations of the Sponsor, the Trustee and the Delaware Trustee. The Trustee will be responsible for the day-to-day administration of the Trust, including (1) processing orders for the creation and redemption of Baskets and (2) calculating the net asset value of the Trust on each Business Day. The Trustee will have the authority to delegate some of its responsibilities under the Trust Agreement to a Trust Administrator or agent. Initially, State Street Bank & Trust Company, a banking corporation organized under the laws of Massachusetts, will serve as the Trust Administrator. The Trustee will delegate the valuation of certain assets of the Trust for the purposes of the daily calculation of the net asset value of the Trust and the remainder of its day-to-day administrative responsibilities to the Trust Administrator.[26]

Barclays Global Fund Advisors (the ''Advisor'') will serve as the commodity trading advisor (''CTA'') of the Trust. The CTA has been registered with the CFTC as a CTA since April 5, 1993, and is a member of the National Futures Association in such capacity.

According to the Registration Statement, the investment objective of the Trust will be to maximize absolute returns from its portfolio of (i) exchange-traded futures contracts involving commodities, currencies, certain eligible stock and/or bond indices, interest rates and sovereign, private and mortgage- or asset-backed debt instruments[27] and/or (ii) certain currency forward contracts in the top 25 most liquid or actively traded currencies measured by turnover in the most recent BIS Central Bank Survey, each as disclosed in the Trust's prospectus as such may be amended from time to time, while seeking to reduce the risks and volatility inherent in those investments by taking long and short positions in historically correlated assets. The Trust will also earn interest on the assets used to collateralize its trading positions. The return on assets in the portfolio, if any, is not intended to track the performance of any index or other benchmark. There is no assurance that the Trust will achieve its investment objectives.

At the discretion of the Advisor, the Trust may enter into certain currency forward contracts of the variety described in the prospectus.

At the discretion of the Advisor, the Trust may engage in trading activities with respect to various exchange-traded futures contracts involving commodities, currencies, certain eligible stock and/or bond indices, interest rates and sovereign, private and mortgage- or asset-backed debt instruments[28] as described further in the Registration Statement.

Description of the Shares

The Trust will create and redeem Shares from time to time, but only by authorized participants in one or more baskets, with each basket constituting a block of not less than 25,000 Shares. Additional information regarding the Trust and the Shares, including creation and redemption procedures, risks, fees and expenses and procedural matters related to the Shares is included in the Registration Statement.

A minimum of 100,000 Shares will be required to be outstanding at the start of trading.

Dissemination and Availability of Information About the Underlying Assets and the Shares

The Web site for the Trust at *http://www.iShares.com,* which is publicly accessible at no charge, will contain the following information: (1) The prior business day's NAV per Share[29] and the reported closing price; (2) the mid-point of the bid-ask price in relation to the NAV per Share as of the time the NAV is calculated (''Bid-Ask Price'');[30] (3) calculation of the premium or discount of such price against such NAV per Share; (4) data in chart form displaying the frequency distribution of discounts and premiums of the Bid-Ask Price against the NAV per Share, within appropriate ranges for each of the four (4) previous calendar quarters; (5) the prospectus and the most recent periodic reports filed with the SEC or required by the CFTC;[31] and (6) other applicable quantitative information.

The Trust's portfolio holdings (*i.e.* Disclosed Portfolio) will be disclosed on the Trust's Web site daily at *http://www.iShares.com.* The Trust has informed the Exchange that Web site disclosure of portfolio holdings will be made daily and will include, as applicable, the name identifier and number of each futures contract, the amount and currency type of each forward contract and amount of cash held in the portfolio of the Trust. The portfolio holdings will be disclosed to all market participants via the Trust's Web site at the same time.

As noted above, the Trust's NAV will be calculated and disseminated daily.[32] The Exchange will disseminate for the Trust on a daily basis by means of Consolidated Tape Association CQ High Speed Lines information with respect to the recent Trust NAV, Shares outstanding and the Basket amount. The Exchange will also make available on its Web site daily trading volume, closing prices and the Trust's NAV per Share.

Pricing for futures contracts are available from the relevant exchange on which such futures contracts trade and pricing for forward contracts are available from major market data vendors.

The Intraday Indicative Value will be widely disseminated by one or more major market data vendors at least every 15 seconds during the time the Shares trade on the Exchange.

Information regarding market price and volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. The previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association high-speed line.

The current trading price per Share will be published continuously as trades occur throughout each trading day on the consolidated tape, Reuters and/or Bloomberg.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to

be entitled to exercise any of the powers, or have any of the duties or responsibilities, of the Trustee. The Delaware Trustee will be a trustee of the Trust for the sole and limited purpose of fulfilling the requirements of the Delaware Statutory Trust Act.

[26] Terms relating to operation of the Trust, referred to, but not defined herein, are defined in the Registration Statement.

[27] *See supra* note 9.

[28] *See id.*

[29] The most recent end-of-day NAV of the Trust and NAV per Share will be published by the Sponsor as of 4 p.m. ET on Reuters and/or Bloomberg and on the Trust's Web site at *http://www.iShares.com.* The end-of-day NAV per Share will also be published the following morning on the consolidated tape.

[30] The Bid-Ask Price of Shares is determined using the highest bid and lowest offer as of the time of calculation of the NAV per Share.

[31] Monthly account statements conforming to applicable CFTC and NFA requirements are posted on the Trust's Web site at *http://www.iShares.com.* Additional reports may be posted on the Trust's Web site in the discretion of the Sponsor or as required by regulatory authorities.

[32] The Exchange will obtain a representation from the Trust that the net asset value per share for the Shares will be calculated daily and that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

halt or suspend trading in the Shares.[33] Trading in the Shares will be halted if the circuit breaker parameters under NYSE Arca Equities Rule 7.12 are reached. Trading may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the underlying futures contracts, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to proposed NYSE Arca Equities Rule 8.700(e)(2)(D), which sets forth circumstances under which trading in the Shares may be halted.

If a series of Managed Trust Securities is trading on the Corporation pursuant to UTP, the Corporation will halt trading in that series as specified in Rule 7.34(a). In addition, if the Exchange becomes aware that the net asset value with respect to a series of Managed Trust Securities is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value is available to all market participants.

Trading Rules

Under proposed Rule 8.700(b), Managed Trust Securities are included within the Exchange's definition of ''securities.'' The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Proposed Commentary .02 to Rule 8.700 provides that transactions in Managed Trust Securities will occur during the trading hours specified in Rule 7.34. Therefore, in accordance with Rule 7.34, the Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. ET. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which will include Managed Trust Securities) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members of the ISG.[34] In addition, the Exchange has an Information Sharing Agreement in place with New York Mercantile Exchange (''NYMEX''), the Kansas City Board of Trade (''KBOT''), ICE Futures and the London Metal Exchange (''LME'') for the purpose of providing information in connection with trading in or related to futures contracts traded on NYMEX, KBOT, ICE Futures and LME. In addition, for components traded on exchanges, not more than 10% of the weight of the Trust's portfolio in the aggregate shall consist of components whose principal trading market is not a member of ISG or is a market with which the Exchange does not have a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Baskets (and that Shares are not individually redeemable); (2) Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (4) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Intraday Indicative Value[35] will not be calculated or publicly disseminated; and (5) trading information.

In addition, the Bulletin will reference that the Trust is subject to various fees and expenses described in the relevant registration statement.

The Bulletin will also reference the fact that there is no regulated source of last sale information regarding physical commodities and many of the asset classes that the Trust may hold, that the Commission has no jurisdiction over the trading of certain futures contracts.

The Bulletin will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. ET each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5),[36] in particular, that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposal to list and trade the Shares of the Trust will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace.[37] In addition, the listing and trading criteria set forth in the proposed rules are intended to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal**

[33] *See* Commentary .04 to NYSE Arca Equities Rule 7.12.

[34] For a list of current members and affiliate members of ISG, *see http://www.isgportal.org*. The Exchange notes that not all of the components of the Trust may trade on exchanges that are currently members or affiliate members of ISG.

[35] *See* Exchange Confirmation, *supra* note 3.

[36] 15 U.S.C. 78f(b)(5).

[37] *See* Exchange Confirmation, *supra* note 3.

Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml)*; or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2009–30 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2009–30. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2009–30 and should be submitted on or before May 27, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10445 Filed 5–5–09; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59843; File No. SR–NASDAQ–2009–035]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for Members Using the NASDAQ Market Center

April 29, 2009.

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 April 14, 2009, The NASDAQ Stock Market LLC (''NASDAQ'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by 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 pricing for NASDAQ members using the Nasdaq Market Center. This proposed rule change, which is effective upon filing, will become operative on April 15, 2009. 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 modifying its pricing for order execution and routing of equities. As detailed below, NASDAQ is establishing two fee schedules for the month of April, the first is applicable from April 1 through April 14 and the second from April 15 to April 30. The effect of the fee changes will vary with respect to the listing venue of the securities being traded and whether a member is accessing or providing liquidity or routing an order.

Fee Schedule Applicable From April 1 through April 14. For the first half of April, NASDAQ will charge the same ''per transaction'' fees and offer the same ''per transaction'' credits that were approved [sic] [5] and put into effect prior to April 1 through the filing of SR–NASDAQ–2009–029. NASDAQ will modify the fee schedule by reducing the levels of market activity at which members qualify for reduced ''per transaction'' pricing. For firms that meet the reduced market activity requirements, this will result in an effective reduction of transaction-based prices. For firms that do not meet the reduced market activity requirements, there will be no change in fees.

As always, NASDAQ calculates market activity levels on a monthly basis at the end of each month. Therefore, although NASDAQ is not changing the transaction-based fees and rebates for the first half of April and the firms' market activity for this period have already been fixed, firms can still affect their average market activity

[38] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] The Commission does not approve proposed rule changes filed pursuant to Section 19(b)(3)(A) of the Act.

levels for the entire month of April by increasing their market activity on NASDAQ during the second half of April. Firms that increase their activity level to exceed the newly-reduced activity requirements will receive reduced fees per transaction.

The specific changes to market activity requirements are as follows. For securities listed on NASDAQ and the New York Stock Exchange (''NYSE''), NASDAQ is reducing the activity requirements for the tier for members with an average daily volume through the Nasdaq Market Center in all securities of (i) more than 50 million shares of liquidity provided, and (ii) more than 60 million shares of liquidity accessed and/or routed.[6] The new fee schedule will require average daily volume through the Nasdaq Market Center in all securities of (i) more than 35 million shares of liquidity provided, and (ii) more than 55 million shares of liquidity accessed and/or routed. Members qualifying for this tier will continue to pay $0.0026 per share executed when accessing liquidity (or 0.1% of the total transaction cost in the case of executions of securities priced at less than $1 per share). There will be no change to the second pricing tier applicable to members with an average daily volume through the Nasdaq Market Center in all securities of (i) more than 25 million shares of liquidity provided, and (ii) more than 40 million shares of liquidity accessed and/or routed. Members qualifying for this tier will continue to pay $0.0028 per share executed when accessing liquidity (or 0.1% of the total transaction cost in the case of executions at less than $1 per share). As is currently the case, members not qualifying for a reduced pricing tier will pay $0.0030 per share executed to access liquidity (or 0.1% of the total transaction cost in the case of executions at less than $1 per share).

With respect to securities listed on exchanges other than NASDAQ or NYSE, NASDAQ is also modifying the levels of activity required to qualify for favorable pricing tiers while leaving the level of charges and credits associated with tiers unchanged. Thus, in order to qualify for the most favorable fee to access and route liquidity, a member must (i) provide more than 35 million shares of liquidity (currently 50 million) and (ii) access or route more than 55 million shares of liquidity (currently 60 million). Members qualifying for this tier currently pay $0.0029 per share executed to access liquidity or to route after attempting to execute for the full size of the order, and this fee will remain unchanged.[7] Members not qualifying for a reduced pricing tier will continue to pay $0.0030 per share executed to access liquidity and to route after checking the Nasdaq Market Center book for the full size of the order.

NASDAQ is also decreasing the market activity levels required to qualify for the most favorable credits it pays to liquidity providers. With respect to NASDAQ and NYSE-listed securities, currently a member must provide more than 50 million shares of liquidity to qualify for the most favorable pricing tier, where the credit for displayed liquidity is $0.0025 per share, with the credit for non-displayed liquidity remaining at $0.0015 per share. The next most favorable tier currently requires a member to provide a daily average of more than 25 million shares of liquidity, and the credit for displayed liquidity is $0.0022 per share, with the credit for non-displayed liquidity remaining $0.001 per share.[8] Under the revised pricing schedule, members qualify for the most favorable pricing tier by providing 35 million shares of liquidity, and for the second tier by providing 20 million shares of liquidity. Members not qualifying for these pricing tiers will continue to receive $0.001 per share for non-displayed liquidity and $0.002 per share for displayed liquidity.

With respect to securities listed on exchanges other than NASDAQ or NYSE, NASDAQ is also reducing the volume levels required to qualify for favorable credits while the transaction-based pricing will remain unchanged. Thus, in order to qualify for the most favorable credit, a member must provide an average daily volume of more than 35 million shares of liquidity (currently 50 million): The most favorable credit will remain $0.0015 for non-displayed liquidity and $0.0028 for displayed liquidity. To qualify for the next most favorable credit, a member must provide a daily average volume of more than 20 million shares of liquidity (currently 25 million): Members is [sic] this tier receive $0.001 per share for non-displayed liquidity and $0.0025 per share for displayed liquidity. Other members will continue to receive $0.001 per share for non-displayed liquidity and $0.002 per share for displayed liquidity.[9]

Fee Schedule Applicable From April 15 through April 30. For the second half of April, NASDAQ will modify the fee schedule by (1) adopting a uniform transaction fee of $0.0030 per share for accessing liquidity in all securities priced over $1.00, (2) adding a new tier of market activity at which favorable pricing is available, and (3) reducing the transaction-based fees and increasing the transaction-based credits offered for each tier of market activity. For firms that meet reduced market activity requirements, this will result in a reduction of transaction-based prices. For firms that do not meet any reduced market activity requirements, there will be no change in fees. Unless specifically mentioned, all other fees set forth in Rule 7018 regarding the first half of April will remain the same for the second half of April.

Specifically, with respect to credits provided for tiers of liquidity-providing activity, NASDAQ will retain its current tiers of average daily volume of liquidity provided of 20 million and 35 million shares, and add a third tier of credits that will be available to members that provide average daily volume of liquidity of 125 million shares.[10] NASDAQ is also modifying the transaction-based credits paid to liquidity providers in each market activity tier. Members that qualify for the highest tier of market activity by providing an average daily volume of 125 million shares or more will receive a credit of $0.00295 per share, as opposed to $0.0025 that they currently receive with respect to NASDAQ and NYSE stocks and $0.0028 for stocks listed on other exchanges. Members that provide 35 million shares of more will receive a credit of $0.0029 per share as opposed to $0.0025 that they currently receive with respect to NASDAQ and NYSE stocks and $0.0028 for stocks listed on other exchanges. Members that provide 20 million shares or more will receive a credit of $0.0025 per share, as opposed to $0.0022 that they currently receive with respect to NASDAQ and NYSE stocks and the same as currently offered for stocks listed on other exchanges. Finally, members that provide less than 20 million shares will

[6] As is currently the case with respect to reduced pricing tiers, orders that do not attempt to execute in the Nasdaq Market Center for the full size of the order prior to routing are not counted in determining shares of liquidity routed.

[7] For securities priced under $1, the fee to access liquidity remains 0.1% of the total transaction cost, and the fee to route remains 0.3% of the total transaction cost.

[8] All credits described relate to executions of securities priced at $1 or more per share. Both before and after implementation of the proposed rule change, the credit with respect to executions of securities priced at less than $1 per share is $0.

[9] In all cases, no credit is paid with respect to securities priced at less than $1 per share.

[10] Again, average daily volume of liquidity provided is calculated on a monthly basis. Therefore, the daily volume that a member provided during the first half of April will impact the volume tier into which the member falls at the end of April.

receive a credit of $0.0020 per share in all securities as they do today.

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)(4) of the Act,[12] 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. The proposed fee change applies uniformly to all NASDAQ members. The impact of the changes upon the net fees paid by a particular market participant will depend upon a number of variables, including its monthly volume, the prices of its quotes and orders (*i.e.,* its propensity to add or remove liquidity), and the listing venue for the securities that it trades. NASDAQ notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule change reflects a reduction in the overall cost of trading on NASDAQ. Nasdaq believes that the applicable fees and credits remain competitive with those charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to NASDAQ rather than competing venues.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [13] and subparagraph (f)(2) of Rule 19b–4 thereunder.[14] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2009–035 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–2009–035. 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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2009–035, and should be submitted on or before May 27, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Elizabeth M. Murphy,

Secretary.

[FR Doc. E9–10428 Filed 5–5–09; 8:45 am]

BILLING CODE 8010–01–P

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78s(b)(3)(a)(ii).

[14] 17 CFR 240.19b–4(f)(2).

[15] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice: 6605]

Bureau of Oceans, Environment and Science; Certifications Pursuant to Section 609 of Public Law 101–162

SUMMARY: On May 1, 2009, the Department of State certified, pursuant to Section 609 of Public Law 101–162 (''Section 609''), that 15 nations have adopted programs to reduce the incidental capture of sea turtles in their shrimp fisheries comparable to the program in effect in the United States. The Department also certified that the fishing environments in 24 other countries and one economy, Hong Kong, do not pose a threat of the incidental taking of sea turtles protected under Section 609. Shrimp imports from any nation not certified were prohibited effective May 1, 2009 pursuant to Section 609.

DATES: *Effective Date:* On Publication.

FOR FURTHER INFORMATION CONTACT: James J. Hogan, III, Office of Marine Conservation, Bureau of Oceans and International Environmental and Scientific Affairs, Department of State, Washington, DC 20520–7818; telephone: (202) 647–2252.

SUPPLEMENTARY INFORMATION: Section 609 of Public Law 101–162 prohibits imports of certain categories of shrimp unless the President certifies to the Congress not later than May 1 of each year either: (1) That the harvesting nation has adopted a program governing the incidental capture of sea turtles in its commercial shrimp fishery comparable to the program in effect in the United States and has an incidental take rate comparable to that of the United States; or (2) that the fishing environment in the harvesting nation does not pose a threat of the incidental taking of sea turtles. The President has delegated the authority to make this certification to the Department of State. Revised State Department guidelines for making the required certifications were published in the **Federal Register** on July 2, 1999 (Vol. 64, No. 130, Public Notice 3086).

On May 1, 2009, the Department certified 15 nations on the basis that

their sea turtle protection programs are comparable to that of the United States: Belize, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Madagascar, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Suriname, and Venezuela.

The Department also certified 24 shrimp harvesting nations and one economy as having fishing environments that do not pose a danger to sea turtles. Sixteen nations have shrimping grounds only in cold waters where the risk of taking sea turtles is negligible. They are: Argentina, Belgium, Canada, Chile, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Norway, Russia, Sweden, the United Kingdom, and Uruguay. Eight nations and one economy only harvest shrimp using small boats with crews of less than five that use manual rather than mechanical means to retrieve nets, or catch shrimp using other methods that do not threaten sea turtles. Use of such small-scale technology does not adversely affect sea turtles. The eight nations and one economy are: the Bahamas, China, the Dominican Republic, Fiji, Hong Kong, Jamaica, Oman, Peru and Sri Lanka.

The 2009 recommendation for certification changes Costa Rica's status by de-certifying that country. For several years, OES/OMC has been accumulating data, both through certification visits and from credible third-party sources suggesting that Costa Rica's program did not provide sanctions for TED violations that served as an effective deterrent against the failure to use TEDs. In meetings with senior Costa Rican fisheries officials during the December 2008 certification visit, the State Department representative stressed that without rapid remedial action Costa Rica's certification might be compromised. Costa Rican officials were aware of the issue and promised to resolve it early in 2009. However, the United States Embassy in San Jose reports that since that December visit Costa Rican authorities have not taken all the action they promised. Additionally, third parties, including Costa Rican Non-Governmental Organizations (NGOs), have written OES/OMC saying that TED violations in Costa Rica still go unpunished. Because of Costa Rica's ineffective enforcement mechanism for TEDs violations, the State Department has concluded that Costa Rica's regulatory program governing the incidental take of sea turtles is not currently comparable to that of the United States.

The Department of State has communicated the certifications under Section 609 to the Office of Field Operations of U.S. Customs and Border Protection.

In addition, this **Federal Register** Notice confirms that the requirement for all DS–2031 forms from uncertified nations must be originals and signed by the competent domestic fisheries authority. This policy change was first announced in a Department of State media note released on December 21, 2004. In order for shrimp harvested with Turtle Excluder Devices (TEDs) in an uncertified nation to be eligible for importation into the United States under the exemption: ''Shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States'', the Department of State must determine in advance that the government of the harvesting nation has put in place adequate procedures to ensure the accurate completion of the DS–2031 forms. At this time, the Department has made such a determination only with respect to Brazil and Australia. Thus, the importation of TED-caught shrimp from any other uncertified nation will not be allowed. For Brazil, only shrimp harvested in the northern shrimp fishery are eligible for entry under this exemption. For Australia, shrimp harvested in the Exmouth, Northern Prawn Fishery and Torres Strait Fishery are eligible for entry under this exemption.

In addition, the Department has already made a determination with regard to wild-harvest shrimp harvested in the Spencer Gulf region in Australia. This product may be exported to the U.S. using a DS–2031 under the exemption for ''shrimp harvested in a manner or under circumstances determined by the Department of State not to pose a threat of the incidental taking of sea turtles.'' An official of the Government of Australia still also must certify the DS–2031.

Dated: April 30, 2009.

Margaret F. Hayes,

Acting Deputy Assistant Secretary for Oceans and Fisheries, Department of State.

[FR Doc. E9–10497 Filed 5–5–09; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 6604]

Notice of Meeting

Title: Notification of a Public Meeting on Section 202 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Pub. L. 110–457).

SUMMARY: The U.S. Department of State is holding a public meeting on Thursday, May 21, 2009 at 1 p.m. at the Department of State, 2201 C Street, NW., Washington, DC 20520, in the Loy Henderson Auditorium. The purpose of the meeting is to allow non-governmental organizations, and others with expertise on the legal rights of workers and victims of severe forms of trafficking in persons, to provide their expertise and input into the development and distribution of an information pamphlet on the legal rights and resources for aliens applying for employment- or education-based nonimmigrant visas. This is pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, specifically section 202, *Protections for domestic workers and other nonimmigrants.* This Act defines ''employment- or education-based nonimmigrant visa'' as a nonimmigrant visa issued under subparagraph (A)(iii), (G)(v), (H), or (J) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)); and any nonimmigrant visa issued to a personal or domestic servant who is accompanying or following to join an employer. Organizations or individuals may also submit written comments to be considered by the Department of State as it develops this information pamphlet.

DATES: RSVP for the Public Meeting must be sent by COB May 18, 2009 to Dabrina Wills at: *WillsDE2@state.gov* in order to facilitate the security clearance process for entry into the Department of State. RSVP must include name, date of birth, and either a driver's license number or passport number; and any request for reasonable accommodation, if applicable. Requests for reasonable accommodation received after May 14 will be considered but might not be possible to fill. Attendees will use the C Street Entrance. Written comments must be submitted on or before May 25, 2009.

ADDRESSES: You may submit written comments to: *TVPRAinfopamphlet@state.gov* or, if you have access to the internet, you may submit written comments electronically at the following address: *http://www.regulations.gov/search/index.jsp.* Please note that comments posted on regulations.gov will be accessible to the general public.

FOR FURTHER INFORMATION CONTACT: Amy O'Neill Richard, Office To Monitor and Combat Trafficking in Persons, U.S.

Department of State, *oneillaw@state.gov* or (202) 312–9642

SUPPLEMENTARY INFORMATION:

Background

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Pub. L. 110–457), section 202, *Protections for domestic workers and other nonimmigrants,* calls for the development and distribution of an information pamphlet on the legal rights and resources for aliens applying for employment- or education-based nonimmigrant visas, as defined in the Act. The contents of the information pamphlet will include information on the nonimmigrant visa application process; the legal rights of employment- or education-based nonimmigrant visa holders under Federal immigration, labor, and employment law; the illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and worker exploitation in the United States; and the legal rights of immigrant victims of trafficking in persons and worker exploitation. It will also include information about non-governmental organizations that provide services for victims of trafficking in persons and worker exploitation.

Once completed, the information pamphlet will be translated into all relevant foreign languages to be determined by the Secretary of State based on the languages spoken by the greatest concentrations of employment- or education-based nonimmigrant visa applicants. The information will then be posted on federal Web sites and made available to any government agency, non-governmental advocacy organization, or foreign labor broker doing business in the United States. If Consular officers conducting interviews with aliens in these visa categories cannot confirm that the alien has received, read, and understood the contents of the pamphlet, then the Consular Officer will go over the contents of the pamphlet with the alien during the interview and answer any questions the alien may have concerning the information discussed.

Dated: April 30, 2009.

Nan Kennelly,

Acting Office Director, Office To Monitor and Combat Trafficking in Persons, Department of State.

[FR Doc. E9–10491 Filed 5–5–09; 8:45 am]

BILLING CODE 4710–17–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) during the Week Ending April 25, 2009.

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (*See* 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions To Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2004–19077, DOT–OST–2007–28567 and DOT–OST–2007–22228.

Date Filed: April 20, 2009.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: May 11, 2009.

Description: Application of Northwest Airlines, Inc. (''Northwest'') requesting a renewal of the exemption and certificate authority set forth in Attachment A, which enable Northwest to offer scheduled foreign air transportation of persons, property and mail between the United States and various foreign points.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. E9–10474 Filed 5–5–09; 8:45 am]

BILLING CODE 4910–9X–P

Federal Register

Wednesday,
May 6, 2009

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2010; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1538–P]

RIN 0938–AP56

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2010

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would update the payment rates for inpatient rehabilitation facilities (IRFs) for Federal fiscal year (FY) 2010 (for discharges occurring on or after October 1, 2009 and on or before September 30, 2010) as required under section 1886(j)(3)(C) of the Social Security Act (the Act). Section 1886(j)(5) of the Act requires the Secretary to publish in the **Federal Register** on or before the August 1 that precedes the start of each fiscal year, the classification and weighting factors for the IRF prospective payment system's (PPS) case-mix groups and a description of the methodology and data used in computing the prospective payment rates for that fiscal year.

We are proposing to revise existing policies regarding the IRF PPS within the authority granted under section 1886(j) of the Act.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 29, 2009.

ADDRESSES: In commenting, please refer to file code CMS–1538–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' and enter the file code to find the document accepting comments.

2. *By regular mail.* You may send written comments by regular mail (one original and two copies) to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1538–P, P.O. Box 8012, Baltimore, MD 21244–8012.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) by express or overnight mail to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1538–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–8012.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to either of the following addresses.

a. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.

b. 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Julie Stankivic, (410) 786–5725, for general information regarding the proposed rule.

Susanne Seagrave, (410) 786–0044, for information regarding the payment policies.

Jeanette Kranacs, (410) 786–9385, for information regarding the wage index.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

Table of Contents

Acronyms

Because of the many terms to which we refer by acronym in this proposed rule, we are listing the acronyms used and their corresponding terms in alphabetical order below.

ADC Average Daily Census
ASCA Administrative Simplification Compliance Act, Pub. L. 107–105
BBA Balanced Budget Act of 1997, Pub. L. 105–33
BBRA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999, Pub. L. 106–113
BIPA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Benefits Improvement and Protection Act of 2000, Pub. L. 106–554
CBSA Core-Based Statistical Area
CCR Cost-to-Charge Ratio
CFR Code of Federal Regulations
CMG Case-Mix Group
DRG Diagnostic Related Group
DSH Disproportionate Share Hospital
FI Fiscal Intermediary
FR Federal Register
FTE Full-time Equivalent
FY Federal Fiscal Year
HCFA Health Care Financing Administration
HHH Hubert H. Humphrey Building
HIPAA Health Insurance Portability and Accountability Act, Pub. L. 104–191
IOM Internet Only Manual
IPF Inpatient Psychiatric Facility
IPPS Inpatient Prospective Payment System
IRF Inpatient Rehabilitation Facility
IRF–PAI Inpatient Rehabilitation Facility—Patient Assessment Instrument
IRF PPS Inpatient Rehabilitation Facility Prospective Payment System
IRVEN Inpatient Rehabilitation Validation and Entry
LTCH Long Term Care Hospital
LIP Low-Income Percentage
MA Medicare Advantage
MAC Medicare Administrative Contractor
MBPM Medicare Benefit Policy Manual
MMSEA Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. 110–173
OMB Office of Management and Budget
PAI Patient Assessment Instrument
PPS Prospective Payment System
QIC Qualified Independent Contractors
RAC Recovery Audit Contractors
RAND RAND Corporation
RFA Regulatory Flexibility Act, Pub. L. 96–354
RIA Regulatory Impact Analysis
RIC Rehabilitation Impairment Category
RPL Rehabilitation, Psychiatric, and Long-Term Care Hospital Market Basket
SCHIP State Children's Health Insurance Program

I. Background

A. Historical Overview of the Inpatient Rehabilitation Facility Prospective Payment System (IRF PPS)

Section 4421 of the Balanced Budget Act of 1997 (BBA), Pub. L. 105–33, as amended by section 125 of the Medicare, Medicaid, and SCHIP (State Children's Health Insurance Program) Balanced Budget Refinement Act of 1999 (BBRA), Pub. L. 106–113, and by section 305 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), Pub. L. 106–554, provides for the implementation of a per discharge prospective payment system (PPS) under section 1886(j) of the Social Security Act (the Act) for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (hereinafter referred to as IRFs).

Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs) but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and other services or items outside the scope of the IRF PPS. Although a complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), we are providing below a general description of the IRF PPS for fiscal years (FYs) 2002 through 2009.

Under the IRF PPS from FY 2002 through FY 2005, as described in the FY 2002 IRF PPS final rule (66 FR 41316), the Federal prospective payment rates were computed across 100 distinct case-mix groups (CMGs). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed five special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the Federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget neutral conversion factor). For a detailed discussion of the budget neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted Federal prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRF's unadjusted Federal prospective payment rates.

For cost reporting periods that began on or after January 1, 2002 and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the Federal IRF PPS rate and the payment that the IRF would have received had the IRF PPS not been implemented. This provision also allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the Federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the Federal IRF PPS rate.

We established a CMS Web site as a primary information resource for the IRF PPS. The Web site URL is *http://www.cms.hhs.gov/InpatientRehabFacPPS/* and may be accessed to download or view publications, software, data specifications, educational materials, and other information pertinent to the IRF PPS.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the

IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS final rule (70 FR 57166) that we published on September 30, 2005, we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of OMB's Core-Based Statistical Area (CBSA) market definitions, modifications to the CMGs, tier comorbidities, and CMG relative weights, implementation of a new teaching status adjustment for IRFs, revision and rebasing of the IRF market basket, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Any reference to the FY 2006 IRF PPS final rule in this proposed rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166).

In the FY 2007 IRF PPS final rule (71 FR 48354), we further refined the IRF PPS case-mix classification system (the CMG relative weights) and the case-level adjustments, to ensure that IRF PPS payments continue to reflect as accurately as possible the costs of care. For a detailed discussion of the FY 2007 policy revisions, please refer to the FY 2007 IRF PPS final rule (71 FR 48354).

In the FY 2008 IRF PPS final rule (72 FR 44284), we updated the Federal prospective payment rates and the outlier threshold, revised the IRF wage index policy, and clarified how we determine high-cost outlier payments for transfer cases. For more information on the policy changes implemented for FY 2008, please refer to the FY 2008 IRF PPS final rule (72 FR 44284), in which we published the final FY 2008 IRF Federal prospective payment rates.

After publication of the FY 2008 IRF PPS final rule (72 FR 44284), section 115 of the Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. 110–173 (MMSEA), amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. Section 1886(j)(3)(C) of the Act requires the Secretary to develop an increase factor to update the IRF Federal prospective payment rates for each FY. Based on the legislative change to the increase factor, we revised the FY 2008 Federal prospective payment rates for IRF discharges occurring on or after April 1, 2008. Thus, the final FY 2008 IRF Federal prospective payment rates that were published in the FY 2008 IRF PPS final rule (72 FR 44284) were effective for discharges occurring on or after October 1, 2007 and on or before March 31, 2008; and the revised FY 2008 IRF Federal prospective payment rates were effective for discharges occurring on or after April 1, 2008 and on or before September 30, 2008. The revised FY 2008 Federal prospective payment rates are available on the CMS Web site at *http://www.cms.hhs.gov/InpatientRehabFacPPS/07_DataFiles.asp#TopOfPage.*

In the FY 2009 IRF PPS final rule (73 FR 46370), we updated the CMG relative weights, the average length of stay values, and the outlier threshold; clarified IRF wage index policies regarding the treatment of ''New England deemed'' counties and multi-campus hospitals; and revised the regulation text in response to section 115 of the MMSEA to set the IRF compliance percentage at 60 percent (''the 60 percent rule'') and continue the practice of including comorbidities in the calculation of compliance percentages. We also applied a zero percent increase factor for FY 2009. For more information on the policy changes implemented for FY 2009, please refer to the FY 2009 IRF PPS final rule (73 FR 46370), in which we published the final FY 2009 IRF Federal prospective payment rates.

B. Operational Overview of the Current IRF PPS

As described in the FY 2002 IRF PPS final rule, upon the admission and discharge of a Medicare Part A fee-for-service patient, the IRF is required to complete the appropriate sections of a patient assessment instrument (PAI), the Inpatient Rehabilitation Facility-Patient Assessment Instrument (IRF–PAI). All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the GROUPER software. The GROUPER software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The GROUPER software produces a five-digit CMG number. The first digit is an alpha-character that indicates the comorbidity tier. The last four digits represent the distinct CMG number. Free downloads of the Inpatient Rehabilitation Validation and Entry (IRVEN) software product, including the GROUPER software, are available on the CMS Web site at *http://www.cms.hhs.gov/InpatientRehabFacPPS/06_Software.asp.*

Once a patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104–191, compliant electronic claim or, if the Administrative Compliance Act (ASCA), Pub. L. 107–105, permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-digit CMG number and sends it to the appropriate Medicare fiscal intermediary (FI) or Medicare Administrative Contractor (MAC). Claims submitted to Medicare must comply with both ASCA and HIPAA.

Section 3 of the ASCA amends section 1862(a) of the Act by adding paragraph (22) which requires the Medicare program, subject to section 1862(h) of the Act, to deny payment under Part A or Part B for any expenses for items or services ''for which a claim is submitted other than in an electronic form specified by the Secretary.'' Section 1862(h) of the Act, in turn, provides that the Secretary shall waive such denial in situations in which there is no method available for the submission of claims in an electronic form or the entity submitting the claim is a small provider. In addition, the Secretary also has the authority to waive such denial ''in such unusual cases as the Secretary finds appropriate.'' For more information we refer the reader to the final rule, ''Medicare Program; Electronic Submission of Medicare Claims'' (70 FR 71008, November 25, 2005). CMS instructions for the limited number of Medicare claims submitted on paper are available at: (*http://www.cms.hhs.gov/manuals/downloads/clm104c25.pdf.*)

Section 3 of the ASCA operates in the context of the administrative simplification provisions of HIPAA, which include, among others, the requirements for transaction standards and code sets codified in 45 CFR, parts 160 and 162, subparts A and I through R (generally known as the Transactions Rule). The Transactions Rule requires covered entities, including covered healthcare providers, to conduct covered electronic transactions according to the applicable transaction standards. (See the program claim memoranda issued and published by CMS at: *http://www.cms.hhs.gov/ElectronicBillingEDITrans/* and listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600).

The Medicare FI or MAC processes the claim through its software system. This software system includes pricing programming called the ''PRICER'' software. The PRICER software uses the

CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the new teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

II. Summary of Provisions of the Proposed Rule

In this proposed rule, we are proposing updates to the IRF PPS, revisions to existing regulations text for the purpose of providing greater clarity, new regulations text to improve calculation of compliance with the ''60 percent'' rule, and rescission of an outdated Health Care Financing Administration (HFCA) Ruling (HCFAR 85–2–1). These proposals are as follows:

A. Proposed Updates to the IRF PPS for Federal Fiscal Year (FY) 2010

- Update the FY 2010 IRF PPS relative weights and average length of stay values using the most current and complete Medicare claims and cost report data in a budget neutral manner, as discussed in section III.
- Update the FY 2010 IRF facility-level adjustments (rural, LIP, and teaching status adjustments) using the most current and complete Medicare claims and cost report data in a budget neutral manner, as discussed in section IV.
- Update the FY 2010 IRF PPS payment rates by the proposed market basket, as discussed in section V.A.
- Update the FY 2010 IRF PPS payment rates by the proposed wage index and the labor-related share in a budget neutral manner, as discussed in section V.A and V.B.
- Update the outlier threshold amount for FY 2010, as discussed in section VI.A.

B. Proposed Revisions to Existing Regulation Text

- Relocate and revise the criteria to be classified as an inpatient rehabilitation hospital found at existing § 412.23(b)(3) through (b)(7) that describe requirements relating to preadmission screening, close medical supervision, a director of rehabilitation, the plan of care, and a coordinated multidisciplinary team approach. Redesignate paragraphs (b)(8) and (b)(9) of § 412.23 as paragraphs (b)(3) and (b)(4) and revise newly redesignated paragraph (b)(4), as described in section VII.
- Revise the section heading at § 412.29 that describes the additional requirements applicable to inpatient rehabilitation units to include inpatient rehabilitation hospitals, as described in section VII.
- Relocate and revise the existing requirements at § 412.29(b) through (f) that describe the requirements relating to preadmission screening, close medical supervision, a director of rehabilitation, the plan of care, and a coordinated multidisciplinary team approach, as described in section VII.
- Revise the section heading at § 412.30 that describes the requirements applicable to new and converted rehabilitation units, as described in section VII.
- Revise the regulation text in § 412.604, § 412.606, § 412.610. § 412.614 and § 412.618 to require the collection of inpatient rehabilitation facility patient assessment instrument data on Medicare Part C (Medicare Advantage) patients in IRFs for use in the 60 percent rule compliance percentage calculations, as described in section VIII.
- Remove § 412.614(a)(3) that provides for an exception in the transmission of IRF–PAI data to CMS, as described in section VIII.
- Revise the heading at § 412.614(d) to ''Consequences of failure to submit complete and timely IRF–PAI data, as required under paragraph (c) of this section,'' as described in section VIII.
- Revise the heading at § 412.614(d)(1) to ''Medicare Part A fee-for-service data,'' as described in section VIII.
- Redesignate existing subsection (1) as (1)(a) and correct a technical error in the new subsection (1)(a), as described in section VIII.
- Redesignate existing subsection (2) as (1)(b), as described in section VIII.

C. Proposed New Regulation Text

- Revise § 412.29, as described in section VII, to include the additional requirements to be met by inpatient rehabilitation hospitals and units and the requirements for coverage in an IRF.
- Add a new introductory paragraph at § 412.30 that includes the requirements previously found in § 412.29(a) (describing the requirements for new and converted rehabilitation units), as described in section VII.
- Revise § 412.610(f) to require that the IRF provide a copy of the electronic computer file format of the IRF–PAI to the contractor upon request, as described in section VII.
- Add a new paragraph § 412.614(d)(2) to indicate that failure of an IRF to submit IRF–PAI data on all of its Medicare Part C (Medicare Advantage) patients will result in forfeiture of the IRF's ability to have any of its Medicare Part C (Medicare Advantage) data used in the compliance calculations, as described in section VIII.

D. Proposed Rescission of Outdated HCFAR–85–2–1

Rescind HCFA Ruling 85–2–1 entitled ''Medicare Criteria for Medicare Coverage of Inpatient Hospital Rehabilitation Services'' and set forth new coverage criteria applicable to care provided by IRFs, as described in section VIII.

Proposed Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2010

As specified in 42 CFR 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support beneficiary access to care as well as provider efficiency.

In this proposed rule, we propose to update the CMG relative weights and average length of stay values for FY 2010. Comments on the FY 2009 IRF PPS proposed rule (73 FR 46373) suggested that the data that we used for FY 2009 to update the CMG relative weights and average length of stay values did not fully reflect recent changes in IRF utilization that have occurred because of changes in the IRF compliance percentage and the consequences of recent IRF medical necessity reviews. In light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of these recent changes and that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time.

As required by statute, we always use the most recent available data to update the CMG relative weights and average length of stay values. For FY 2009,

however, those data were the FY 2006 IRF cost report data. As noted above, many commenters on the FY 2009 IRF PPS proposed rule (73 FR 46373) suggested that the FY 2006 IRF cost report data were not fully reflective of the recent IRF utilization changes and that the FY 2007 IRF cost report data would be more reflective of these changes. We were unable to use the FY 2007 IRF cost report data for the FY 2009 final rule (73 FR 46370) because, as we indicated in that rule, only a small portion of the FY 2007 IRF cost reports were available for analysis at that time. Thus, we used the most current and complete IRF cost report data available at that time.

At this time, the majority of FY 2007 IRF cost reports are available for use in analyses in this proposed rule. Thus, we are using FY 2007 cost report data to update the proposed FY 2010 CMG relative weights and average length of stay values in this proposed rule.

In this proposed rule, we propose to use the same methodology that we used to update the CMG relative weights and average length of stay values in the FY 2009 IRF PPS final rule (73 FR 46370). In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process used to calculate the CMG relative weights for this proposed rule follows below:

Step 1. We calculate the CMG relative weights by estimating the effects that comorbidities have on costs.

Step 2. We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

Step 3. We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

Step 4. We normalize the FY 2010 CMG relative weight to the same average CMG relative weight from the CMG relative weights implemented in the FY 2009 IRF PPS final rule (73 FR 46370).

Consistent with the way we implemented changes to the IRF classification system in the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166), the FY 2007 IRF PPS final rule (71 FR 48354), and the FY 2009 IRF PPS final rule (73 FR 46370), we propose to make changes to the CMG relative weights for FY 2010 in such a way that total estimated aggregate payments to IRFs for FY 2010 would be the same with or without the proposed changes (that is, in a budget neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate proposed budget neutrality factor for use in updating the FY 2010 CMG relative weights, we propose to use the following steps:

Step 1. Calculate the estimated total amount of IRF PPS payments for FY 2010 (with no proposed changes to the CMG relative weights).

Step 2. Apply the proposed changes to the CMG relative weights (as discussed above) to calculate the estimated total amount of IRF PPS payments for FY 2010.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the proposed budget neutrality factor (*1.0004*) that would maintain the same total estimated aggregate payments in FY 2010 with and without the proposed changes to the CMG relative weights.

Step 4. Apply the proposed budget neutrality factor (1.0004) to the FY 2009 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section V.C of this proposed rule, we discuss the proposed methodology for calculating the standard payment conversion factor for FY 2010.

Table 1 below, ''Proposed Relative Weights and Average Length of Stay Values for Case-Mix Groups,'' presents the CMGs, the comorbidity tiers, the proposed corresponding relative weights, and the proposed average length of stay values for each CMG and tier for FY 2010. The average length of stay for each CMG is used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment. The proposed relative weights and average length of stay values shown in Table 1 are subject to change for the final rule if more recent data become available for use in these analyses.

TABLE 1—PROPOSED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS

CMG	CMG description (M=motor, C=cognitive, A=age)	Proposed relative weight				Proposed average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0101	Stroke M > 51.05	0.7687	0.7091	0.6360	0.6046	9	10	9	8
0102	Stroke M > 44.45 and M < 51.05 and C > 18.5.	0.9676	0.8926	0.8006	0.7611	11	11	11	10
0103	Stroke M > 44.45 and M < 51.05 and C < 18.5.	1.1434	1.0548	0.9461	0.8994	14	14	12	12
0104	Stroke M > 38.85 and M < 44.45.	1.2167	1.1225	1.0068	0.9570	13	14	13	13
0105	Stroke M > 34.25 and M < 38.85.	1.4313	1.3205	1.1843	1.1258	16	18	15	15
0106	Stroke M > 30.05 and M < 34.25.	1.6634	1.5345	1.3763	1.3083	19	19	17	17
0107	Stroke M > 26.15 and M < 30.05.	1.8955	1.7486	1.5684	1.4909	20	21	19	19
0108	Stroke M < 26.15 and A > 84.5.	2.2786	2.1021	1.8854	1.7922	28	26	23	22
0109	Stroke M > 22.35 and M < 26.15 and A < 84.5.	2.1740	2.0057	1.7989	1.7100	22	23	21	22
0110	Stroke M < 22.35 and A < 84.5.	2.7212	2.5104	2.2516	2.1404	30	30	27	26
0201	Traumatic brain injury M > 53.35 and C > 23.5.	0.7736	0.6581	0.5909	0.5368	11	10	8	8
0202	Traumatic brain injury M > 44.25 and M < 53.35 and C > 23.5.	1.0344	0.8800	0.7901	0.7177	14	11	10	10

TABLE 1—PROPOSED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description (M=motor, C=cognitive, A=age)	Proposed relative weight				Proposed average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0203	Traumatic brain injury M > 44.25 and C < 23.5.	1.1675	0.9933	0.8918	0.8101	12	13	12	11
0204	Traumatic brain injury M > 40.65 and M < 44.25.	1.2977	1.1040	0.9913	0.9005	15	14	13	12
0205	Traumatic brain injury M > 28.75 and M < 40.65.	1.5866	1.3498	1.2120	1.1009	20	17	16	14
0206	Traumatic brain injury M > 22.05 and M < 28.75.	1.9678	1.6741	1.5032	1.3655	21	21	18	18
0207	Traumatic brain injury M < 22.05.	2.6606	2.2636	2.0324	1.8462	36	28	25	22
0301	Non-traumatic brain injury M > 41.05.	1.1006	0.9303	0.8372	0.7664	12	12	11	10
0302	Non-traumatic brain injury M > 35.05 and M < 41.05.	1.3956	1.1797	1.0615	0.9719	14	15	13	13
0303	Non-traumatic brain injury M > 26.15 and M < 35.05.	1.6795	1.4197	1.2775	1.1696	17	18	16	15
0304	Non-traumatic brain injury M < 26.15.	2.3029	1.9466	1.7517	1.6037	28	23	21	20
0401	Traumatic spinal cord injury M > 48.45.	0.9262	0.7974	0.7669	0.6573	12	12	11	9
0402	Traumatic spinal cord injury M > 30.35 and M < 48.45.	1.3955	1.2013	1.1554	0.9903	17	15	16	13
0403	Traumatic spinal cord injury M > 16.05 and M < 30.35.	2.2854	1.9675	1.8922	1.6218	27	23	23	21
0404	Traumatic spinal cord injury M < 16.05 and A > 63.5.	4.0113	3.4532	3.3211	2.8464	52	40	37	35
0405	Traumatic spinal cord injury M < 16.05 and A < 63.5.	3.0911	2.6610	2.5592	2.1935	45	30	29	27
0501	Non-traumatic spinal cord injury M > 51.35.	0.8120	0.6408	0.5930	0.5226	9	10	8	8
0502	Non-traumatic spinal cord injury M > 40.15 and M < 51.35.	1.1022	0.8698	0.8049	0.7094	13	11	11	10
0503	Non-traumatic spinal cord injury M > 31.25 and M < 40.15.	1.4364	1.1336	1.0491	0.9245	16	14	13	13
0504	Non-traumatic spinal cord injury M > 29.25 and M < 31.25.	1.7306	1.3658	1.2639	1.1139	21	17	16	15
0505	Non-traumatic spinal cord injury M > 23.75 and M < 29.25.	2.0466	1.6151	1.4947	1.3172	23	21	19	17
0506	Non-traumatic spinal cord injury M < 23.75.	2.8482	2.2478	2.0801	1.8332	32	27	26	23
0601	Neurological M > 47.75	0.9213	0.7561	0.7165	0.6517	11	9	10	9
0602	Neurological M > 37.35 and M < 47.75.	1.2343	1.0130	0.9598	0.8730	12	13	12	12
0603	Neurological M > 25.85 and M < 37.35.	1.5714	1.2897	1.2220	1.1115	16	16	15	15
0604	Neurological M < 25.85	2.0876	1.7133	1.6235	1.4766	24	21	20	18
0701	Fracture of lower extremity M > 42.15.	0.9097	0.7723	0.7302	0.6542	11	11	10	9
0702	Fracture of lower extremity M > 34.15 and M < 42.15.	1.2047	1.0228	0.9671	0.8664	14	14	12	12
0703	Fracture of lower extremity M > 28.15 and M < 34.15.	1.4750	1.2523	1.1841	1.0609	16	16	15	14
0704	Fracture of lower extremity M < 28.15.	1.8842	1.5997	1.5126	1.3552	20	20	19	17
0801	Replacement of lower extremity joint M > 49.55.	0.6950	0.5693	0.5176	0.4707	8	7	8	7
0802	Replacement of lower extremity joint M > 37.05 and M < 49.55.	0.9315	0.7631	0.6938	0.6309	10	10	9	9
0803	Replacement of lower extremity joint M > 28.65 and M < 37.05 and A > 83.5.	1.3298	1.0894	0.9904	0.9007	13	13	13	12
0804	Replacement of lower extremity joint M > 28.65 and M < 37.05 and A < 83.5.	1.1654	0.9547	0.8680	0.7893	13	12	11	11

TABLE 1—PROPOSED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description (M=motor, C=cognitive, A=age)	Proposed relative weight				Proposed average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
0805	Replacement of lower extremity joint M > 22.05 and M < 28.65.	1.4552	1.1921	1.0838	0.9856	16	16	13	13
0806	Replacement of lower extremity joint M < 22.05.	1.8041	1.4779	1.3436	1.2219	18	18	17	15
0901	Other orthopedic M > 44.75	0.8415	0.7586	0.6834	0.6029	10	10	9	9
0902	Other orthopedic M > 34.35 and M < 44.75.	1.1248	1.0140	0.9135	0.8059	13	13	12	11
0903	Other orthopedic M > 24.15 and M < 34.35.	1.4546	1.3113	1.1813	1.0422	16	16	15	14
0904	Other orthopedic M < 24.15	1.9249	1.7352	1.5633	1.3791	22	22	19	18
1001	Amputation, lower extremity M > 47.65.	0.9396	0.9140	0.7841	0.7190	11	12	11	10
1002	Amputation, lower extremity M > 36.25 and M < 47.65.	1.2481	1.2141	1.0416	0.9550	14	15	13	12
1003	Amputation, lower extremity M < 36.25.	1.8120	1.7627	1.5122	1.3865	19	22	19	17
1101	Amputation, non-lower extremity M > 36.35.	1.1979	0.9863	0.9863	0.8490	12	12	13	11
1102	Amputation, non-lower extremity M < 36.35.	1.7482	1.4394	1.4394	1.2389	18	18	17	15
1201	Osteoarthritis M > 37.65	1.0475	0.9619	0.8526	0.7588	11	12	11	10
1202	Osteoarthritis M > 30.75 and M < 37.65.	1.3064	1.1998	1.0634	0.9464	14	15	13	13
1203	Osteoarthritis M < 30.75	1.6446	1.5103	1.3387	1.1914	16	18	17	15
1301	Rheumatoid, other arthritis M > 36.35.	1.1050	0.9958	0.8482	0.7584	12	12	11	10
1302	Rheumatoid, other arthritis M > 26.15 and M < 36.35.	1.4925	1.3451	1.1456	1.0243	15	16	14	14
1303	Rheumatoid, other arthritis M < 26.15.	1.9358	1.7445	1.4858	1.3285	24	22	19	17
1401	Cardiac M > 48.85	0.8086	0.7359	0.6488	0.5737	10	10	9	8
1402	Cardiac M > 38.55 and M < 48.85.	1.1101	1.0104	0.8907	0.7877	13	13	12	11
1403	Cardiac M > 31.15 and M < 38.55.	1.3542	1.2325	1.0866	0.9609	15	15	14	13
1404	Cardiac M < 31.15	1.7581	1.6002	1.4107	1.2475	20	20	17	16
1501	Pulmonary M > 49.25	0.9737	0.8538	0.7507	0.7139	11	12	10	10
1502	Pulmonary M > 39.05 and M < 49.25.	1.2407	1.0879	0.9565	0.9097	13	13	12	11
1503	Pulmonary M > 29.15 and M < 39.05.	1.5710	1.3776	1.2112	1.1519	16	17	14	14
1504	Pulmonary M < 29.15	1.9666	1.7245	1.5162	1.4419	22	19	17	17
1601	Pain syndrome M > 37.15	1.0995	0.8921	0.7628	0.7055	13	13	10	10
1602	Pain syndrome M > 26.75 and M < 37.15.	1.4832	1.2034	1.0290	0.9518	16	16	13	13
1603	Pain syndrome M < 26.75	1.9071	1.5473	1.3231	1.2238	21	19	17	16
1701	Major multiple trauma without brain or spinal cord injury M > 39.25.	1.0471	0.9262	0.8483	0.7476	11	12	11	10
1702	Major multiple trauma without brain or spinal cord injury M > 31.05 and M < 39.25.	1.3692	1.2110	1.1092	0.9776	14	15	14	13
1703	Major multiple trauma without brain or spinal cord injury M > 25.55 and M < 31.05.	1.6479	1.4575	1.3350	1.1765	18	17	16	15
1704	Major multiple trauma without brain or spinal cord injury M < 25.55.	2.0704	1.8312	1.6773	1.4782	23	24	21	19
1801	Major multiple trauma with brain or spinal cord injury M > 40.85.	1.2289	0.9679	0.9097	0.7838	16	13	13	11
1802	Major multiple trauma with brain or spinal cord injury M > 23.05 and M < 40.85.	1.8447	1.4528	1.3655	1.1766	19	18	16	15
1803	Major multiple trauma with brain or spinal cord injury M < 23.05.	3.1568	2.4862	2.3367	2.0135	41	31	27	24
1901	Guillain Barre M > 35.95	1.1168	0.9120	0.9120	0.8640	14	11	11	12

TABLE 1—PROPOSED RELATIVE WEIGHTS AND AVERAGE LENGTH OF STAY VALUES FOR CASE-MIX GROUPS—Continued

CMG	CMG description (M=motor, C=cognitive, A=age)	Proposed relative weight				Proposed average length of stay			
		Tier 1	Tier 2	Tier 3	None	Tier 1	Tier 2	Tier 3	None
1902	Guillain Barre M > 18.05 and M < 35.95.	2.2757	1.8585	1.8585	1.7607	25	23	25	22
1903	Guillain Barre M < 18.05	3.6152	2.9523	2.9523	2.7970	33	39	41	32
2001	Miscellaneous M > 49.15	0.8798	0.7281	0.6613	0.5922	11	10	9	8
2002	Miscellaneous M > 38.75 and M < 49.15.	1.1850	0.9807	0.8907	0.7977	12	13	12	11
2003	Miscellaneous M > 27.85 and M < 38.75.	1.5208	1.2585	1.1431	1.0236	16	16	14	13
2004	Miscellaneous M < 27.85	2.0336	1.6829	1.5286	1.3688	22	20	19	17
2101	Burns M > 0	2.2605	2.2605	1.9566	1.6843	25	25	25	17
5001	Short-stay cases, length of stay is 3 days or fewer.				0.1465				3
5101	Expired, orthopedic, length of stay is 13 days or fewer.				0.6748				8
5102	Expired, orthopedic, length of stay is 14 days or more.				1.5299				19
5103	Expired, not orthopedic, length of stay is 15 days or fewer.				0.7087				9
5104	Expired, not orthopedic, length of stay is 16 days or more.				1.9990				24

Generally, updates to the CMG relative weights result in some increases and some decreases to the CMG relative weight values. Table 2 shows, overall, how the proposed revisions in this proposed rule would affect particular CMG relative weight values, which affect the overall distribution of payments within CMGs and tiers. Note that, because we propose to implement the CMG relative weight revisions in a budget neutral manner, total estimated aggregate payments to IRFs for FY 2010 would not be affected. However, the proposed revisions would affect the distribution of payments within CMGs and tiers.

TABLE 2—DISTRIBUTIONAL EFFECTS OF THE PROPOSED CHANGES TO THE CMG RELATIVE WEIGHTS (FY 2009 VALUES COMPARED WITH FY 2010 VALUES)

Percentage change	Number of cases affected	Percentage of cases affected
Increased by 5% or more	0	0
Increased by between 0% and 5%	121,702	33
Changed by 0%	72,205	19
Decreased by between 0% and 5%	180,032	48
Decreased by 5% or more	76	0

As Table 2 shows, virtually 100 percent of all IRF cases are in CMGs and tiers that would experience less than a 5 percent change (either increase or decrease) in the CMG relative weight value as a result of the proposed revisions. The largest increase in the proposed CMG relative weight values would be a 2.9 percent increase in the CMG relative weight value for CMG C0405—Traumatic spinal cord injury, motor score less than 16.05 and age less than 63.5—in tier 2. However, based on our analysis of the FY 2007 IRF claims data, this proposed change would only affect 25 cases. The proposed increase affecting the largest number of cases would be a 0.1 percent increase in the CMG relative weight value for CMG A0110—Stroke, motor score less than 22.35 and age less than 84.5—in the ''no comorbidity'' tier. Based on our analysis of the FY 2007 IRF claims data, this change would affect 15,426 cases. The largest percent decrease that would be anticipated from the proposed CMG relative weight values would be an estimated 8.9 percent decrease in the CMG relative weight for CMG D2101—Burns, motor score greater than zero—in tier 3. However, based on our analysis of the FY 2007 IRF claims data, this proposed change would only affect 76 cases. The proposed decrease affecting the largest number of cases would be a 0.1 percent decrease in the CMG relative weight value for CMG A0704—Fracture of lower extremity, motor score less than 28.15—in the ''no comorbidity'' tier. Based on our analysis of the FY 2007 IRF claims data, this change would affect 24,541 cases.

Given the changes in IRFs' case mix over time, we believe that it is important to update the CMG relative weights and average length of stay values periodically to continue to reflect the trends in IRF patient populations. As we have data that better reflect the recent IRF utilization changes at this time, we propose the updates described in this section.

IV. Proposed Updates to the Facility-Level Adjustment Factors for FY 2010

A. Background on Facility-Level Adjustments

Section 1886(j)(3)(A)(v) of the Act confers broad authority upon the Secretary to adjust the per unit payment rate by ''such factors as the Secretary determines are necessary to properly reflect variations in necessary costs of

treatment among rehabilitation facilities.'' For example, we adjust the Federal prospective payment amount associated with a CMG to account for facility-level characteristics such as an IRF's LIP percentage, teaching status, and location in a rural area, if applicable, as described in § 412.624(e).

In the FY 2002 IRF PPS final rule (66 FR at 41359), we published the original adjustment factors that were used to calculate an IRF's LIP percentage, and location in a rural area, if applicable. These original adjustment factors were computed by the RAND Corporation (RAND) under contract with CMS. As discussed in the FY 2002 IRF PPS proposed rule (65 FR 66356), RAND used regression analysis to establish these adjustment factors by examining the effects of various facility-level characteristics, including rural location and percentage of low-income patients, on an IRF's average cost per case. Based on RAND's analysis, in the FY 2002 IRF PPS final rule (66 FR at 41359 through 41360) we finalized a rural adjustment factor of 19.14 percent and a LIP adjustment formula of (1 + disproportionate share hospital (DSH) patient percentage) raised to the power of (0.4838), where the DSH patient percentage for each IRF =

$$\frac{\text{Medicare SSI Days}}{\text{Total Medicare Days}} + \frac{\text{Medicaid, Non-Medicare Days}}{\text{Total Days}}$$

(From this point forward when we refer to the ''LIP adjustment factor'', we mean the number to which the standard formula (1 + DSH patient percentage) is raised [in this case, 0.4838].)

In the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47934), we updated the adjustment factors for the rural and LIP adjustments and added a new teaching status adjustment. The FY 2006 adjustment factors were based on updated regression analysis by RAND using the same methodology used to develop the rural and LIP adjustment factors for the FY 2002 IRF PPS final rule (66 FR at 41359) and the most current and complete IRF claims and cost report data available at that time (FY 2003). (RAND's analysis for FY 2006 is included in a November 2005 RAND report titled ''Possible Refinements to the Facility-Level Payment Adjustments for the Inpatient Rehabilitation Facility Prospective Payment System,'' which can be downloaded from RAND's Web site at *http://www.rand.org/pubs/technical_reports/TR219/*.) Based on RAND's 2005 analysis, we finalized a rural adjustment factor of 21.3 percent and a LIP adjustment factor of 0.6229 in the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47934).

We also described our rationale for implementing a teaching status adjustment for IRFs based on RAND's 2005 analysis in the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47932). The IRF teaching status adjustment that was finalized in the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47932) was calculated using the following formula for each IRF: (1 + full-time equivalent (FTE) residents/average daily census) raised to the power of (0.9012). (From this point forward when we refer to the ''teaching status adjustment factor'', we mean the number to which the standard formula (1 + FTE residents/average daily census) is raised [in this case, 0.9012]).

B. Proposed Updates to the IRF Facility-Level Adjustment Factors

In this rule, we propose to update the rural, LIP, and teaching status adjustment factors for the IRF PPS based on updated regression analysis using the same regression analysis methodology that was used by RAND to compute the rural and LIP adjustment factors for the FY 2002 IRF PPS final rule (66 FR at 41359) and the rural, LIP, and teaching status adjustment factors for the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47934). However, for the reasons discussed below, we are proposing to compute the adjustment factors using three consecutive years of cost report data (FY 2005, FY 2006, and FY 2007) and average the adjustment factors for all three years to develop the proposed rural, LIP, and teaching status adjustment factors for FY 2010.

We received a comment on the FY 2009 IRF PPS proposed rule (73 FR 22674) suggesting that we consider a three-year moving average approach because it would enable IRFs to plan their future Medicare payments more accurately. We analyzed the suggestion and believe that a three year average of the adjustment factors would promote more stability in the adjustment factors over time, which we believe would benefit IRFs by ensuring reduced variation from year to year, thus enabling them to better project future Medicare payments and thereby facilitate IRFs' long-term budgetary planning processes. If, instead, we were to continue to compute the adjustment factors based on only a single year's worth of data (as was done in the FY 2002 and FY 2006 IRF PPS final rules (66 FR at 41359 and 70 FR 47880, 47928 through 47934)), we believe that IRFs would experience unnecessarily large fluctuations in the adjustment factors from year to year. These large fluctuations would reduce the consistency and predictability of IRF PPS payments over time, and could be detrimental to IRFs' long-term planning processes. For this reason, we are proposing the use of a three-year moving average in computing the proposed rural, LIP, and teaching status adjustment factors in this proposed rule.

To study the effects of this proposal over time, we examined the magnitude of changes in the rural, LIP, and teaching status adjustment factors that would occur if we were to compute the proposed adjustment factors based on a single year's worth of data (FY 2007) compared with computing the proposed adjustment factors based on an average of three year's worth of data (FY 2005, FY 2006, and FY 2007). In 2002 the rural adjustment factor was set at 19.14 percent. It was updated in FY 2006 to 21.3 percent based on RAND's regression analysis of FY 2003 Medicare claims and cost report data, as described above. If we were to update the rural adjustment factor for FY 2010 using a single year's worth of data (FY 2007), it would decrease to 17.65 percent. If instead we were to calculate an average adjustment factor by using the most recent three years worth of data (FY 2005, FY 2006, and FY 2007), the rural adjustment factor would instead decrease to 18.27 percent. That is, computing the adjustment factors based on an average of three year's worth of data (FY 2005 through FY 2007) instead of a single year's worth of data (FY 2007) would lead to a smaller decrease in the rural adjustment factor and would thereby mitigate the impact of this change on IRF payments to rural providers, which would benefit rural IRFs in conducting their long-term budgetary planning processes.

Similarly, we examined the effects of the proposed three-year moving average methodology on the magnitude of the LIP adjustment factor for FY 2010. The LIP adjustment factor was 0.4838 in FY 2002. It was updated in FY 2006 to 0.6229 based on RAND's regression

analysis of FY 2003 Medicare claims and cost report data, as described above. If we were to update the LIP adjustment factor for FY 2010 using FY 2007 data, it would decrease to 0.3865. If instead we were to average the adjustment factors derived by using the most recent three years worth of data (FY 2005, FY 2006, and FY 2007), the proposed LIP adjustment factor for FY 2010 would be 0.4372. Thus, computing the LIP adjustment factor based on the most recent three years worth of data (FY 2005, FY 2006, and FY 2007) would result in a smaller decrease in the LIP adjustment factor and would thereby mitigate the impact of this change on IRF payments, which would benefit all IRF providers that receive LIP payments.

Lastly, we examined the effects of the proposed three-year moving average approach on the magnitude of the teaching status adjustment factor for FY 2010. The IRF teaching status adjustment was first implemented in the FY 2006 IRF PPS final rule (70 FR 47880, 47928 through 47932), and the teaching status adjustment factor implemented in FY 2006 was 0.9012. If we were to update the teaching status adjustment factor for FY 2010 using FY 2007 data, it would increase to 1.0451. If instead we were to average the adjustment factors derived by using the most recent three years worth of data (FY 2005, FY 2006, and FY 2007), the proposed teaching status adjustment factor for FY 2010 would be 1.0494. Thus, the proposed teaching status adjustment factor based on the most recent three years worth of data (FY 2005, FY 2006, and FY 2007) would be higher than the teaching status adjustment factor based on one year's worth of data (FY 2007). We note, however, that the teaching status adjustment factor fluctuates significantly from year to year over the three year period (FY 2005 through 2007) that we examined. Using FY 2005, FY 2006, and FY 2007 data, respectively, we estimate that the teaching status adjustment factors would be 1.5155, 0.6732, and 1.0451, respectively. Such extreme volatility in the teaching status adjustment factors demonstrates the benefit to IRF providers of the proposed three year moving average approach because it mitigates the volatility in provider payments from year to year.

Thus, we propose to use the same methodology developed by RAND in computing the rural and LIP adjustment factors for the FY 2002 IRF PPS final rule, and in computing the rural, LIP, and teaching status adjustment factors for the FY 2006 IRF PPS final rule, to update the proposed rural, LIP, and teaching status adjustment factors for FY 2010 in this proposed rule. However, we also propose to compute these updated adjustment factors using each of three years worth of data (FY 2005, FY 2006, and FY 2007) and to average the adjustment factors for these three years to compute the proposed updates to the adjustment factors for this proposed rule. To calculate the proposed updates to the rural, LIP, and teaching status adjustment factors for FY 2010, we propose to use the following steps:

[Steps 1 and 2 are performed independently for each of three years of IRF claims data: FY 2005, FY 2006, and FY 2007.]

Step 1. Calculate the average cost per case for each IRF in the IRF claims data.

Step 2. Use logarithmic regression analysis on average cost per case to compute the coefficients for the rural, LIP, and teaching status adjustments.

Step 3. Calculate a simple mean for each of the coefficients across the three years of data (using logarithms for the LIP and teaching status adjustment coefficients (because they are continuous variables), but not for the rural adjustment coefficient (because the rural variable is either zero (if not rural) or 1 (if rural)). To compute the LIP and teaching status adjustment factors, we convert these factors back out of the logarithmic form.

Using the proposed methodology described above, we estimate the proposed rural adjustment factor for FY 2010 to be 18.27 percent, the proposed LIP adjustment factor for FY 2010 to be 0.4372, and the proposed teaching status adjustment factor for FY 2010 to be 1.0494. We note that we had expected that recent improvements in the CMG relative weights implemented in FY 2006, FY 2007, and FY 2009 final rules would more appropriately account for the variation in costs among different types of IRF patients and thereby reduce the need for the facility-level adjustments. This appears to be the case with respect to the decreases in the estimated rural and LIP adjustment factors. The proposed adjustment factors are subject to change for the final rule if more recent data become available for use in these analyses.

C. Budget Neutrality Methodology for the Updates to the IRF Facility-Level Adjustment Factors

Consistent with the way that we implemented changes to the IRF facility-level adjustment factors (the rural, LIP, and teaching status adjustment factors) in the FY 2006 IRF PPS final rule (70 FR 47880 and 70 FR 57166), which was the only year in which we updated these adjustment factors, we propose to make changes to the rural, LIP, and teaching status adjustment factors for FY 2010 in such a way that total estimated aggregate payments to IRFs for FY 2010 would be the same with or without the proposed changes (that is, in a budget neutral manner) by applying budget neutrality factors for each of these three changes to the standard payment amount. To calculate the proposed budget neutrality factors used to update the rural, LIP, and teaching status adjustment factors, we propose to use the following steps:

Step 1. Using the most recent available data (currently FY 2007), calculate the estimated total amount of IRF PPS payments that would be made in FY 2010 (without applying the proposed changes to the rural, LIP, or teaching status adjustment factors).

Step 2. Calculate the estimated total amount of IRF PPS payments that would be made in FY 2010 if the proposed update to the rural adjustment factor were applied.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the proposed budget neutrality factor (1.0025) that would maintain the same total estimated aggregate payments in FY 2010 with and without the proposed change to the rural adjustment factor.

Step 4. Calculate the estimated total amount of IRF PPS payments that would be made in FY 2010 if the proposed update to the LIP adjustment factor were applied.

Step 5. Divide the amount calculated in step 1 by the amount calculated in step 4 to determine the proposed budget neutrality factor (1.0221) that would maintain the same total estimated aggregate payments in FY 2010 with and without the proposed change to the LIP adjustment factor.

Step 6. Calculate the estimated total amount of IRF PPS payments that would be made in FY 2010 if the proposed update to the teaching status adjustment factor were applied.

Step 7. Divide the amount calculated in step 1 by the amount calculated in step 6 to determine the proposed budget neutrality factor (0.9980) that would maintain the same total estimated aggregate payments in FY 2010 with and without the proposed change to the teaching status adjustment factor.

Step 8. Apply the proposed budget neutrality factors for the updates to the rural, LIP, and teaching status adjustment factors to the FY 2009 IRF PPS standard payment amount after the application of the proposed budget neutrality factors for the wage

adjustment and the CMG relative weights.

The proposed budget neutrality factors for the proposed changes to the rural, LIP, and teaching status adjustment factors are subject to change for the final rule if more recent data become available for use in these analyses or if the proposed payment policies associated with the proposed budget neutrality factors change.

In section V.C of this proposed rule, we discuss the proposed methodology for calculating the standard payment conversion factor for FY 2010.

V. Proposed FY 2010 IRF PPS Federal Prospective Payment Rates

A. Proposed Market Basket Increase Factor and Labor-Related Share for FY 2010

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services, which is referred to as a market basket index. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF Federal prospective payment rates for each FY. Section 115 of the MMSEA amended section 1886(j)(3)(C) of the Act to apply a zero percent increase factor for FYs 2008 and 2009, effective for IRF discharges occurring on or after April 1, 2008. In the absence of any such amendment for FY 2010, we are proposing a market basket increase factor based upon the most current data available in accordance with section 1886(j)(3)(A)(i) of the Act.

Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments is a 2002-based market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket).

Therefore, in FY 2010 we propose to use the same methodology described in the FY 2006 IRF PPS Final Rule (70 FR 47908 through 47917) to compute the FY 2010 market basket increase factor and labor-related share. Using this method and the IHS Global Insight, Inc. forecast for the first quarter of 2009 of the 2002-based RPL market basket, the proposed FY 2010 IRF market basket increase factor would be 2.4 percent. IHS Global Insight is an economic and financial forecasting firm that contracts with CMS to forecast the components of providers' market baskets. In addition, consistent with historical practice, we propose to update the market basket increase factor and labor-related share estimates in the final rule to reflect the most recent available data.

We also propose to continue to use the methodology described in the FY 2006 IRF PPS final rule to update the IRF labor-related share for FY 2010 (70 FR 47880, 47908 through 47917). Using this method and the IHS Global Insight, Inc. forecast for the first quarter of 2009 of the 2002-based RPL market basket, the IRF labor-related share for FY 2010 is the sum of the FY 2010 relative importance of each labor-related cost category. This figure reflects the different rates of price change for these cost categories between the base year (FY 2002) and FY 2010. Consistent with our proposal to update the labor-related share with the most recent available data, the labor-related share for this proposed rule reflects IHS Global Insight's first quarter 2009 forecast of the 2002-based RPL market basket. As shown in Table 3, the proposed FY 2010 labor-related share is currently calculated to be 75.904 percent.

TABLE 3—FY 2010 IRF RPL LABOR-RELATED SHARE RELATIVE IMPORTANCE

Cost category	FY 2010 IRF labor-related share relative importance
Wages and salaries	53.064
Employee benefits	13.880
Professional fees	2.894
All other labor intensive services	2.123
Subtotal	71.961
Labor-related share of capital costs (.46)	3.943
Total	75.904

SOURCE: IHS GLOBAL INSIGHT, INC., 1st QTR, 2009; @USMACRO/CONTROL0209@CISSIM/TL0209.SIM Historical Data through 4th QTR, 2008.

We are interested in exploring the possibility of creating a stand-alone IRF market basket that reflects the cost structures of only IRF providers. To do so, we would propose combining Medicare cost report data from freestanding IRF providers (which is presently incorporated into the RPL market basket) and data from hospital-based IRF providers.

As part of our consideration of a stand-alone IRF market basket, we seek to have a better understanding of differences in costs between freestanding and hospital-based IRFs. An examination of the Medicare cost report data for freestanding and hospital-based IRFs reveals considerable differences in both cost levels and cost structure. We have reviewed several explanatory variables such as geographic variation, case mix, urban/rural status, share of low income patients, teaching status, and outliers (short stay and high-cost); however, we are currently unable to fully understand the observed cost differences between these two types of IRF providers. We believe that further research is required. Having examined the relevant data that is internal to CMS, we welcome any help from the public in the form of additional information, data, or suggested data sources that may help us to better understand the underlying reasons for the variations in cost structure between freestanding and hospital-based IRFs.

B. Proposed Area Wage Adjustment

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion (as estimated by the Secretary from time to time) of rehabilitation facilities' costs attributable to wages and wage-related costs by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustments or updates made under section 1886(j)(6) of the Act for a FY are made in a budget neutral manner.

In the FY 2009 IRF PPS final rule (73 FR 46370 at 46378), we maintained the methodology described in the FY 2006 IRF PPS final rule to determine the wage index, labor market area definitions, and hold harmless policy consistent with the rationale outlined in the FY 2006 IRF PPS final rule (70 FR 47880, 47917 through 47933).

For FY 2010, we propose to maintain the policies and methodologies described in the FY 2009 IRF PPS final rule relating to the labor market area definitions and the wage index methodology for areas with wage data. The FY 2009 hospital wage index defines hospital geographic areas (labor market areas) based on the definitions of Core-Based Statistical Areas (CBSAs) established by the Office of Management and Budget announced in December 2003. It also uses data included in the wage index derived from the Medicare Cost Report, the Hospital Wage Index Occupational Mix Survey, hospitals' payroll records, contracts, and other

wage-related documentation. However, the IRF wage index does not include an occupational mix adjustment. In computing the wage index, we derive an average hourly wage for each labor market area and a national average hourly wage. A labor market area's wage index value is the ratio of the area's average hourly wage to the national average hourly wage. The wage index adjustment factor is applied only to the labor portion of the standardized amounts. Therefore, this proposed rule continues to use the CBSA labor market area definitions and the pre-reclassification and pre-floor hospital wage index data based on 2005 cost report data.

The labor market designations made by the Office of Management and Budget (OMB), include some geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the IRF PPS wage index. We propose to continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44284 at 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the FY 2010 IRF PPS wage index.

Additionally, this proposed rule incorporates the CBSA changes published in the most recent OMB bulletin that applies to the hospital wage data used to determine the current IRF PPS wage index. The changes were nominal and did not represent substantive changes to the CBSA-based designations. Specifically, OMB added or deleted certain CBSA numbers and revised certain titles. The OMB bulletins are available Online at *http://www.whitehouse.gov/omb/bulletins/index.html.*

To calculate the wage-adjusted facility payment for the payment rates set forth in this proposed rule, we multiply the unadjusted Federal payment rate for IRFs by the proposed FY 2010 RPL labor-related share (75.904 percent) to determine the labor-related portion of the standard payment amount. We then multiply the labor-related portion by the applicable proposed IRF wage index from the tables in the addendum to this rule. Table 1 is for urban areas, and Table 2 is for rural areas.

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget neutral manner. We propose to calculate a budget neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45674 at 45689), codified at § 412.624(e)(1), as described in the steps below. We propose to use the listed steps to ensure that the FY 2010 IRF standard payment conversion factor reflects the update to the proposed wage indexes (based on the FY 2005 hospital cost report data) and the labor-related share in a budget neutral manner:

Step 1. Determine the total amount of the estimated FY 2009 IRF PPS rates, using the FY 2009 standard payment conversion factor and the labor-related share and the wage indexes from FY 2009 (as published in the FY 2009 IRF PPS final rule (73 FR 46370 at 44301, 44298, and 44312 through 44335, respectively)).

Step 2. Calculate the total amount of estimated IRF PPS payments using the FY 2009 standard payment conversion factor and the FY 2010 labor-related share and CBSA urban and rural wage indexes.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the proposed FY 2010 budget neutral wage adjustment factor of 1.0010.

Step 4. Apply the proposed FY 2010 budget neutral wage adjustment factor from step 3 to the FY 2009 IRF PPS standard payment conversion factor after the application of the estimated market basket update to determine the proposed FY 2010 standard payment conversion factor.

C. Description of the Proposed IRF Standard Payment Conversion Factor and Payment Rates for FY 2010

To calculate the proposed standard payment conversion factor for FY 2010, as illustrated in Table 4 below, we begin by applying the estimated market basket increase factor for FY 2010 (2.4 percent) to the standard payment conversion factor for FY 2009 ($12,958), which would equal $13,269. Then, we propose to apply the proposed budget neutrality factor for the FY 2010 wage index and labor related share of 1.0010, which would result in a standard payment amount of $13,282. Then, we propose to apply the proposed budget neutrality factor for the revised CMG relative weights of 1.0004, which would result in a standard payment amount of $13,287. Finally, we propose to apply the proposed budget neutrality factors for the updates to the rural, LIP, and IRF teaching status adjustments of 1.0025, 1.0221, and 0.9980, respectively, which would result in the proposed FY 2010 standard payment conversion factor of $13,587.

TABLE 4—CALCULATIONS TO DETERMINE THE PROPOSED FY 2010 STANDARD PAYMENT CONVERSION FACTOR

Explanation for adjustment	Calculations
Standard Payment Conversion Factor for FY 2009	$12,958
Estimated Market Basket Increase Factor for FY 2010	× 1.0240
Proposed Budget Neutrality Factor for the Wage Index and Labor-Related Share	× 1.0010
Proposed Budget Neutrality Factor for the Revisions to the CMG Relative Weights	× 1.0004
Proposed Budget Neutrality Factor for the Update to the Rural Adjustment Factor	× 1.0025
Proposed Budget Neutrality Factor for the Update to the LIP Adjustment Factor	× 1.0221
Proposed Budget Neutrality Factor for the Update to the Teaching Status Adjustment Factor	× 0.9980
Proposed FY 2010 Standard Payment Conversion Factor	= $13,587

After the application of the proposed CMG relative weights described in section II of this proposed rule, the resulting proposed unadjusted IRF prospective payment rates for FY 2010 are shown below in Table 5, ''Proposed FY 2010 Payment Rates.'' The proposed standard payment conversion factor and the proposed FY 2010 payment rates are subject to change in the final rule if more recent data become available for analysis or if any changes are made to any of the proposed payment policies set forth in this proposed rule.

TABLE 5—PROPOSED FY 2010 PAYMENT RATES

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
0101	$10,444.33	$9,634.54	$8,641.33	$8,214.70
0102	13,146.78	12,127.76	10,877.75	10,341.07
0103	15,535.38	14,331.57	12,854.66	12,220.15
0104	16,531.30	15,251.41	13,679.39	13,002.76
0105	19,447.07	17,941.63	16,091.08	15,296.24
0106	22,600.62	20,849.25	18,699.79	17,775.87
0107	25,754.16	23,758.23	21,309.85	20,256.86
0108	30,959.34	28,561.23	25,616.93	24,350.62
0109	29,538.14	27,251.45	24,441.65	23,233.77
0110	36,972.94	34,108.80	30,592.49	29,081.61
0201	10,510.90	8,941.60	8,028.56	7,293.50
0202	14,054.39	11,956.56	10,735.09	9,751.39
0203	15,862.82	13,495.97	12,116.89	11,006.83
0204	17,631.85	15,000.05	13,468.79	12,235.09
0205	21,557.13	18,339.73	16,467.44	14,957.93
0206	26,736.50	22,746.00	20,423.98	18,553.05
0207	36,149.57	30,755.53	27,614.22	25,084.32
0301	14,953.85	12,639.99	11,375.04	10,413.08
0302	18,962.02	16,028.58	14,422.60	13,205.21
0303	22,819.37	19,289.46	17,357.39	15,891.36
0304	31,289.50	26,448.45	23,800.35	21,789.47
0401	12,584.28	10,834.27	10,419.87	8,930.74
0402	18,960.66	16,322.06	15,698.42	13,455.21
0403	31,051.73	26,732.42	25,709.32	22,035.40
0404	54,501.53	46,918.63	45,123.79	38,674.04
0405	41,998.78	36,155.01	34,771.85	29,803.08
0501	11,032.64	8,706.55	8,057.09	7,100.57
0502	14,975.59	11,817.97	10,936.18	9,638.62
0503	19,516.37	15,402.22	14,254.12	12,561.18
0504	23,513.66	18,557.12	17,172.61	15,134.56
0505	27,807.15	21,944.36	20,308.49	17,896.80
0506	38,698.49	30,540.86	28,262.32	24,907.69
0601	12,517.70	10,273.13	9,735.09	8,854.65
0602	16,770.43	13,763.63	13,040.80	11,861.45
0603	21,350.61	17,523.15	16,603.31	15,101.95
0604	28,364.22	23,278.61	22,058.49	20,062.56
0701	12,360.09	10,493.24	9,921.23	8,888.62
0702	16,368.26	13,896.78	13,139.99	11,771.78
0703	20,040.83	17,015.00	16,088.37	14,414.45
0704	25,600.63	21,735.12	20,551.70	18,413.10
0801	9,442.97	7,735.08	7,032.63	6,395.40
0802	12,656.29	10,368.24	9,426.66	8,572.04
0803	18,067.99	14,801.68	13,456.56	12,237.81
0804	15,834.29	12,971.51	11,793.52	10,724.22
0805	19,771.80	16,197.06	14,725.59	13,391.35
0806	24,512.31	20,080.23	18,255.49	16,601.96
0901	11,433.46	10,307.10	9,285.36	8,191.60
0902	15,282.66	13,777.22	12,411.72	10,949.76
0903	19,763.65	17,816.63	16,050.32	14,160.37
0904	26,153.62	23,576.16	21,240.56	18,737.83
1001	12,766.35	12,418.52	10,653.57	9,769.05
1002	16,957.93	16,495.98	14,152.22	12,975.59
1003	24,619.64	23,949.80	20,546.26	18,838.38
1101	16,275.87	13,400.86	13,400.86	11,535.36
1102	23,752.79	19,557.13	19,557.13	16,832.93
1201	14,232.38	13,069.34	11,584.28	10,309.82
1202	17,750.06	16,301.68	14,448.42	12,858.74
1203	22,345.18	20,520.45	18,188.92	16,187.55
1301	15,013.64	13,529.93	11,524.49	10,304.38
1302	20,278.60	18,275.87	15,565.27	13,917.16
1303	26,301.71	23,702.52	20,187.56	18,050.33
1401	10,986.45	9,998.67	8,815.25	7,794.86
1402	15,082.93	13,728.30	12,101.94	10,702.48
1403	18,399.52	16,745.98	14,763.63	13,055.75
1404	23,887.30	21,741.92	19,167.18	16,949.78
1501	13,229.66	11,600.58	10,199.76	9,699.76
1502	16,857.39	14,781.30	12,995.97	12,360.09
1503	21,345.18	18,717.45	16,456.57	15,650.87
1504	26,720.19	23,430.78	20,600.61	19,591.10
1601	14,938.91	12,120.96	10,364.16	9,585.63
1602	20,152.24	16,350.60	13,981.02	12,932.11

TABLE 5—PROPOSED FY 2010 PAYMENT RATES—Continued

CMG	Payment rate tier 1	Payment rate tier 2	Payment rate tier 3	Payment rate no comorbidity
1603	25,911.77	21,023.17	17,976.96	16,627.77
1701	14,226.95	12,584.28	11,525.85	10,157.64
1702	18,603.32	16,453.86	15,070.70	13,282.65
1703	22,390.02	19,803.05	18,138.65	15,985.11
1704	28,130.52	24,880.51	22,789.48	20,084.30
1801	16,697.06	13,150.86	12,360.09	10,649.49
1802	25,063.94	19,739.19	18,553.05	15,986.46
1803	42,891.44	33,780.00	31,748.74	27,357.42
1901	15,173.96	12,391.34	12,391.34	11,739.17
1902	30,919.94	25,251.44	25,251.44	23,922.63
1903	49,119.72	40,112.90	40,112.90	38,002.84
2001	11,953.84	9,892.69	8,985.08	8,046.22
2002	16,100.60	13,324.77	12,101.94	10,838.35
2003	20,663.11	17,099.24	15,531.30	13,907.65
2004	27,630.52	22,865.56	20,769.09	18,597.89
2101	30,713.41	30,713.41	26,584.32	22,884.58
5001	.....	.....	.....	1,990.50
5101	.....	.....	.....	9,168.51
5102	.....	.....	.....	20,786.75
5103	.....	.....	.....	9,629.11
5104	.....	.....	.....	27,160.41

D. Example of the Methodology for Adjusting the Proposed Federal Prospective Payment Rates

Table 6 illustrates the methodology for adjusting the proposed Federal prospective payments (as described in sections V.A through V.C of this proposed rule). The examples below are based on two hypothetical Medicare beneficiaries, both classified into CMG 0110 (without comorbidities). The proposed unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) appears in Table 5 above.

One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a DSH percentage of 5 percent (which would result in a LIP adjustment of 1.0216), a wage index of 0.8473, and a rural adjustment of 18.27 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0630), a wage index of 0.9249, and a teaching status adjustment of 0.0706.

To calculate each IRF's labor and non-labor portion of the proposed Federal prospective payment, we begin by taking the proposed unadjusted Federal prospective payment rate for CMG 0110 (without comorbidities) from Table 5 above. Then, we multiply the estimated labor-related share (75.904) described in section V.A of this proposed rule by the proposed unadjusted Federal prospective payment rate. To determine the non-labor portion of the proposed Federal prospective payment rate, we subtract the labor portion of the proposed Federal payment from the proposed unadjusted Federal prospective payment.

To compute the proposed wage-adjusted Federal prospective payment, we multiply the labor portion of the proposed Federal payment by the appropriate wage index found in the addendum in Tables 1 and 2. The resulting figure is the wage-adjusted labor amount. Next, we compute the proposed wage-adjusted Federal payment by adding the wage-adjusted labor amount to the non-labor portion.

Adjusting the proposed wage-adjusted Federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted Federal prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (1.0706, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted Federal prospective payment rates. Table 6 illustrates the components of the adjusted payment calculation.

TABLE 6—EXAMPLE OF COMPUTING THE PROPOSED IRF FY 2010 FEDERAL PROSPECTIVE PAYMENT

Steps		Rural facility A (Spencer Co., IN)	Urban facility B (Harrison Co., IN)
1	Unadjusted Federal Prospective Payment	$29,081.61	$29,081.61
2	Labor Share	× 0.75904	× 0.75904
3	Labor Portion of Federal Payment	= $22,074.11	= $22,074.11
4	CBSA Based Wage Index (shown in the Addendum, Tables 1 and 2)	× 0.8473	× 0.9249
5	Wage-Adjusted Amount	= $18,703.39	= $20,416.34
6	Nonlabor Amount	+ $7,007.50	+ $7,007.50
7	Wage-Adjusted Federal Payment	= $25,710.89	= $27,423.84
8	Rural Adjustment	× 1.1827	× 1.000
9	Wage- and Rural-Adjusted Federal Payment	= $30,408.27	= $27,423.84
10	LIP Adjustment	× 1.0216	× 1.0630
11	FY 2010 Wage-, Rural- and LIP-Adjusted Federal Prospective Payment Rate	= $31,065.09	= $29,151.55
12	FY 2010 Wage- and Rural-Adjusted Federal Prospective Payment	$30,408.27	$27,423.84

TABLE 6—EXAMPLE OF COMPUTING THE PROPOSED IRF FY 2010 FEDERAL PROSPECTIVE PAYMENT—Continued

Steps		Rural facility A (Spencer Co., IN)	Urban facility B (Harrison Co., IN)
13	Teaching Status Adjustment	× 0.000	× 0.0706
14	Teaching Status Adjustment Amount	= $0.00	= $1,936.12
15	FY2010 Wage-, Rural-, and LIP-Adjusted Federal Prospective Payment Rate	+ $31,065.09	+ $29,151.55
16	Total FY 2010 Adjusted Federal Prospective Payment	= $31,065.09	= $31,087.67

Thus, the proposed adjusted payment for Facility A would be $31,065.09 and the proposed adjusted payment for Facility B would be $31,087.67.

VI. Proposed Update to Payments for High-Cost Outliers Under the IRF PPS

A. Proposed Update to the Outlier Threshold Amount for FY 2010

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments). Then, we calculate the estimated cost of a case by multiplying the IRF's overall cost-to-charge ratio (CCR) by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41316, 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006, 2007, 2008, and 2009 IRF PPS final rules (70 FR 47880, 70 FR 57166, 71 FR 48354, 72 FR 44284, and 73 FR 46370, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (FR 73 46287) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

For FY 2010, we are proposing to use updated data for calculating the high-cost outlier threshold amount. Specifically, we propose to use FY 2007 claims data using the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316, 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2009.

Based on an analysis of updated FY 2007 claims data, we estimate that IRF outlier payments as a percentage of total estimated payments are 2.8 percent in FY 2009.

Based on the updated analysis of the most recent available claims data (FY 2007), we propose to update the outlier threshold amount to $9,976 to maintain estimated outlier payments at 3 percent of total estimated aggregate IRF payments for FY 2010.

The proposed outlier threshold amount of $9,976 for FY 2010 is subject to change in the final rule if more recent data become available for analysis or if any changes are made to any of the other proposed payment policies set forth in this proposed rule.

B. Proposed Update to the IRF Cost-to-Charge Ratio Ceilings

In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we apply a ceiling to IRFs' cost-to-charge ratios (CCRs). Using the methodology described in that final rule, we propose to update the national urban and rural CCRs for IRFs, as well as the national CCR ceiling for FY 2010, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first Medicare cost report.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2010, as discussed below.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2010, we estimate a proposed national average CCR of 0.621 for rural IRFs, which we calculate by taking an average of the CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, we estimate a proposed national CCR of 0.493 for urban IRFs, which we calculate by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher costs factor more heavily into the averages than the CCRs of IRFs with lower costs. For this proposed rule, we have used the most recent available cost report data (FY 2007). This includes all IRFs whose cost reporting periods begin on or after October 1, 2006, and before October 1, 2007. If, for any IRF, the FY 2007 cost report was missing or had an ''as submitted'' status, we used data from a previous fiscal year's settled cost report for that IRF. However, we do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the ''60 percent'' rule and IRF medical review activities mean that these older data do not adequately reflect the current cost of care.

In addition, in light of the analysis described below, we propose to set the national CCR ceiling at 3 standard deviations above the mean CCR. The national CCR ceiling is set at 1.60 for FY 2010. This means that, if an individual IRF's CCR exceeds this ceiling of 1.60 for FY 2010, we would replace the IRF's CCR with the appropriate national average CCR (either rural or urban, depending on the geographic location of the IRF). We estimate the national CCR ceiling by:

Step 1. Taking the national average CCR (weighted by each IRF's total costs, as discussed above) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined);

Step 2. Estimating the standard deviation of the national average CCR computed in step 1;

Step 3. Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling; and

Step 4. Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

We note that the proposed national average rural and urban CCRs and our estimate of the national CCR ceiling in this section are subject to change in the final rule if more recent data become available for use in these analyses.

VII. Inpatient Rehabilitation Facility (IRF) Classification and Payment Requirements

Prior to the introduction of the Inpatient Prospective Payment System (IPPS) in 1983, hospital care was reimbursed on a cost basis. Beneficiaries who required closely supervised, resource intensive rehabilitation services, in addition to the treatment of the acute care condition for which they were hospitalized, generally received these rehabilitation services as part of the same inpatient hospital stay that addressed their acute care needs. With the introduction of the prospective payment methodology, we developed Diagnostic Related Groups (DRGs) for classifying acute hospital stays. We found that DRGs did not fully address the variability of the rehabilitation portion of a hospital stay. Thus, in 1983, we established coverage for post-acute hospital level rehabilitation services that were excluded from the IPPS and reimbursed on a cost basis.

At that time, we established payment requirements that reimbursed rehabilitation units and free-standing rehabilitation hospitals as IRFs rather than as hospitals subject to the IPPS. The payment requirements governing free-standing IRFs can be found in § 412.23. Similar requirements for hospital rehabilitation units classified as IRFs can be found in § 412.29. To provide further guidance on our implementation of § 412.23(b)(3) through (b)(7) and § 412.29(b) through (f), we issued a HCFA Ruling, HCFAR 85–2–1, at 50 FR 31040. It outlines the criteria for Medicare coverage of inpatient hospital rehabilitation services.

These regulatory payment requirements and the policies outlined in HCFAR 85–2 were the basis for the policies currently contained in Chapter 1, Section 110 of the Medicare Benefit Policy Manual (MBPM), which provides further instructions applicable to IRFs. In this rule, we are proposing regulatory changes to certain regulations. The final changes will be incorporated into revised manual provisions that will be placed in an updated Chapter 1, Section 110 of the MBPM. The proposed regulatory changes, and the conforming manual provisions that would provide policy instructions on these regulatory provisions, would reflect the changes that have occurred in medical practice during the past 25 years as well as the implementation of the inpatient rehabilitation facility prospective payment system (IRF PPS). We also propose to rescind the outdated HCFA Ruling 85–2 since it is inconsistent with the current payment system.

A. Analysis of Current IRF Classification and Payment Requirements

The payment requirements and coverage policies that currently govern IRFs were developed more than 25 years ago, and were designed to provide instructions for a small subset of providers furnishing intensive and complex therapy services in a fee-for-service environment to a small segment of patients whose rehabilitation needs could only be safely furnished at a hospital level of care. At that time about 350 IRFs were treating a relatively homogeneous patient group with similar health conditions and deficit levels, that is, approximately 54,000 Medicare patients per year being treated primarily for stroke and other severe neurological disorders. However, advances in health care technology and treatments, in combination with the 2002 introduction of a new IRF PPS, contributed to a rapid increase in the type and volume of IRF services. By 2007, there were over 1,200 IRFs treating approximately 400,000 Medicare cases per year for a broader range of conditions. By 2007, the types of cases being treated in IRFs had also become more heterogeneous as almost a third of IRF patients were treated for orthopedic, rather than neurological, conditions.

Rehabilitation services of varying intensity and duration are beneficial to beneficiaries with a broad range of conditions, but rehabilitation can be provided in a range of settings. It has become apparent that the existing IRF payment requirements and instructions do not always enable us to distinguish between patients who require complex, high intensity rehabilitation care in a hospital environment and those patients whose rehabilitation needs can be met in less intensive settings.

In the absence of clear, up-to-date instructions on determining and documenting the medical necessity of IRF care, different stakeholders (including providers, FIs, and, most recently, Recovery Audit Contractors (RACs)) have developed different and sometimes conflicting interpretations of how our existing payment requirements and policies apply to the determination of IRF medical necessity. Recently, the differing interpretations of these requirements have led to a high volume of IRF claims denials by Medicare contractors as well as concerns about the effects of the claims denials on the IRF industry and on beneficiaries' access to IRF care.

In response to these concerns, CMS assembled an internal workgroup in June 2007 to determine how best to clarify IRF classification and payment requirements and make corresponding revisions to the regulations and manual instructions. The workgroup enlisted the advice of medical directors from within CMS, from several of the fiscal intermediaries, from one of the qualified independent contractors (QICs), and from the National Institutes of Health. These individuals, including general physicians, physiatrists, and therapists, considered how best to identify those patients for whom IRF coverage was intended, that is, patients who both require complex rehabilitation in a hospital environment and could most reasonably be expected to benefit from IRF services.

In addition, we received comments from industry groups in response to the FY 2009 IRF PPS proposed rule (73 FR 22674). These commenters requested that we revise and update IRF coverage policy so that all stakeholders would have a clear understanding of CMS policy and the expectations of CMS contractors charged with performing medical review to validate claims payment.

Finally, the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), Pub. L. 110–173, mandated at section 115(c)(1) that the Secretary evaluate IRF access and utilization issues. In so doing, section 115(c)(1) of the MMSEA required that the Secretary obtain input from a broad range of stakeholders. While a full report on our findings is beyond the scope of this proposed rule, we have carefully considered those findings and the stakeholder comments in framing this proposed revision to the IRF classification and payment regulations and the conforming amendments to the MBPM. A formal report on our findings in response to section 115(c)(1) of the MMSEA will be included in a Report to Congress.

B. Summary of the Major Proposed Revisions and New Requirements

In this proposed rule, we are proposing to amend certain regulations for the purpose of providing greater clarity and rescind the outdated HCFAR 85–2–1 to ensure that our policies reflect current medical practice and the needs of the current IRF PPS. Proposed changes to the existing classification and payment requirements are presented in sections VII.C and VII.D of this rule. We intend to redraft the corresponding manual provisions found in Chapter 1, § 110 of the MBPM to make conforming changes. A copy of the revised draft of Section 110 of the MBPM has been posted on the Medicare IRF PPS Web site at *http://www.cms.hhs.gov/InpatientRehabFacPPS/02_Spotlight.asp#TopOfPag.*

We encourage stakeholder comment on the proposed changes to the classification and payment requirements. We are also requesting separate comments on the draft revisions to the MBPM. While CMS will address comments on the proposed changes to the regulation in the final rule, it is beyond the scope of the final rule to address all of the separate comments on the draft revisions to the MBPM in the final rule. We will instead address the separate comments on the draft revisions to the MBPM on the Medicare IRF PPS Web site at *http://www.cms.hhs.gov/InpatientRehabFacPPS/02_Spotlight.asp#TopOfPag.*

The IRF PPS is a per-stay, case-mix adjusted prospective payment system. However, the policies on which we base our medical necessity claims reviews for IRFs were developed more than 25 years ago for a cost-based, per diem system. The proposed revisions in this rule recognize that a potential patient's likely post-admission performance is subject to many factors outside the IRF's control. Therefore, these revisions focus on the key decision points that should be considered and documented when making a decision to admit, retain, or discharge a patient. Thus, we focus the proposed regulatory and conforming manual changes on the processes rehabilitation physicians use to make admission, continued stay, and discharge decisions. In sections VII.C through VII.D below, we provide more detail on these revisions and the reasoning behind each of the revisions. In summary, the major proposed revisions are as follows:

1. Redesignating and expanding the existing requirements at § 412.23(b)(4) and § 412.29(c) in a new § 412.29(a) to require that IRFs provide rehabilitation nursing, physical therapy, occupational therapy, speech-language pathology, social services, psychological services, and prosthetic and orthotic services using qualified personnel and adding to those requirements that these services be ordered by a rehabilitation physician.

2. Redesignating and expanding the existing requirements at § 412.23(b)(3) and § 412.29(b) in a new § 412.29(b)(2) to require that IRFs conduct a comprehensive preadmission screening to evaluate the appropriateness of IRF-level care. The requirements for a preadmission screening process are discussed in section VII.C of this rule and detailed instructions are presented in section 110.1.1 of the draft MBPM.

3. Establishing a new post-admission evaluation requirement at § 412.29(c)(1) to document the status of the patient after admission to the IRF, to compare it to that noted in the preadmission screening documentation, and to begin development of the patient's overall plan of care. The overall plan of care would be required to be completed with input from all of the interdisciplinary team members. The preadmission and post-admission evaluations document the appropriateness of an admission and then serve as a basis for the development of the overall plan of care. The requirements for a post-admission evaluation are discussed in section VII.D of this rule, and detailed instructions are presented in section 110.1.2 of the draft MBPM.

4. Redesignating and expanding the existing requirements at § 412.23 (b)(6) and § 412.29(d) for an overall plan of care at the new § 412.29(c)(2) to establish the responsibility of the rehabilitation physician in the care planning process. The requirements for an overall plan of care are discussed in section VII.D of this rule, and detailed instructions are presented in section 110.1.3 of the draft MBPM.

5. Redesignating and revising the regulatory requirements at 412.23(b)(7) and 412.29(e) governing a multidisciplinary team and the required team meetings at the new § 412.29(d) to require an interdisciplinary team, to define the members of the interdisciplinary team, to define the minimum content to be covered at the team meetings, and to specify the expected frequency of the team meetings. We propose to require that team meetings be held at least once every week, rather than once every two weeks. The requirements governing interdisciplinary team meetings are discussed in section VII.E of this rule, and detailed instructions are presented in section 110.2.2 of the draft MBPM.

C. Proposed IRF Admission Requirements

IRFs provide intensive rehabilitation services through a coordinated interdisciplinary team of skilled professionals, based upon physician orders that document the need for intensive rehabilitation services. Thus, we believe that a patient appropriate for admission to an IRF should be able and willing to actively participate in an intensive rehabilitation program that is provided through a coordinated interdisciplinary team approach in an inpatient hospital setting. Further, the patient should also be expected to make measurable improvement that will be of practical value in terms of improving the patient's functional capacity or adaptation to impairments.

We believe that the use of the term ''interdisciplinary team'' instead of ''multidisciplinary team'' (as is currently required at § 412.23(b)(7) and § 412.29(e)) more accurately reflects the care provided in an IRF. A multidisciplinary team approach to care requires only that clinicians representing various rehabilitation disciplines individually work with the patient to achieve an optimal level of functioning. However, with each clinician working independently, the patient loses the benefits of the coordinated care approach offered in IRFs.

In contrast, the interdisciplinary team approach to care requires that treating clinicians interact with each other and the patient to define a set of coordinated goals for the IRF stay and work together in a cooperative manner to deliver the services necessary to achieve these goals. As a result, we believe that the use of an interdisciplinary team instead of a multidisciplinary team will ensure that patients achieve better outcomes. Therefore, we are proposing that the IRF shall ensure that each patient's treatment is managed using a coordinated interdisciplinary approach to treatment.

We believe that patients who have completed their acute care hospital stay, but do not need or are not able or willing to participate in the level of intensive rehabilitation provided in an inpatient setting, should be referred to a less-intensive rehabilitation setting.

We believe that a comprehensive preadmission screening process is the key factor in initially identifying appropriate candidates for IRF care. For this reason, we are proposing (at § 412.29(b)(2)) to clarify our expectations regarding the scope of the preadmission assessment and to require documentation of the clinical evaluation

process that must form the basis of the admission decision. The detailed preadmission screening requirements, including instructions for documenting the decision-making process used to determine the appropriateness of an IRF admission, are presented in detail in the draft MBPM. In accordance with the proposed regulations, the comprehensive preadmission screening must include an evaluation of the following proposed requirements that a patient must meet to be admitted to an IRF (see proposed § 412.29(b)):

1. Whether the patient's condition is sufficiently stable to allow the patient to actively participate in an intensive rehabilitation program.

We recognize that there are strong financial incentives for acute care hospitals to discharge patients whose care is covered by IPPS as quickly as possible to IRFs for post-acute rehabilitation care. We believe that these incentives for early discharge could have negative consequences on patient care and on the total cost of care. For example, patients who are transferred to the IRF setting before they are adequately stabilized may later need to be re-hospitalized for treatment of the same acute condition or a complication that arose during the original hospital stay. Therefore, we are proposing to require that the patient be sufficiently stable at the time of admission to allow the patient to actively participate in an intensive rehabilitation program.

2. Whether the patient has the appropriate therapy needs for placement in an IRF.

Since one of the critical aspects of care provided in an IRF is the provision of interdisciplinary care, we are proposing (at § 412.29(b)(1)(i)) to require that, at the time of admission to the IRF, the patient require the active and ongoing therapeutic intervention of at least two therapy disciplines (physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics therapy), one of which must be physical or occupational therapy.

3. Whether the patient requires the intensive services of an inpatient rehabilitation setting.

Another critical aspect of care provided in an IRF, versus another post-acute care setting, is that IRFs generally provide at least 3 hours of therapy per day at least 5 days per week. To conform to this standard, we propose (at § 412.29(b)(1)(ii)) to require that patients generally require and reasonably be expected to actively participate in at least 3 hours of therapy per day at least 5 days per week, and be expected to make measurable improvement that will be of practical value to improve the patient's functional capacity or adaptation to impairments. In addition, we are proposing (at § 412.29(b)(1)(ii)) to require that therapy treatments begin within 36 hours after the patient's admission to the IRF, to conform with IRF best practices and to ensure that the patient's care goals can be met.

Patients who are unwilling or unable to tolerate this intense level of therapy should be referred to another setting of care that is more appropriate to their medical needs, such as SNFs, long-term care hospitals, or home health agencies, where the patient can receive more appropriate levels of rehabilitation therapy and other forms of care.

At the same time, we recognize that a patient's condition may vary during the course of the stay. Therefore, in the MBPM we provide instructions on the procedures that should be followed to document cases in which therapy can be reduced or suspended for brief periods of time.

Also, we note that many IRF patients will medically benefit from more than 3 hours of therapy per day. Therefore, the 3 hour per day requirement is intended to be a minimum number of hours of therapy provided in an IRF, not a maximum. However, for the safety of the patient, we note that the intensity of therapy provided must never exceed the patient's level of tolerance or compromise the patient's safety.

In addition, while the requirement that IRFs ''ensure that the patients receive close medical supervision'' has been in effect since the mid-1980s, it has recently raised confusion among IRFs and Medicare contractors. Since this criterion currently found at 42 CFR 412.23(b)(4) and 412.29(c) has not been well-defined, it has been unclear how an IRF would document that close medical supervision was either needed by a patient or provided by the IRF. The need for physician supervision cannot be inferred retroactively from the presence or absence of an acute medical complication during the IRF stay. Similarly, the need for close medical supervision cannot generally be inferred from the presence or absence of frequent physician orders. Instead, we are proposing to include an evaluation of each patient's risk for clinical complications as part of the preadmission screening. Candidates for IRF admission should be assessed to ascertain the presence of risk factors requiring a level of physician supervision similar to the physician involvement generally expected in an acute inpatient environment, as compared with other settings of care. While the need for physician supervision will vary with each patient, we are proposing that the close medical supervision requirement would generally be met by having a rehabilitation physician, or other licensed treating physician with specialized training and experience in inpatient rehabilitation, conduct face-to-face visits with the patient a minimum of at least 3 days per week throughout the patient's stay. The purpose of the face-to-face visits is to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process.

It is critical to capture the preadmission screening information as closely as possible to the actual time of the IRF admission, so that the information provides a reliable picture of the patient's condition at the time of admission. For this reason, we propose to require (at § 412.29(b)(2)(i)) that the preadmission screening be conducted by a qualified clinician(s) designated by a rehabilitation physician within the 48 hours immediately preceding the IRF admission, to give the most accurate picture of the patient upon admission to the IRF. Further, we are proposing to require (at § 412.29(b)(2)(v)) that the preadmission screening documentation must be retained in the patient's medical record. We would expect that the reasons that the IRF clinical staff believe that the patient meets all of the required criteria for admission to the IRF would be included in the preadmission screening documentation. The MBPM will include more detailed instructions on the types of information required by the preadmission screening.

We are also proposing (at § 412.29(b)(2)(iv)) to require that a rehabilitation physician review and document his or her concurrence with the findings and results of the preadmission screening. By ''rehabilitation physician,'' we mean a licensed physician with specialized training and experience in rehabilitation. This requirement ensures that the appropriate admission decision will be made by a physician with specialized knowledge of rehabilitation therapies and will be based on the best available information about the patient's condition.

Finally, since the proposed preadmission screening must be detailed and comprehensive for every patient, we do not believe that there will be a continued need for an extensive post-admission assessment period which, when the current manual was written over two decades ago, was used to evaluate the need for IRF care. Therefore, we intend to delete the post-

admission evaluation period that is currently described in subsection 110.3 of the MBPM (rev. October 1, 2003) and replace it with more detailed instructions on continued stay and discharge policies as demonstrated in the draft MBPM.

By establishing these requirements, we recognize the importance of the professional judgment of a rehabilitation physician in the review of the preadmission screen at the time an admission decision is made. This information is more useful in reviewing the IRF admission decision than aspects of the IRF stay that would either be unknown or outside the control of the rehabilitation physician at the time of admission.

D. Proposed Post-Admission Requirements

It is the IRF's responsibility to initiate care as soon as the patient is admitted. To make accurate care planning decisions, the rehabilitation physician and interdisciplinary care team need to verify that the information obtained during the preadmission screen is still accurate. This post-admission evaluation also documents the physician decision-making process, and will provide additional insight to CMS in the program oversight process.

1. Post-Admission Evaluation: Once a patient has been admitted to an IRF, it is the responsibility of the rehabilitation physician with input from the interdisciplinary team to identify any relevant changes that may have occurred since the preadmission screening. Therefore, consistent with current industry practice, we propose to add a requirement (at § 412.29(c)(1)) for a post-admission evaluation by a rehabilitation physician within 24 hours of admission. The purpose of the post-admission evaluation is to document the patient's status on admission to the IRF, compare it to that noted in the preadmission screening documentation, and begin development of the patient's expected course of treatment that will be completed with input from all of the interdisciplinary team members in the overall plan of care. The results of the post-admission evaluation may result in a change from the preadmission conclusion that the patient is appropriate for IRF care. In such cases, appropriate steps should be taken. We propose to require that this document be retained in the patient's medical record. Please see section 110.1.2 of the draft MBPM for more detailed instructions on this proposal.

2. Individualized Overall Plan of Care: The overall plan of care is essential to providing high-quality care in IRFs. Comprehensive planning of the patient's course of treatment in the early stages of the stay leads to a more coordinated delivery of services to the patient, and such coordinated care is a critical aspect of the care provided in IRFs. The current regulations do not define the term ''overall plan of care,'' provide any instructions on the information required in the overall plan of care, or require it to be retained in the patient's medical record. We propose to require retention of the overall plan of care at the new section 412.29(c)(2)(ii). Furthermore, we intend to provide instructions on overall plans of care as seen in section 110.1.3 of the draft manual. Such detail would provide CMS with the information necessary for program review activities.

We believe that it is critical that a rehabilitation physician be responsible for developing the overall plan of care, with substantial input from the interdisciplinary team. We also believe that the physician-generated overall plan of care must be individualized to the unique needs of the patient, to ensure that each patient's individual care goals can be met.

Therefore, we are proposing (at § 412.29(c)(2)) to require that an individualized overall plan of care be developed for each IRF admission by a rehabilitation physician with input from the interdisciplinary team within 72 hours of the patient's admission to the IRF, and be retained in the patient's medical record.

E. Proposed Changes to the Requirements for the Interdisciplinary Team Meeting

As mentioned earlier in this proposed rule, we believe that interdisciplinary services, by definition, cannot be provided by only one discipline. The purpose of the interdisciplinary team meeting is to foster communication among disciplines to establish, prioritize, and achieve treatment goals.

Currently, we require team meetings at least once every two weeks. However, the length of many IRF stays has decreased significantly since this requirement was established. We believe that the biweekly meeting requirement is inadequate to ensure the appropriate establishment and achievement of treatment goals. Therefore, we propose at (§ 412.29(d)(2)) to increase the required frequency of the interdisciplinary team meetings to at least once per week to reflect current best practices in IRFs.

Also, to improve the effectiveness and coordination of the care provided to IRF patients and to better reflect best practices in IRFs, we propose (at § 412.29(d)(1)) to broaden the requirements regarding the professional staff that are expected to participate in the interdisciplinary team meetings. We propose that, at a minimum, the interdisciplinary team must consist of professionals from the following disciplines (each of whom must have current knowledge of the beneficiary as documented in the medical record):

- A rehabilitation physician with specialized training and experience in rehabilitation services;
- A registered nurse with specialized training or experience in rehabilitation;
- A social worker or a case manager (or both); and
- A licensed or certified therapist from each therapy discipline involved in treating the patient.

Although the purpose of the proposed requirement for interdisciplinary team meetings is to allow the exchange of information from all of the different disciplines involved in the patient's care, we believe that it is important to designate one person, specifically the rehabilitation physician, to be responsible for making the final decisions regarding the patient's IRF care. Thus, we are proposing to require (at § 412.29(d)(3)) that the rehabilitation physician document concurrence with all decisions made by the interdisciplinary team at each meeting.

As discussed above, the interdisciplinary team must include registered nurses with training or experience in rehabilitation. We believe that 24-hour nursing care is both a key component of IRF care, and the normal standard of care in IRFs. Further, we believe that requiring registered nurses to have specialized training or experience is warranted considering that IRF patients typically have significant risk factors for medical complications that need to be monitored in an inpatient hospital environment. Thus, it is important to note that under proposed § 412.29(a) the facility must be staffed to provide specialized nursing, regardless of whether any particular patient actually has a complication requiring specialized nursing.

Another critical aspect of IRF care is that rehabilitation therapy services are generally provided to each patient by a licensed or certified therapist working directly with the patient, more commonly known as one-on-one therapy. Anecdotally, we have heard that some IRFs are providing essentially all ''group therapy'' to their patients. We believe that group therapies have a role in patient care in an IRF, but that they should be used in IRFs primarily as an adjunct to one-on-one therapy services, not as the main or only source of therapy services provided to IRF

patients. While we recognize the value of group therapy, we believe that group therapy is typically a lower intensity service that should be considered as a supplement to the intensive individual therapy services generally provided in an IRF. To improve our understanding of when group therapy may be appropriate in IRFs, we specifically solicit comments on the types of patients for which group therapy may be appropriate, and the specific amounts of group instead of one-on-one therapies that may be beneficial for these types of patients. We anticipate using this information to assess the appropriate use of group therapies in IRFs and may create standards for group therapies in IRFs.

F. Proposed Director of Rehabilitation Requirement

We are proposing to retain the existing requirements for a Director of Rehabilitation without change.

G. Clarifying and Conforming Amendments

Since the proposed classification and payment requirements described above will apply to both rehabilitation hospitals and rehabilitation units, we are proposing to consolidate the criteria into one section of the regulations (at revised § 412.29). Thus, we propose to revise the heading of § 412.29 to include rehabilitation hospitals and to relocate the criteria to be classified as an inpatient rehabilitation hospital found at existing § 412.23(b)(3) through (b)(7) to the revised § 412.29. As a result, we propose to redesignate paragraphs (b)(8) and (b)(9) of § 412.23 as paragraphs (b)(3) and (b)(4). Lastly, we propose to make a technical correction to newly redesignated paragraph (b)(4) to ensure that it is consistent with the language found in the introductory paragraph at revised § 412.29 by changing the word ''or'' to the word ''and'' following the words ''specified in § 412.1(a)(1).''

H. Proposed Introductory Paragraph at § 412.30

As a result of the proposed changes to revised § 412.29, we are proposing to relocate the current provisions found at § 412.29(a) to a new introductory paragraph to be inserted at the beginning of § 412.30. The purpose of moving the definitions of a new and converted IRF is to separate them from the proposed requirements for admission and post-admission. Section 412.30 currently only contains regulatory requirements for new and converted rehabilitation units. As amended, it will cover inpatient rehabilitation hospitals and hospital units as well.

I. Proposed Rescission of the HCFAR 85–2 Ruling

As noted previously, the HCFAR is inconsistent with the current payment system. We would therefore like to take this opportunity to propose rescission of this document in order to prevent further confusion over which document provides instructions on the IRF PPS regulations (that document is Chapter 1, Section 110 of the MBPM).

VIII. Proposed Revisions to the Regulation Text To Require IRFs To Submit Patient Assessments on Medicare Advantage Patients for Use in the ''60 Percent Rule'' Calculations

In order to be excluded from the acute care inpatient hospital PPS specified in § 412.1(a)(1) and instead be paid under the IRF PPS, rehabilitation hospitals and units must meet the requirements for classification as an IRF stipulated in subpart B of part 412. In particular, § 412.23(b)(2) specifies that an IRF must meet a minimum percentage requirement that at least 60 percent of the IRF's population has one of the 13 medical conditions listed in § 412.23(b)(2)(ii) as a primary condition or comorbidity in order for the facility to be classified as an IRF. The minimum percentage is known as the ''compliance threshold.''

The instructions that we provide to Medicare contractors in Chapter 3, section 140 of the Medicare Claims Processing Manual, Internet-Only Manual (IOM) Pub. L. 100–04, provide for two methodologies that Medicare contractors may use to determine an IRF's compliance threshold. We refer to the first of these two methodologies as the ''presumptive methodology.'' This methodology makes use of the IRF–PAI information that is submitted for Medicare Part A fee-for-service inpatients under § 412.604 and § 412.618. It is ''presumptive'' in that, while the compliance threshold requirements specify the percent of all patients, this method utilizes Medicare patient data to estimate the compliance percent for the entire IRF patient population. The presumptive methodology uses computer software to examine the IRF–PAIs that each IRF submits to CMS for diagnostic codes that would indicate that a particular IRF patient has one of the 13 medical conditions listed in § 412.23(b)(2)(ii). If the computer software determines that the patient has a diagnostic code that indicates one of the 13 medical conditions listed in § 412.23(b)(2)(ii), then that patient is counted in the presumptive methodology calculation of that facility's compliance percentage; otherwise, the patient is not counted. Once the computer software has examined all of the IRF–PAIs submitted by a particular facility, the computer software computes the presumptive compliance percentage for that facility, which equals the total number of IRF–PAIs for patients with a diagnostic code indicating at least one of the 13 medical conditions listed in § 412.23(b)(2)(ii) divided by the total number of IRF–PAIs submitted by the facility. This becomes the facility's presumptive compliance percentage, which is then compared to the required minimum compliance percentage to determine whether the facility has met the required minimum compliance percentage for the designated compliance review period.

In accordance with IOM instructions in Chapter 3, section 140 of the Medicare Claims Processing Manual, the presumptive methodology described above is used in instances in which the Medicare contractor has verified that the facility's Medicare Part A fee-for-service inpatient population is representative of the facility's total inpatient population. For this to be the case, the IOM instructions specify that the facility's Medicare Part A fee-for-service inpatient population must be at least 50 percent or more of the facility's total inpatient population. If the facility's Medicare Part A fee-for-service inpatient population is less than 50 percent of the facility's total inpatient population, we cannot conclude that the IRF–PAI data are representative of the IRF's aggregate utilization pattern. Therefore, we require the Medicare contractors to use the second of the 2 methodologies to determine the facility's compliance percentage.

The second methodology is commonly known as the ''medical review'' methodology. This methodology requires the Medicare contractor to review a sample of medical records from the facility's total inpatient population. Information from those records is then used in an extrapolation that estimates the facility's compliance percentage. The second methodology may be used at any time at the discretion of the Medicare contractor, but we require its use if the facility's Medicare Part A fee-for-service inpatient population is less than 50 percent of the facility's total inpatient population (as described above) or if the facility fails to meet the minimum compliance percentage using the presumptive methodology. The medical review methodology is time consuming and labor intensive for both providers and contractors. It is most useful when

evaluating facilities with questionable utilization patterns, such as facilities that do not meet the presumptive compliance percentage, and is not efficient as the sole method for evaluating compliance.

As described above, the presumptive methodology relies upon the IRF–PAI data that is submitted under § 412.604 and § 412.618. To be used, the Medicare Part A inpatient population must consist of at least 50 percent or more of the facility's total inpatient population.

Since 2004, however, increasing numbers of Medicare beneficiaries in many areas of the country have been enrolling in Medicare Advantage (MA) plans rather than remaining in the traditional Medicare Part A fee-for-service program. This, in turn, has led to decreases in the number of Medicare Part A fee-for-service inpatients in certain IRFs across the country and has resulted in a reduction in the number of IRFs that can benefit from the presumptive methodology. For this reason, we have received many comments from individual IRFs as well as from IRF industry groups requesting that we allow Medicare Advantage patient data to be used in the presumptive methodology to improve facilities' chances of reaching the required 50 percent or more of the population mark for use of the presumptive methodology.

We agree with the unsolicited comments on the FY 2009 proposed rule that the MA population represents an increasing percentage of the patient populations in IRFs in many areas of the country. We also believe that it is important to update our policies wherever possible to allow for a reasonable means for calculating an IRF's compliance percentage under the 60 percent rule. Although we do not currently require IRFs to submit IRF–PAI data on MA patients, we understand that some IRFs are voluntarily submitting IRF–PAI data on some or all of their MA patients. To ensure that IRFs do not selectively submit IRF–PAI data on only those MA patients that help them in meeting their compliance percentage, we believe that it is essential to require IRFs to submit IRF–PAI data on all of their MA patients. We believe that this is the only way to maintain the integrity of the compliance percentage review process. Therefore, we are proposing to require that IRFs submit IRF–PAI data on all of their MA patients to facilitate better calculations under the 60 percent rule. However, we are seeking comments on whether requiring IRFs to submit IRF–PAI data on all of their MA patients is the best way to ensure the integrity of the compliance review process.

Where an IRF fails to submit all MA IRF PAIs, we propose that CMS will not count the MA patients in the compliance percentage for that IRF. In addition, to ensure that we receive all IRF–PAI data for all Medicare Patients, whether Part A or Part C, we propose to remove § 412.614(a)(3) of the regulations that currently provides for an exception that allows an IRF to not transmit IRF–PAIs for Medicare patients if the IRF does not submit a claim to Medicare for payment.

Thus, we propose to revise the regulation text in § 412.604, § 412.606, § 412.610, § 412.14, and § 412.618 to require IRFs to submit IRF–PAI information to CMS for all MA inpatients in IRFs, in addition to all Medicare Part A fee-for-service inpatients in IRFs. Requiring IRFs to submit IRF–PAI information for all MA inpatients will allow Medicare contractors to use this information to determine facilities' compliance percentages for the IRF 60 percent rule using the presumptive methodology. Note that we are proposing to preserve the long-standing 5 year record retention requirement for the IRF–PAIs completed on Medicare Part A fee-for-service patients, as currently required in § 412.610(f), but we are proposing a 10 year record retention requirement for IRF–PAIs completed on Medicare Part C (Medicare Advantage) patients to maintain consistency with the record retention requirements for Medicare Part C data specified in § 422.504(d).

For this reason, we propose the following revisions to the regulation text in § 412.604, § 412.606, § 412.610, § 412.14, and § 412.618. Specifically, we propose to add Medicare Part C (Medicare Advantage) patients to the patients for whom IRFs must complete and submit an IRF–PAI, remove the paragraph that allows IRFs not to submit IRF PAI data in instances in which the IRF does not submit a claim to Medicare, and reject MA IRF–PAI data that is not complete. The proposed changes to the regulations text are as follows:

- In § 412.604(c), we propose to add the following sentence to the end of the paragraph: ''IRFs must also complete a patient assessment instrument in accordance with § 412.606 for each Medicare Part C (Medicare Advantage) patient admitted to or discharged from an IRF on or after October 1, 2009.'' Thus, the paragraph would read as follows: ''For each Medicare Part A fee-for-service patient admitted to or discharged from an IRF on or after January 1, 2002, the inpatient rehabilitation facility must complete a patient assessment instrument in accordance with § 412.606. IRFs must also complete a patient assessment instrument in accordance with § 412.606 for each Medicare Part C (Medicare Advantage) patient admitted to or discharged from an IRF on or after October 1, 2009.''
- In § 412.606(b), we propose to add the phrase ''and Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''inpatients.'' The paragraph would read as follows: ''An inpatient rehabilitation facility must use the CMS inpatient rehabilitation facility patient assessment instrument to assess Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatients who—''
- In § 412.606(c)(1), we propose to add a sentence at the end of the existing paragraph that reads as follows: ''IRFs must also complete a patient assessment instrument in accordance with § 412.606 for each Medicare Part C (Medicare Advantage) patient admitted to or discharged from an IRF on or after October 1, 2009.''
- In § 412.610(a), we propose to add the phrase ''and Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''inpatient.'' The paragraph would read as follows: ''For each Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) inpatient, an inpatient rehabilitation facility must complete a patient assessment instrument as specified in § 412.606 that covers a time period that is in accordance with the assessment schedule specified in paragraph (c) of this section.''
- In § 412.610(b), we propose to add the phrase ''or Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''inpatient.'' The paragraph would read as follows: ''The first day that the Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) inpatient is furnished Medicare-covered services during his or her current inpatient rehabilitation facility hospital stay is counted as day one of the patient assessment schedule.''
- In § 412.610(c), we propose to add the phrase ''or Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''patient's.'' The paragraph would read as follows: ''The inpatient rehabilitation facility must complete a patient assessment instrument upon the Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) patient's admission and discharge as specified in paragraphs (c)(1) and (c)(2) of this section.''

• In § 412.610(c)(1)(i)(A), we propose to add the phrase ''or Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''hospitalization.'' The paragraph would read as follows: ''Time period is a span of time that covers calendar days 1 through 3 of the patient's current Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) hospitalization; * * *''

• In § 412.610(c)(2)(ii)(B), we propose to add the phrase ''or Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''inpatient,'' so that the resulting paragraph would read, ''The patient stops being furnished Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) inpatient rehabilitation services.''

• In § 412.610(f), we propose to add the phrase ''and Medicare Part C (Medicare Advantage) patients within the previous 10 years'' after ''5 years'' and before ''either,'' and also add the phrase ''and produce upon request to CMS or its contractors'' after ''obtain.'' The paragraph would read as follows: ''An inpatient rehabilitation facility must maintain all patient assessment data sets completed on Medicare Part A fee-for-service patients within the previous 5 years and Medicare Part C (Medicare Advantage) patients within the previous 10 years either in a paper format in the patient's clinical record or in an electronic computer file format that the inpatient rehabilitation facility can easily obtain and produce upon request to CMS or its contractors.''

• In § 412.614(a), we propose to add the phrase ''and Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''inpatient,'' the paragraph would read as follows: ''The inpatient rehabilitation facility must encode and transmit data for each Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatient—''

• We propose to remove § 412.614(a)(3).

• In § 412.614(b)(1), we propose to add the phrase ''and Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''inpatient,'' the paragraph would read as follows: ''Electronically transmit complete, accurate, and encoded data from the patient assessment instrument for each Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatient to our patient data system in accordance with the data format specified in paragraph (a) of this section; and * * *''

• We propose to revise § 412.614(d) to read, ''Consequences of failure to submit complete and timely IRF–PAI data, as required under paragraph (c) of this section.''

• We propose to revise § 412.614(d)(1) to read, ''Medicare Part A fee-for-service data.''

• We propose to make a technical correction to the paragraph formerly designated as § 412.614(d)(1) and assign the revised language to a new paragraph § 412.614(d)(1)(a), which would read as follows: ''We assess a penalty when an inpatient rehabilitation facility does not transmit all of the required data from the patient assessment instrument for its Medicare Part A fee-for-service patients to our patient data system in accordance with the transmission timeline in paragraph (c) of this section.

• We propose to redesignate paragraph § 412.614(d)(2) as § 412.614(d)(1)(b).

• We propose to add a new paragraph § 412.614(d)(2), which would read as follows: ''Medicare Part C (Medicare Advantage) data. Failure of the inpatient rehabilitation facility to transmit all of the required patient assessment instrument data for its Medicare Part C (Medicare Advantage) patients to our patient data system in accordance with the transmission timeline in paragraph (c) of this section will result in a forfeiture of the facility's ability to have any of its Medicare Part C (Medicare Advantage) data used in the calculations for determining the facility's compliance with the regulations at § 412.23(b)(2).

• In the introductory paragraph of § 412.618, we propose to add the phrase ''or Medicare Part C (Medicare Advantage)'' after ''fee-for-service'' and before ''patient.'' The paragraph would read as follows: ''For purposes of the patient assessment process, if a Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) patient has an interrupted stay, as defined under § 412.602, the following applies: * * *''

In addition, we have received several inquiries concerning the need to include IRF PAIs in the medical record. The IRF PAI was introduced as a payment tool when the IRF PPS was established in 2002. The IRF PAI provides detailed information on each patient's medical condition and rehabilitation status. As such, it is also used by CMS to conduct its program oversight functions. We are therefore proposing to revise § 412.610(f) to require that the IRF maintain all patient assessment data sets completed on Medicare Part A fee-for-service patients within the previous 5-years and Medicare Part C (Medicare Advantage) patients within the previous 10-years either in a paper format in the patient's clinical record or in an electronic computer file format that the inpatient rehabilitation facility can easily obtain and produce upon request to CMS or its contractors. This is meant to clarify any confusion that may have existed previously about whether the IRF–PAI is considered part of the patient's medical record. Note that we are proposing to preserve the long-standing 5-year record retention requirement for the IRF–PAIs completed on Medicare Part A fee-for-service patients, as required in current § 412.610(f), but we are proposing a 10-year record retention requirement for IRF–PAIs completed on Medicare Part C (Medicare Advantage) patients to maintain consistency with the record retention requirements for Medicare Part C data specified in § 422.504(d)(1)(ii).

IX. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

• The need for the information collection and its usefulness in carrying out the proper functions of our agency.

• The accuracy of our estimate of the information collection burden.

• The quality, utility, and clarity of the information to be collected.

• Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements:

Section 412.29 Excluded Rehabilitation Hospitals and Units: Additional Requirements

In 1983, CMS sought to distinguish rehabilitation hospitals from other hospitals that offer general medical and surgical services, but also provide some rehabilitation services, by developing new regulatory provisions that describe the criteria that hospital must meet to be excluded from the Inpatient Prospective Payment System (IPPS). These criteria relate to the preadmission screening of prospective inpatients, to the types of services that must be furnished by or

made available in the hospital, and to the hospital's management of the rehabilitation services it furnished.

All IPPS hospitals, including excluded rehabilitation hospitals and units, have been and continue to be required to comply with the Hospital Conditions of Participation (CoP) that served as the basis for the excluded criteria established in 1983. In this proposed rule, we propose regulatory provisions that would reinforce the link between the Hospital CoPs for medical records and delivery of inpatient rehabilitation services within the exclusion criteria, and that would promote further understanding of how medical necessity for rehabilitation services provided in IRFs should be established.

As previously discussed in this proposed rule, we are proposing to consolidate the existing exclusion criteria in § 412.23(b)(3) through (7) and § 412.29(b) through (f) into a revised § 412.29 that applies to both rehabilitation hospitals and units. We will then utilize the MPBM to issue guidance on how the documentation requirements relating to the medical record should be used in determining the medical necessity of IRF claims.

Section 412.23(b)(3) and § 412.29(b) currently require IRF facilities to have a preadmission screening process for each potential IRF patient. These requirements would be combined in the proposed § 412.29(b)(2)(iv). The proposed § 412.29(b)(2)(iv) would also require that the rehabilitation physician review and document his or her concurrence with the preadmission screening findings and the admission decision in keeping with the Hospital CoPs at § 482.24(c)(1). Similarly, the preadmission screening findings and admission decision would need to be retained in the patient's medical record, in keeping with the Hospital CoPs at § 482.24(c)(2). The burden associated with these proposed requirements would be the time and effort put forth by the rehabilitation physician to document his or her concurrence with the preadmission findings and the admission decision and retain the information in the patient's medical record. The burden associated with these proposed requirements are in keeping with the ''Condition of Participation: Medical record services,'' that are already applicable to Medicare participating hospitals. The burden associated with these requirements is currently approved under OMB# 0938–0328. As stated in the approved Hospital CoPs Supporting Statement, we believe that the proposed requirements reflect customary and usual business and medical practice. Thus, in accordance with section 1320.3(b)(2) of the Act, the burden is not subject to the PRA.

Proposed section § 412.29(c)(1) would be in keeping with the existing Hospital CoP requirement at § 482.24(c)(2) that requires the facility to have and utilize a post-admission evaluation process. The proposed post admission evaluation process at § 412.29(c)(1) would require that a rehabilitation physician complete a post-admission evaluation for each patient within 24 hours of that patient's admission to the IRF facility in order to document the patient's status on admission to the IRF, compare it to that noted in the preadmission screening documentation, and begin development of the overall individualized plan of care. Similarly, this proposed section would require that a post-admission physician evaluation be retained in the patient's medical record, in keeping with the Hospital CoPs at § 482.24(c)(2).

The burden associated with these proposed requirements would be the time and effort put forth by the rehabilitation physician to document the patient's status on admission to the IRF, compare it to that noted in the preadmission screening document, begin development of the plan of care, and retain the information in the patient's medical record. The burden associated with these proposed requirements are in keeping with the ''Condition of Participation: Medical record services,'' applicable to Medicare participating Hospitals. The burden associated with these requirements is currently approved under OMB# 0938–0328. As stated in the approved ''Hospital CoPs Supporting Statement,'' we believe that the proposed requirements reflect customary and usual business and medical practice. Thus, in accordance with section 1320.3(b)(2) of the Act, the burden is not subject to the PRA.

Proposed § 412.29(c)(2) would be in keeping with the existing requirement at § 412.23(c)(6) to develop an overall plan of care for each IRF admission. Such a proposal is in keeping with the Hospital CoPs at § 482.56(b). Similarly, the individualized plan of care that would be required by proposed § 412.29(c)(2) would be required to be retained in the patient's medical record, as currently required by the Hospital CoPs at § 482.24(c)(2).

The burden associated with these prospective requirements would be the time and effort put forth by the rehabilitation physician to develop the individualized overall plan of care and retain the individualized overall plan of care in the patient's medical record. The burden associated with these proposed requirements are in keeping with the ''Condition of Participation: Medical record services,'' and the ''Standard: Delivery of Services,'' that are already applicable to Medicare participating hospitals. The burden associated with these requirements is currently approved under OMB# 0938–0328. As stated in the approved ''Hospital CoPs Supporting Statement,'' we believe that the purposed requirements reflect customary and usual business and medical practice. The requirement for an individualized plan of care is also an industry standard. Thus, in accordance with section 1320.3(b)(2) of the Act, the burden is not subject to the PRA.

Proposed § 412.29(d)(2) would require the interdisciplinary team to meet at least once per week throughout the duration of the patient's stay to implement appropriate treatment services; review the patient's progress toward stated rehabilitation goals; identify any problems that could impede progress towards those goals; and, where necessary, reassess previously established goals in light of impediments, revise the treatment plan in light of new goals, and monitor continued progress toward those goals. Proposed § 412.23(d)(2) would be in keeping with § 482.24(c)(1) and (c)(2) of the Hospital CoPs.

The proposed requirement for a weekly conference revises the current requirement for bi-weekly meetings to reflect current medical practice and a reduction in the average patient lengths of stay that in turn make more frequent monitoring of patient status an important factor in ensuring adequate patient care. For example, with the average length of stay for many IRF stays under 14 days, a bi-weekly requirement for consultation and coordination of the patient's care would be ineffective. In consulting with clinicians, we have found that more frequent interdisciplinary team meetings are considered to be a currently recognized standard of practice, regardless of payor source. As with all other proposed requirements in this proposed rule, the public may submit comments on this proposed change.

The burden associated with this proposed revised requirement would be the time spent discussing the patient's progress, problems and reassessment/monitoring of continued progress. The burden associated with this proposed requirement is in keeping with the ''Condition of Participation: Medical record services,'' that are already applicable to Medicare participating hospitals. The burden associated with

these requirements is currently approved under OMB# 0938–0328. As stated in the approved ''Hospital CoPs Supporting Statement,'' we believe that the proposed requirements reflect customary and usual business and medical practice. Thus, in accordance with section 1320.3(b)(2) of the Act, the burden is not subject to the PRA.

Proposed § 412.29(d)(3) would require the rehabilitation physician to document concurrence with all decisions made by the interdisciplinary team at each team meeting, which would be in keeping with what is currently required by the Hospital CoPs at § 482.24(c)(1).

The burden associated with this proposed requirement is the time and effort put forth by the rehabilitation physician to document concurrence. The burden associated with this proposed requirement is in keeping with the ''Condition of Participation: Medical record services,'' applicable to Medicare participating hospitals. The burden associated with these requirements is currently approved under OMB# 0938–0328. As stated in the approved ''Hospital CoPs Supporting Statement,'' we believe that the proposed requirements reflect customary and usual business and medical practice. Thus, in accordance with section 1320.3(b)(2) of the Act, the burden is not subject to the PRA.

Section 412.604 Conditions for Payment Under the Prospective Payment System for Inpatient Rehabilitation Facilities

We have proposed to amend § 412.604(c) to add an IRF–PAI requirement for Medicare Part C (Medicare Advantage) patients that are admitted to or discharged from an Inpatient Rehabilitation Facility (IRF) on or after October 1, 2009.

The burden associated with this requirement is the time and effort put forth by each IRF to complete an average of approximately 38 additional patient assessment instruments each year associated with its Medicare Part C patients. We obtained the estimated average number of Medicare Part C patients in each IRF from the American Medical Rehabilitation Providers Association (AMRPA), based on AMRPA's own analysis of the eRehabData® policy database. CMS currently estimates that it takes the IRF 0.75 of an hour to complete a single patient assessment instrument. Therefore, the annual hour burden for each IRF to complete approximately 38 additional patient assessment instruments is 28.5 hours (38 × 0.75). The total annual hour burden for all 1,205 IRFs is 34,342.5 hours (28.5 hours × 1,205 IRFs). The burden estimate for using the patient assessment instrument for Medicare Part A is currently approved under 0938–0842. CMS will revise this currently approved package as necessary to include any additional burden placed on the IRF for submitting the patient assessment instrument for Medicare Advantage patients.

Section 412.606 Patient Assessments

Section 412.606 proposes to require an IRF to use the CMS inpatient rehabilitation facility patient assessment instrument to assess Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatients.

The burden for using the patient assessment instrument for Medicare Part A is currently approved under 0938–0842. CMS will revise this currently approved package as necessary to include any additional burden placed on IRFs for submitting the patient assessment instrument for Medicare Advantage patients.

Section 412.610 Assessment Schedule

Proposed § 412.610(f) states that an IRF must maintain all patient assessment data sets completed on Medicare Part A fee-for-service patients within the previous 5 years and Medicare Part C (Medicare Advantage) patients within the previous 10 years either in a paper format in the patient's clinical record or in an electronic computer file format that the inpatient rehabilitation facility can easily obtain and produce upon request to CMS or its contractors.

The burden for maintaining the patient assessment instrument for Medicare Part A is currently approved under OMB# 0938–0842. CMS will revise this currently approved package as necessary to include any additional burden placed on IRFs for maintaining the patient assessment instrument for Medicare Advantage patients.

Section 412.614 Transmission of Patient Assessment Data

Section 412.614(a) requires that the IRF must encode and transmit patient assessment data to CMS. The burden associated with this requirement is the time staff must take to transmit the data.

CMS currently estimates that it takes the IRF 0.10 of an hour to transmit a single patient assessment instrument. Therefore, the annual hour burden to transmit an average of approximately 38 additional patient assessments instruments per IRF is 3.8 hours (38 × 0.10). The total annual hour burden for all 1,205 IRFs is 4,579 hours (3.8 hours × 1,205 IRFs). The burden estimate for transmitting the patient assessment instrument for Medicare Part A is currently approved under 0938–0842. CMS will revise this currently approved package as necessary to include any additional burden placed on the IRF for transmitting the patient assessment instrument for Medicare Advantage patients.

You may submit comments on these information collection and recordkeeping requirements in one of the following ways (please choose only one of the ways listed):

4. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

5. Submit your written comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, *Attention:* CMS Desk Officer; *Fax:* (202) 395–7245; or *E-mail: OIRA_submission@omb.eop.gov*.

X. Response to Public Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the ''DATES'' section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

XI. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this proposed rule as required by Executive Order 12866 (September 30, 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA, September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). This proposed rule is a major rule, as defined in Title 5, United States Code, section 804(2),

because we estimate the impact to the Medicare program, and the annual effects to the overall economy, will be more than $100 million. We estimate that the total impact of these proposed changes for estimated FY 2010 payments compared to estimated FY 2009 payments would be an increase of approximately $150 million (this reflects a $140 million increase from the update to the payment rates and a $10 million increase due to the proposed update to the outlier threshold amount to increase estimated outlier payments from approximately 2.8 percent in FY 2009 to 3 percent in FY 2010).

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most IRFs and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7 million to $34.5 million in any one year. (For details, see the Small Business Administration's final rule that set forth size standards for health care industries, at 65 FR 69432, November 17, 2000.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an approximate total of 1,200 IRFs, of which approximately 60 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. The Department of Health and Human Services generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 7, we estimate that the net revenue impact of this proposed rule on all IRFs is to increase estimated payments by about 2.6 percent, with an estimated positive increase in payments of 3 percent or higher for some categories of IRFs (such as urban IRFs in the Mountain and Pacific regions). Thus, we anticipate that this proposed rule would have a significant impact on a substantial number of small entities. However, there is no negative estimated impact of this proposed rule that is within the significance threshold of 3 to 5 percent, so we believe that this proposed rule would not impose a significant burden on small entities. Medicare fiscal intermediaries and carriers are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. As discussed in detail below, the rates and policies set forth in this proposed rule will not have an adverse impact on rural hospitals based on the data of the 193 rural units and 21 rural hospitals in our database of 1,205 IRFs for which data were available.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of $100 million in 1995 dollars, updated annually for inflation. In 2009, that threshold level is approximately $133 million. This proposed rule will not impose spending costs on State, local, or tribal governments, in the aggregate, or by the private sector, of $133 million.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this proposed rule would not have a substantial effect on State and local governments.

B. Anticipated Effects of the Proposed Rule

1. Basis and Methodology of Estimates

This proposed rule sets forth updates of the IRF PPS rates contained in the FY 2009 final rule and proposes updates to the CMG relative weights and length of stay values, the facility-level adjustments, the wage index, and the outlier threshold for high-cost cases.

We estimate that the FY 2010 impact would be a net increase of $150 million in payments to IRF providers (this reflects a $140 million estimated increase from the proposed update to the payment rates and a $10 million estimated increase due to the proposed update to the outlier threshold amount to increase the estimated outlier payments from approximately 2.8 percent in FY 2009 to 3.0 percent in FY 2010). The impact analysis in Table 7 of this proposed rule represents the projected effects of the proposed policy changes in the IRF PPS for FY 2010 compared with estimated IRF PPS payments in FY 2009 without the proposed policy changes. We estimate the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these proposed changes, and we do not make adjustments for future changes in such variables as number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs. Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2010, we are proposing a number of standard annual revisions and clarifications mentioned elsewhere in this proposed rule (for example, the update to the wage and market basket indexes used to adjust the Federal rates). We estimate that these proposed revisions would increase payments to IRFs by approximately $140 million (all due to the update to the market basket index, since the update to the wage index is done in a budget neutral manner—as required by statute—and therefore neither increases nor decreases aggregate payments to IRFs).

The aggregate change in estimated payments associated with this proposed rule is estimated to be an increase in payments to IRFs of $150 million for FY 2010. The market basket increase of $140 million and the $10 million increase due to the proposed update to the outlier threshold amount to increase estimated outlier payments from approximately 2.8 percent in FY 2009 to 3.0 percent in FY 2010 would result in a net change in estimated payments from FY 2009 to FY 2010 of $150 million.

The effects of the proposed changes that impact IRF PPS payment rates are shown in Table 7. The following proposed changes that affect the IRF

PPS payment rates are discussed separately below:

- The effects of the proposed update to the outlier threshold amount, from approximately 2.8 to 3.0 percent of total estimated payments for FY 2010, consistent with section 1886(j)(4) of the Act.
- The effects of the annual market basket update (using the RPL market basket) to IRF PPS payment rates, as required by section 1886(j)(3)(A)(i) and section 1886(j)(3)(C) of the Act.
- The effects of applying the budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the proposed budget-neutral changes to the CMG relative weights and length of stay values, under the authority of section 1886(j)(2)(C)(i) of the Act.
- The effects of the proposed budget-neutral changes to the facility-level adjustment factors, as permitted under section 1886(j)(3)(A)(v) of the Act.
- The total proposed change in estimated payments based on the FY 2010 proposed policies relative to estimated FY 2009 payments without the proposed policies.

2. Description of Table 7

The table below categorizes IRFs by geographic location, including urban or rural location, and location with respect to CMS's nine census divisions (as defined on the cost report) of the country. In addition, the table divides IRFs into those that are separate rehabilitation hospitals (otherwise called freestanding hospitals in this section), those that are rehabilitation units of a hospital (otherwise called hospital units in this section), rural or urban facilities, ownership (otherwise called for-profit, non-profit, and government), and by teaching status. The top row of the table shows the overall impact on the 1,205 IRFs included in the analysis.

The next 12 rows of Table 7 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 991 IRFs located in urban areas included in our analysis. Among these, there are 793 IRF units of hospitals located in urban areas and 198 freestanding IRF hospitals located in urban areas. There are 214 IRFs located in rural areas included in our analysis. Among these, there are 193 IRF units of hospitals located in rural areas and 21 freestanding IRF hospitals located in rural areas. There are 398 for-profit IRFs. Among these, there are 324 IRFs in urban areas and 74 IRFs in rural areas. There are 739 non-profit IRFs. Among these, there are 615 urban IRFs and 124 rural IRFs. There are 68 government-owned IRFs. Among these, there are 52 urban IRFs and 16 rural IRFs.

The remaining three parts of Table 7 show IRFs grouped by their geographic location within a region and by teaching status. First, IRFs located in urban areas are categorized with respect to their location within a particular one of the nine CMS geographic regions. Second, IRFs located in rural areas are categorized with respect to their location within a particular one of the nine CMS geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. Finally, IRFs are grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to average daily census (ADC) ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent.

The estimated impacts of each proposed change to the facility categories listed above are shown in the columns of Table 7. The description of each column is as follows:

Column (1) shows the facility classification categories described above.

Column (2) shows the number of IRFs in each category in our FY 2007 analysis file.

Column (3) shows the number of cases in each category in our FY 2007 analysis file.

Column (4) shows the estimated effect of the proposed adjustment to the outlier threshold amount so that estimated outlier payments increase from approximately 2.8 percent in FY 2009 to 3.0 percent of total estimated payments for FY 2010.

Column (5) shows the estimated effect of the market basket update to the IRF PPS payment rates.

Column (6) shows the estimated effect of the update to the IRF labor-related share and wage index, in a budget neutral manner.

Column (7) shows the estimated effect of the update to the CMG relative weights and average length of stay values, in a budget neutral manner.

Column (8) shows the estimated effect of the update to the facility-level adjustment factors (rural, LIP, and teaching status), in a budget neutral manner.

Column (9) compares our estimates of the payments per discharge, incorporating all of the proposed changes reflected in this proposed rule for FY 2010, to our estimates of payments per discharge in FY 2009 (without these proposed changes).

The average estimated increase for all IRFs is approximately 2.6 percent. This estimated increase includes the effects of the 2.4 percent market basket update. It also includes the 0.2 percent overall estimated increase (the difference between 2.8 percent in FY 2009 and 3.0 percent in FY 2010) in estimated IRF outlier payments from the proposed update to the outlier threshold amount. Because we are making the remainder of the proposed changes outlined in this proposed rule in a budget-neutral manner, they would not affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they would affect the estimated distribution of payments among providers.

TABLE 7—PROPOSED IRF IMPACT TABLE FOR FY 2010

Facility classification	Number of IRFs	Number of cases	Outlier	Market basket	FY 2010 CBSA wage index and labor-share	CMG	Facility adjustments	Total percent change
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Total	1,205	376,418	0.2%	2.4%	0.0%	0.0%	0.0%	2.6%
Urban unit	793	205,883	0.3	2.4	0.0	0.0	0.2	2.9
Rural unit	193	31,249	0.3	2.4	0.1	0.0	−1.9	0.8

TABLE 7—PROPOSED IRF IMPACT TABLE FOR FY 2010—Continued

Facility classification	Number of IRFs	Number of cases	Outlier	Market basket	FY 2010 CBSA wage index and labor-share	CMG	Facility adjustments	Total percent change
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
Urban hospital	198	132,879	0.1	2.4	0.0	0.0	0.3	2.8
Rural hospital	21	6,407	0.1	2.4	0.1	0.0	−2.3	0.3
Urban for-profit	324	128,187	0.2	2.4	0.1	0.0	0.1	2.9
Rural for-profit	74	13,477	0.2	2.4	0.0	0.0	−2.2	0.3
Urban Non-Profit	615	195,986	0.3	2.4	−0.1	0.0	0.3	2.8
Rural Non-Profit	124	21,898	0.2	2.4	0.1	0.0	−1.9	0.9
Urban Government	52	14,589	0.5	2.4	0.1	0.0	0.0	3.0
Rural Government	16	2,281	0.5	2.4	0.3	0.0	−1.8	1.4
Urban	991	338,762	0.2	2.4	0.0	0.0	0.2	2.8
Rural	214	37,656	0.2	2.4	0.1	0.0	−2.0	0.7
Urban by region								
Urban New England	32	16,461	0.2	2.4	0.0	0.0	0.2	2.8
Urban Middle Atlantic	156	60,076	0.2	2.4	−0.3	0.0	0.5	2.7
Urban South Atlantic	133	57,429	0.3	2.4	−0.2	0.0	0.1	2.6
Urban East North Central	195	59,475	0.3	2.4	−0.6	0.0	0.6	2.6
Urban East South Central	54	24,565	0.2	2.4	−0.1	0.0	0.4	2.9
Urban West North Central	68	17,166	0.3	2.4	0.4	0.0	0.2	3.3
Urban West South Central	175	58,891	0.2	2.4	0.0	0.0	0.3	3.0
Urban Mountain	71	21,982	0.3	2.4	0.3	0.0	0.2	3.2
Urban Pacific	107	22,717	0.4	2.4	1.5	0.0	−1.1	3.2
Rural by region								
Rural New England	6	1,480	0.4	2.4	−0.3	0.0	−1.5	0.9
Rural Middle Atlantic	18	3,372	0.2	2.4	−0.3	0.0	−1.3	0.9
Rural South Atlantic	26	5,505	0.2	2.4	−0.2	0.0	−2.2	0.2
Rural East North Central	36	6,332	0.2	2.4	−0.5	0.0	−1.7	0.3
Rural East South Central	23	4,078	0.1	2.4	−0.2	0.0	−2.7	−0.4
Rural West North Central	37	5,485	0.3	2.4	0.5	0.0	−1.7	1.4
Rural West South Central	57	10,316	0.2	2.4	0.7	0.0	−2.3	1.0
Rural Mountain	6	592	0.4	2.4	0.3	0.0	−1.8	1.3
Rural Pacific	5	496	0.8	2.4	0.5	0.0	−1.0	2.7
Teaching Status								
Non-teaching	1,087	325,871	0.2	2.4	0.0	0.0	−0.1	2.6
Resident to ADC less than 10%	66	35,237	0.2	2.4	−0.1	0.0	0.0	2.5
Resident to ADC 10%–19%	34	10,178	0.2	2.4	−0.8	0.0	0.4	2.2
Resident to ADC greater than 19%	18	5,132	0.2	2.4	−0.2	0.0	2.4	4.9

3. Impact of the Proposed Update to the Outlier Threshold Amount

In the FY 2009 IRF PPS final rule (73 FR 46370), we used FY 2007 patient-level claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2009 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2009. For this proposed rule, we are proposing to update our analysis using more current FY 2007 data. Using the updated FY 2007 data, we now estimate that IRF outlier payments, as a percentage of total estimated payments for FY 2010, decreased from 3 percent using the FY 2007 data to approximately 2.8 percent using the updated FY 2007 data. As a result, we are proposing to adjust the outlier threshold amount for FY 2010 to $9,976, reflecting total estimated outlier payments equal to 3 percent of total estimated payments in FY 2010.

The impact of the proposed update to the outlier threshold amount (as shown in column 4 of Table 7) is to increase estimated overall payments to IRFs by 0.2 percent. We do not estimate that any group of IRFs would experience a decrease in payments from this proposed update. We estimate the largest increase in payments to be a 0.8 percent increase in estimated payments to rural IRF's in the Pacific region.

4. Impact of the Proposed Market Basket Update to the IRF PPS Payment Rates

The proposed market basket update to the IRF PPS payment rates is presented in column 5 of Table 7. In the aggregate the proposed update would result in a 2.4 percent increase in overall estimated payments to IRFs.

5. Impact of the Proposed CBSA Wage Index and Labor-Related Share

In column 6 of Table 7, we present the effects of the proposed budget neutral update of the wage index and labor-related share. In the aggregate and for all urban IRFs, we do not estimate that these proposed changes would affect

overall estimated payments to IRFs. However, we estimate that these proposed changes would have small distributional effects. We estimate a 0.1 percent increase in payments to rural IRFs, with the largest increase in payments of 1.5 percent for urban IRFs in the Pacific region. We estimate the largest decrease in payments from the proposed update to the CBSA wage index and labor-related share to be a 0.8 percent decrease for IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent.

6. Impact of the Proposed Update to the CMG Relative Weights and Average Length of Stay Values

In column 7 of Table 7, we present the effects of the proposed budget neutral update of the CMG relative weights and average length of stay values. In the aggregate and across all hospital groups we do not estimate that these proposed changes would affect overall estimated payments to IRFs.

7. Impact of the Proposed Update to the Rural, LIP, and Teaching Status Adjustment Factors

In column 8 of Table 7, we present the effects of the proposed budget neutral update to the rural, LIP, and teaching status adjustment factors. In the aggregate, we do not estimate that these proposed changes would affect overall estimated payments to IRFs. However, we estimate that these proposed changes would have small distributional effects. We estimate the largest increase in payments to be a 2.4 percent increase for IRFs with a resident to ADC ratio greater than 19 percent. We estimate the largest decrease in payments to be a 2.7 percent decrease for rural IRFs in the East South Central region.

C. Alternatives Considered

Because we have determined that this proposed rule would have a significant economic impact on IRFs and on a substantial number of small entities, we will discuss the alternative changes to the IRF PPS that we considered.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services. As noted in section V of this proposed rule, in the absence of statutory direction on the FY 2010 market basket increase factor, it is our understanding that the Congress requires a full market basket increase factor based upon current data. Thus, we did not consider alternatives to updating payments using the estimated RPL market basket increase factor (currently 2.4 percent) for FY 2010.

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2010. However, several commenters on the FY 2009 IRF PPS proposed rule (73 FR 46373) suggested that the data that we used for FY 2009 to update the CMG relative weights and average length of stay values did not fully reflect recent changes in IRF utilization that have occurred because of changes in the IRF compliance percentage and the consequences of recent IRF medical necessity reviews. In light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of these recent changes and that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs, we believe that it is appropriate to update the CMG relative weights and average length of stay values at this time.

We also considered maintaining the existing rural, LIP, and teaching status adjustment factors for FY 2010. However, the current rural, LIP, and teaching status adjustment factors are based on RAND's analysis of FY 2003 data, which are not reflective of recent changes in IRF utilization that have occurred because of changes in the IRF compliance percentage and the consequences of recent IRF medical necessity reviews. Thus, we believe that it is important to update these adjustment factors at this time to ensure that payments to IRFs reflect as accurately as possible the current costs of care in IRFs.

In estimating the proposed updates to the rural, LIP, and teaching status adjustment factors, we considered either basing them on an analysis of FY 2007 data alone, or averaging the adjustment factors based on the most recent three years of data (FYs 2005, 2006, and 2007). We decided to propose the new approach of averaging the adjustment factors based on the most recent three years of data to avoid unnecessarily large fluctuations in the adjustment factors from year to year, and thereby promote the consistency and predictability of IRF PPS payments over time. We believe that this will benefit all IRFs by enabling them to plan their future Medicare payments more accurately.

We considered maintaining the existing outlier threshold amount for FY 2010. However, the proposed update to the outlier threshold amount would have a positive impact on IRF providers and, therefore, on small entities (as shown in Table 7, column 4). Further, analysis of FY 2007 data indicates that estimated outlier payments would not equal 3 percent of estimated total payments for FY 2010 unless we proposed to update the outlier threshold amount. Thus, we believe that this update is appropriate for FY 2010.

In addition, we considered maintaining the existing coverage requirements for IRFs, without clarification. However, these coverage requirements have not been updated in over 20 years and no longer reflect current medical practice or changes that have occurred in IRF utilization and payments as a result of the implementation of the IRF PPS in 2002. We believe that the proposed clarifications would benefit IRFs and Medicare's contractors (including fiscal intermediaries, Medicare Administrative Contractors, and Recovery Audit Contractors) by promoting a more consistent understanding of CMS's IRF coverage policies among stakeholders, thereby leading to fewer disputed IRF claims denials.

Finally, we considered maintaining our current policy of requiring that an IRF's Medicare Part A inpatient population consist of at least 50 percent or more of the facility's total inpatient population before the presumptive methodology can be used to calculate the IRF's compliance percentage under the 60 percent rule. However, increasing numbers of Medicare beneficiaries in many areas of the country have been enrolling in Medicare Advantage (MA) plans rather than remaining in the traditional Medicare Part A fee-for-service program. This, in turn, has led to decreases in the number of Medicare Part A fee-for-service inpatients in certain IRFs across the country and has resulted in a reduction in the number of IRFs that can benefit from the presumptive methodology. We did not anticipate this result when the policy was implemented. In light of these recent trends, we believe that it is appropriate at this time to include the Medicare Advantage patients in the calculations for the purposes of using the presumptive methodology to determine IRFs' compliance with the 60 percent rule requirements.

D. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 8 below, we have prepared an accounting statement showing the classification of the expenditures associated with the

provisions of this proposed rule. This table provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the proposed changes presented in this proposed rule based on the data for 1,205 IRFs in our database. All estimated expenditures are classified as transfers to Medicare providers (that is, IRFs).

TABLE 8—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES, FROM THE 2009 IRF PPS FISCAL YEAR TO THE 2010 IRF PPS FISCAL YEAR

Category	Transfers
Annualized Monetized Transfers	$150 million.
From Whom to Whom?	Federal Government to IRF Medicare Providers.

E. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2010 are projected to increase by 2.6 percent, compared with those in FY 2009, as reflected in column 9 of Table 7. IRF payments are estimated to increase 2.8 percent in urban areas and 0.7 percent in rural areas, per discharge compared with FY 2009. Payments to rehabilitation units in urban areas are estimated to increase 2.9 percent per discharge. Payments to rehabilitation freestanding hospitals in urban areas are estimated to increase 2.8 percent per discharge. Payments to rehabilitation units in rural areas are estimated to increase 0.8 percent per discharge, while payments to freestanding rehabilitation hospitals in rural areas are estimated to increase 0.3 percent per discharge.

Overall, the largest payment increase is estimated at 4.9 percent for IRFs with a resident to ADC ratio greater than 19 percent. Rural IRFs in the East South Central region are estimated to have a decrease of 0.4 percent in payments.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

1. The authority citation for part 412 continues to read as follows:

Authority: Sections 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart B—Hospital Services Subject to and Excluded From the Prospective Payment Systems for Inpatient Operating Costs and Inpatient Capital-Related Costs

2. Section 412.23 is amended by—

A. Removing paragraphs (b)(3) through (b)(7).

B. Redesignating paragraphs (b)(8) and (b)(9) as paragraphs (b)(3) and (b)(4).

C. Revising newly redesignated paragraph (b)(4).

The revision reads as follows:

§ 412.23 Excluded hospitals: Classifications.

* * * * *

(b) * * *

(4) For cost reporting periods beginning on or after October 1, 1991, if a hospital is excluded from the prospective payment systems specified in § 412.1(a)(1) and is paid under the prospective payment system specified in § 412.1(a)(3) for a cost reporting period under paragraph (b)(3) of this section, but the inpatient population it actually treated during that period does not meet the requirements of paragraph (b)(2) of this section, we adjust payments to the hospital retroactively in accordance with the provisions in § 412.130.

* * * * *

3. Section 412.29 is amended by—

A. Revising the section heading.

B. Revising the introductory text.

C. Revising paragraphs (a) through (d).

D. Removing paragraph (e).

E. Redesignating paragraph (f) as paragraph (e).

F. Revising newly redesignated paragraph (e).

The revisions read as follows:

§ 412.29 Excluded rehabilitation hospitals and units: Additional requirements.

In order to be excluded from the prospective payment systems described in § 412.1(a)(1) and to be paid under the prospective payment system specified in § 412.1(a)(3), a rehabilitation hospital or a rehabilitation unit, collectively referred to as ''inpatient rehabilitation facilities,'' must meet the following requirements:

(a) Provide rehabilitation nursing, physical therapy, occupational therapy, plus, as needed, speech-language pathology, social services, psychological services, and prosthetic and orthotic services that—

(1) Are ordered by a rehabilitation physician; that is, a licensed physician with specialized training and experience in rehabilitation.

(2) Require the care of skilled professionals, such as rehabilitation nurses, physical therapists, occupational therapists, speech-language pathologists, prosthetists, orthotists, and neuropsychologists.

(b) Inpatient Rehabilitation Facility Admission Requirements:

(1) The facility must ensure that each patient it admits meets the following requirements at the time of admission—

(i) Requires the active and ongoing therapeutic intervention of at least two therapy disciplines (physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics therapy), one of which must be physical or occupational therapy.

(ii) Generally requires and can reasonably be expected to actively participate in at least 3 hours of therapy (physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics therapy) per day at least 5 days per week and is expected to make measurable improvement that will be of practical value to improve the patient's functional capacity or adaptation to impairments. The required therapy treatments must begin within 36 hours after the patient's admission to the IRF.

(iii) Is sufficiently stable at the time of admission to the IRF to be able to actively participate in an intensive rehabilitation program.

(iv) Requires physician supervision by a rehabilitation physician, as defined in subsection (a)(1), or other licensed treating physician with specialized training and experience in inpatient rehabilitation. Generally, the requirement for medical supervision means that the rehabilitation physician

must conduct fact-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process.

(2) The facility must have and utilize a thorough preadmission screening process for each potential patient that meets the following criteria:

(i) It is conducted by a qualified clinician(s) designated by a rehabilitation physician described in paragraph (a)(1) of this section within the 48 hours immediately preceding the IRF admission.

(ii) It includes a detailed and comprehensive review of each prospective patient's condition and medical history.

(iii) It serves as the basis for the initial determination of whether or not the patient meets the IRF admission requirements in paragraph (b) of this section.

(iv) It is used to inform a rehabilitation physician who reviews and documents his or her concurrence with the findings and results of the preadmission screening.

(v) It is retained in the patient's medical record.

(c) Post-Admission Requirements:

(1) *Post-Admission Evaluation.* The facility must have and utilize a post-admission evaluation process in which a rehabilitation physician completes a post-admission evaluation for each patient within 24 hours of that patient's admission to the IRF facility in order to document the patient's status on admission to the IRF, compare it to that noted in the preadmission screening documentation, and begin development of the overall individualized plan of care. This post-admission physician evaluation is to be retained in the patient's medical record.

(2) *Individualized Overall Plan of Care.* The facility shall ensure that:

(i) An individualized overall plan of care is developed by a rehabilitation physician with input from the interdisciplinary team within 72 hours of the patient's admission to the IRF.

(ii) The individualized overall plan of care is retained in the patient's medical record.

(d) Interdisciplinary Team. The facility shall ensure that each patient's treatment is managed using a coordinated interdisciplinary team approach to treatment.

(1) At a minimum, the interdisciplinary team is to be led by a rehabilitation physician and further consist of a registered nurse with specialized training or experience in rehabilitation; a social worker or case manager (or both); and a licensed or certified therapist from each therapy discipline involved in treating the patient. All team members must have current knowledge of the patient's medical and functional status.

(2) The team must meet at least once per week throughout the duration of the patient's stay to implement appropriate treatment services; review the patient's progress toward stated rehabilitation goals; identify any problems that could impede progress towards those goals; and, where necessary, reassess previously established goals in light of impediments, revise the treatment plan in light of new goals, and monitor continued progress toward those goals.

(3) The rehabilitation physician must document concurrence with all decisions made by the interdisciplinary team at each team meeting.

(e) Director of Rehabilitation. The IRF must have a director of rehabilitation who—

(1) In a rehabilitation hospital provides services to the hospital and its inpatients on a full-time basis, or

(2) In a rehabilitation unit, provides services to the unit and to its inpatients for at least 20 hours per week; and

(3) Meets the definition of a physician as set forth in Section 1861(r) of the Act; and,

(4) Has had, after completing a one-year hospital internship, at least two years of training or experience in the medical management of inpatients requiring rehabilitation services.

4. Section 412.30 is amended by—

A. Revising the section heading.

B. Adding new introductory text.

The revision and addition read as follows:

§ 412.30 Exclusion of new and converted rehabilitation units and expansion of units already excluded.

In order to be excluded from the prospective payment systems described in § 412.1(a)(1) and to be paid under the prospective payment system specified in § 412.1(a)(3), a new rehabilitation unit must meet either the requirements for a new unit under § 412.30(b) or a converted unit under § 412.30(c).

* * * * *

Subpart P—Prospective Payment for Inpatient Rehabilitation Hospitals and Rehabilitation Units

5. Section 412.604 is amended by revising paragraph (c) to read as follows:

§ 412.604 Conditions for payment under the prospective payment system for inpatient rehabilitation facilities.

* * * * *

(c) *Completion of patient assessment instrument.* For each Medicare Part A fee-for-service patient admitted to or discharged from an IRF on or after January 1, 2002, the inpatient rehabilitation facility must complete a patient assessment instrument in accordance with § 412.606. IRFs must also complete a patient assessment instrument in accordance with § 412.606 for each Medicare Part C (Medicare Advantage) patient admitted to or discharged from an IRF on or after October 1, 2009.

* * * * *

6. Section 412.606 is amended by—

A. Revising paragraph (b) introductory text.

B. Revising paragraph (c)(1).

The revisions read as follows:

§ 412.606 Patient Assessments.

* * * * *

(b) *Patient assessment instrument.* An inpatient rehabilitation facility must use the CMS inpatient rehabilitation facility patient assessment instrument to assess Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatients who—

* * * * *

(c) * * *

(1) A clinician of the inpatient rehabilitation facility must perform a comprehensive, accurate, standardized, and reproducible assessment of each Medicare Part A fee-for-service inpatient using the inpatient rehabilitation facility patient assessment instrument specified in paragraph (b) of this section as part of his or her patient assessment in accordance with the schedule described in § 412.610. IRFs must also complete a patient assessment instrument in accordance with § 412.606 for each Medicare Part C (Medicare Advantage) patient admitted to or discharged from an IRF on or after October 1, 2009.

* * * * *

7. Section 412.610 is amended by—

A. Revising paragraph (a).

B. Revising paragraph (b).

C. Revising paragraph (c) introductory text.

D. Revising paragraph (c)(1)(i)(A).

E. Revising paragraph (c)(2)(ii)(B).

F. Revising paragraph (f).

The revisions read as follows:

§ 412.610 Assessment schedule.

(a) *General.* For each Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) inpatient, an inpatient rehabilitation facility must complete a patient assessment instrument as specified in § 412.606 that covers a time period that is in accordance with the assessment

schedule specified in paragraph (c) of this section.

(b) *Starting the assessment schedule day count.* The first day that the Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) inpatient is furnished Medicare-covered services during his or her current inpatient rehabilitation facility hospital stay is counted as day one of the patient assessment schedule.

(c) *Assessment schedules and references dates.* The inpatient rehabilitation facility must complete a patient assessment instrument upon the Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) patient's admission and discharge as specified in paragraphs (c)(1) and (c)(2) of this section.

(1) * * *

(i) * * *

(A) Time period is a span of time that covers calendar days 1 through 3 of the patient's current Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) hospitalization;

* * * * *

(2) * * *

(ii) * * *

(B) The patient stops being furnished Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) inpatient rehabilitation services.

* * * * *

(f) *Patient assessment instrument record retention.* An inpatient rehabilitation facility must maintain all patient assessment data sets completed on Medicare Part A fee-for-service patients within the previous 5 years and Medicare Part C (Medicare Advantage) patients within the previous 10 years either in a paper format in the patient's clinical record or in an electronic computer file format that the inpatient rehabilitation facility can easily obtain and produce upon request to CMS or its contractors.

8. Section 412.614 is amended by—

A. Revising paragraph (a) introductory text.

B. Removing paragraph (a)(3).

C. Revising paragraph (b)(1).

D. Revising paragraph (d).

E. Revising paragraph (e).

The revisions read as follows:

§ 412.614 Transmission of patient assessment data.

(a) *Data format*; *General rule.* The inpatient rehabilitation facility must encode and transmit data for each Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatient—

* * * * *

(b) * * *

(1) Electronically transmit complete, accurate, and encoded data from the patient assessment instrument for each Medicare Part A fee-for-service and Medicare Part C (Medicare Advantage) inpatient to our patient data system in accordance with the data format specified in paragraph (a) of this section; and

* * * * *

(d) *Consequences of failure to submit complete and timely IRF–PAI data, as required under paragraph (c) of this section.*

(1) *Medicare Part A fee-for-service data.*

(i) We assess a penalty when an inpatient rehabilitation facility does not transmit all of the required data from the patient assessment instrument for its Medicare Part A fee-for-service patients to our patient data system in accordance with the transmission timeline in paragraph (c) of this section.

(ii) If the actual patient assessment data transmission date for a Medicare Part A fee-for-service patient is later than 10 calendar days from the transmission date specified in paragraph (c) of this section, the patient assessment data is considered late and the inpatient rehabilitation facility receives a payment rate than is 25 percent less than the payment rate associated with a case-mix group.

(2) *Medicare Part C (Medicare Advantage) data.* Failure of the inpatient rehabilitation facility to transmit all of the required patient assessment instrument data for its Medicare Part C (Medicare Advantage) patients to our patient data system in accordance with the transmission timeline in paragraph (c) of this section will result in a forfeiture of the facility's ability to have any of its Medicare Part C (Medicare Advantage) data used in the calculations for determining the facility's compliance with the regulations in § 412.23(b)(2).

(e) *Exemption to the consequences for transmitting the IRF–PAI data late.* CMS may waive the consequences of failure to submit complete and timely IRF–PAI data specified in paragraph (d) of this section when, due to an extraordinary situation that is beyond the control of an inpatient rehabilitation facility, the inpatient rehabilitation facility is unable to transmit the patient assessment data in accordance with paragraph (c) of this section. Only CMS can determine if a situation encountered by an inpatient rehabilitation facility is extraordinary and qualifies as a situation for waiver of the penalty specified in paragraph (d)(1)(ii) of this section or for waiver of the forfeiture specified in paragraph (d)(2) of this section. An extraordinary situation may be due to, but is not limited to, fires, floods, earthquakes, or similar unusual events that inflect extensive damage to an inpatient facility. An extraordinary situation may be one that produces a data transmission problem that is beyond the control of the inpatient rehabilitation facility, as well as other situations determined by CMS to be beyond the control of the inpatient rehabilitation facility. An extraordinary situation must be fully documented by the inpatient rehabilitation facility.

9. Section 412.618 is amended by revising the introductory text to read as follows.

§ 412.618 Assessment process for interrupted stays.

For purposes of the patient assessment process, if a Medicare Part A fee-for-service or Medicare Part C (Medicare Advantage) patient has an interrupted stay, as defined under § 412.602, the following applies:

* * * * *

Authority: (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: March 11, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 16, 2009.

Charles E. Johnson,

Acting Secretary.

The following addendum will not appear in the Code of Federal Regulations.

Addendum

In this addendum, we provide the wage index tables referred to throughout the preamble to this proposed rule. The tables presented below are as follows:

Table 1—Proposed Inpatient Rehabilitation Facility Wage Index for Urban Areas for Discharges Occurring from October 1, 2009 through September 30, 2010

Table 2—Proposed Inpatient Rehabilitation Facility Wage Index for Rural Areas for Discharges Occurring from October 1, 2009 through September 30, 2010.

BILLING CODE 4120–01–P

TABLE 1 - PROPOSED INPATIENT REHABILITATION FACILITY WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2009 THROUGH SEPTEMBER 30, 2010

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10180	Abilene, TX Callahan County, TX Jones County, TX Taylor County, TX	0.8097
10380	Aguadilla-Isabela-San Sebastián, PR Aguada Municipio, PR Aguadilla Municipio, PR Añasco Municipio, PR Isabela Municipio, PR Lares Municipio, PR Moca Municipio, PR Rincón Municipio, PR San Sebastián Municipio, PR	0.3399
10420	Akron, OH Portage County, OH Summit County, OH	0.8917
10500	Albany, GA Baker County, GA Dougherty County, GA Lee County, GA Terrell County, GA Worth County, GA	0.8703
10580	Albany-Schenectady-Troy, NY Albany County, NY Rensselaer County, NY Saratoga County, NY Schenectady County, NY Schoharie County, NY	0.8707

CBSA Code	Urban Area (Constituent Counties)	Wage Index
10740	Albuquerque, NM Bernalillo County, NM Sandoval County, NM Torrance County, NM Valencia County, NM	0.9210
10780	Alexandria, LA Grant Parish, LA Rapides Parish, LA	0.8130
10900	Allentown-Bethlehem-Easton, PA-NJ Warren County, NJ Carbon County, PA Lehigh County, PA Northampton County, PA	0.9499
11020	Altoona, PA Blair County, PA	0.8521
11100	Amarillo, TX Armstrong County, TX Carson County, TX Potter County, TX Randall County, TX	0.8927
11180	Ames, IA Story County, IA	0.9487
11260	Anchorage, AK Anchorage Municipality, AK Matanuska-Susitna Borough, AK	1.1931
11300	Anderson, IN Madison County, IN	0.8760
11340	Anderson, SC Anderson County, SC	0.9570
11460	Ann Arbor, MI Washtenaw County, MI	1.0445
11500	Anniston-Oxford, AL Calhoun County, AL	0.7927

CBSA Code	Urban Area (Constituent Counties)	Wage Index
11540	Appleton, WI Calumet County, WI Outagamie County, WI	0.9440
11700	Asheville, NC Buncombe County, NC Haywood County, NC Henderson County, NC Madison County, NC	0.9142
12020	Athens-Clarke County, GA Clarke County, GA Madison County, GA Oconee County, GA Oglethorpe County, GA	0.9591

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12060	Atlanta-Sandy Springs-Marietta, GA Barrow County, GA Bartow County, GA Butts County, GA Carroll County, GA Cherokee County, GA Clayton County, GA Cobb County, GA Coweta County, GA Dawson County, GA DeKalb County, GA Douglas County, GA Fayette County, GA Forsyth County, GA Fulton County, GA Gwinnett County, GA Haralson County, GA Heard County, GA Henry County, GA Jasper County, GA Lamar County, GA Meriwether County, GA Newton County, GA Paulding County, GA Pickens County, GA Pike County, GA Rockdale County, GA Spalding County, GA Walton County, GA	0.9754
12100	Atlantic City-Hammonton, NJ Atlantic County, NJ	1.1973
12220	Auburn-Opelika, AL Lee County, AL	0.7544

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12260	Augusta-Richmond County, GA-SC Burke County, GA Columbia County, GA McDuffie County, GA Richmond County, GA Aiken County, SC Edgefield County, SC	0.9615
12420	Austin-Round Rock, TX Bastrop County, TX Caldwell County, TX Hays County, TX Travis County, TX Williamson County, TX	0.9536
12540	Bakersfield, CA Kern County, CA	1.1189
12580	Baltimore-Towson, MD Anne Arundel County, MD Baltimore County, MD Carroll County, MD Harford County, MD Howard County, MD Queen Anne's County, MD Baltimore City, MD	1.0055
12620	Bangor, ME Penobscot County, ME	1.0174
12700	Barnstable Town, MA Barnstable County, MA	1.2643

CBSA Code	Urban Area (Constituent Counties)	Wage Index
12940	Baton Rouge, LA Ascension Parish, LA East Baton Rouge Parish, LA East Feliciana Parish, LA Iberville Parish, LA Livingston Parish, LA Pointe Coupee Parish, LA St. Helena Parish, LA West Baton Rouge Parish, LA West Feliciana Parish, LA	0.8163
12980	Battle Creek, MI Calhoun County, MI	1.0120
13020	Bay City, MI Bay County, MI	0.9248
13140	Beaumont-Port Arthur, TX Hardin County, TX Jefferson County, TX Orange County, TX	0.8479
13380	Bellingham, WA Whatcom County, WA	1.1640
13460	Bend, OR Deschutes County, OR	1.1375
13644	Bethesda-Frederick-Gaithersburg, MD Frederick County, MD Montgomery County, MD	1.0548
13740	Billings, MT Carbon County, MT Yellowstone County, MT	0.8805
13780	Binghamton, NY Broome County, NY Tioga County, NY	0.8574

CBSA Code	Urban Area (Constituent Counties)	Wage Index
13820	Birmingham-Hoover, AL Bibb County, AL Blount County, AL Chilton County, AL Jefferson County, AL St. Clair County, AL Shelby County, AL Walker County, AL	0.8792
13900	Bismarck, ND Burleigh County, ND Morton County, ND	0.7148
13980	Blacksburg-Christiansburg-Radford, VA Giles County, VA Montgomery County, VA Pulaski County, VA Radford City, VA	0.8155
14020	Bloomington, IN Greene County, IN Monroe County, IN Owen County, IN	0.8979
14060	Bloomington-Normal, IL McLean County, IL	0.9323
14260	Boise City-Nampa, ID Ada County, ID Boise County, ID Canyon County, ID Gem County, ID Owyhee County, ID	0.9268
14484	Boston-Quincy, MA Norfolk County, MA Plymouth County, MA Suffolk County, MA	1.1897
14500	Boulder, CO Boulder County, CO	1.0302

CBSA Code	Urban Area (Constituent Counties)	Wage Index
14540	Bowling Green, KY Edmonson County, KY Warren County, KY	0.8388
14600	Bradenton-Sarasota-Venice, FL Manatee County, FL Sarasota County, FL	0.9900
14740	Bremerton-Silverdale, WA Kitsap County, WA	1.0770
14860	Bridgeport-Stamford-Norwalk, CT Fairfield County, CT	1.2868
15180	Brownsville-Harlingen, TX Cameron County, TX	0.8916
15260	Brunswick, GA Brantley County, GA Glynn County, GA McIntosh County, GA	0.9567
15380	Buffalo-Niagara Falls, NY Erie County, NY Niagara County, NY	0.9537
15500	Burlington, NC Alamance County, NC	0.8736
15540	Burlington-South Burlington, VT Chittenden County, VT Franklin County, VT Grand Isle County, VT	0.9254
15764	Cambridge-Newton-Framingham, MA Middlesex County, MA	1.1086
15804	Camden, NJ Burlington County, NJ Camden County, NJ Gloucester County, NJ	1.0346
15940	Canton-Massillon, OH Carroll County, OH Stark County, OH	0.8841

CBSA Code	Urban Area (Constituent Counties)	Wage Index
15980	Cape Coral-Fort Myers, FL Lee County, FL	0.9396
16180	Carson City, NV Carson City, NV	1.0128
16220	Casper, WY Natrona County, WY	0.9579
16300	Cedar Rapids, IA Benton County, IA Jones County, IA Linn County, IA	0.8919
16580	Champaign-Urbana, IL Champaign County, IL Ford County, IL Piatt County, IL	0.9461
16620	Charleston, WV Boone County, WV Clay County, WV Kanawha County, WV Lincoln County, WV Putnam County, WV	0.8275
16700	Charleston-North Charleston-Summerville, SC Berkeley County, SC Charleston County, SC Dorchester County, SC	0.9209
16740	Charlotte-Gastonia-Concord, NC-SC Anson County, NC Cabarrus County, NC Gaston County, NC Mecklenburg County, NC Union County, NC York County, SC	0.9595

CBSA Code	Urban Area (Constituent Counties)	Wage Index
16820	Charlottesville, VA Albemarle County, VA Fluvanna County, VA Greene County, VA Nelson County, VA Charlottesville City, VA	0.9816
16860	Chattanooga, TN-GA Catoosa County, GA Dade County, GA Walker County, GA Hamilton County, TN Marion County, TN Sequatchie County, TN	0.8878
16940	Cheyenne, WY Laramie County, WY	0.9276
16974	Chicago-Naperville-Joliet, IL Cook County, IL DeKalb County, IL DuPage County, IL Grundy County, IL Kane County, IL Kendall County, IL McHenry County, IL Will County, IL	1.0399
17020	Chico, CA Butte County, CA	1.0897

CBSA Code	Urban Area (Constituent Counties)	Wage Index
17140	Cincinnati-Middletown, OH-KY-IN Dearborn County, IN Franklin County, IN Ohio County, IN Boone County, KY Bracken County, KY Campbell County, KY Gallatin County, KY Grant County, KY Kenton County, KY Pendleton County, KY Brown County, OH Butler County, OH Clermont County, OH Hamilton County, OH Warren County, OH	0.9687
17300	Clarksville, TN-KY Christian County, KY Trigg County, KY Montgomery County, TN Stewart County, TN	0.8298
17420	Cleveland, TN Bradley County, TN Polk County, TN	0.8010
17460	Cleveland-Elyria-Mentor, OH Cuyahoga County, OH Geauga County, OH Lake County, OH Lorain County, OH Medina County, OH	0.9241
17660	Coeur d'Alene, ID Kootenai County, ID	0.9322

CBSA Code	Urban Area (Constituent Counties)	Wage Index
17780	College Station-Bryan, TX Brazos County, TX Burleson County, TX Robertson County, TX	0.9346
17820	Colorado Springs, CO El Paso County, CO Teller County, CO	0.9977
17860	Columbia, MO Boone County, MO Howard County, MO	0.8540
17900	Columbia, SC Calhoun County, SC Fairfield County, SC Kershaw County, SC Lexington County, SC Richland County, SC Saluda County, SC	0.8933
17980	Columbus, GA-AL Russell County, AL Chattahoochee County, GA Harris County, GA Marion County, GA Muscogee County, GA	0.8739
18020	Columbus, IN Bartholomew County, IN	0.9739
18140	Columbus, OH Delaware County, OH Fairfield County, OH Franklin County, OH Licking County, OH Madison County, OH Morrow County, OH Pickaway County, OH Union County, OH	0.9943

CBSA Code	Urban Area (Constituent Counties)	Wage Index
18580	Corpus Christi, TX Aransas County, TX Nueces County, TX San Patricio County, TX	0.8598
18700	Corvallis, OR Benton County, OR	1.1304
19060	Cumberland, MD-WV Allegany County, MD Mineral County, WV	0.7816
19124	Dallas-Plano-Irving, TX Collin County, TX Dallas County, TX Delta County, TX Denton County, TX Ellis County, TX Hunt County, TX Kaufman County, TX Rockwall County, TX	0.9945
19140	Dalton, GA Murray County, GA Whitfield County, GA	0.8705
19180	Danville, IL Vermilion County, IL	0.9374
19260	Danville, VA Pittsylvania County, VA Danville City, VA	0.8395
19340	Davenport-Moline-Rock Island, IA-IL Henry County, IL Mercer County, IL Rock Island County, IL Scott County, IA	0.8435

CBSA Code	Urban Area (Constituent Counties)	Wage Index
19380	Dayton, OH Greene County, OH Miami County, OH Montgomery County, OH Preble County, OH	0.9203
19460	Decatur, AL Lawrence County, AL Morgan County, AL	0.7803
19500	Decatur, IL Macon County, IL	0.8145
19660	Deltona-Daytona Beach-Ormond Beach, FL Volusia County, FL	0.8890
19740	Denver-Aurora, CO Adams County, CO Arapahoe County, CO Broomfield County, CO Clear Creek County, CO Denver County, CO Douglas County, CO Elbert County, CO Gilpin County, CO Jefferson County, CO Park County, CO	1.0818
19780	Des Moines-West Des Moines, IA Dallas County, IA Guthrie County, IA Madison County, IA Polk County, IA Warren County, IA	0.9535
19804	Detroit-Livonia-Dearborn, MI Wayne County, MI	0.9958
20020	Dothan, AL Geneva County, AL Henry County, AL Houston County, AL	0.7613

CBSA Code	Urban Area (Constituent Counties)	Wage Index
20100	Dover, DE Kent County, DE	1.0325
20220	Dubuque, IA Dubuque County, IA	0.8380
20260	Duluth, MN-WI Carlton County, MN St. Louis County, MN Douglas County, WI	1.0363
20500	Durham, NC Chatham County, NC Durham County, NC Orange County, NC Person County, NC	0.9732
20740	Eau Claire, WI Chippewa County, WI Eau Claire County, WI	0.9668
20764	Edison-New Brunswick, NJ Middlesex County, NJ Monmouth County, NJ Ocean County, NJ Somerset County, NJ	1.1283
20940	El Centro, CA Imperial County, CA	0.8746
21060	Elizabethtown, KY Hardin County, KY Larue County, KY	0.8525
21140	Elkhart-Goshen, IN Elkhart County, IN	0.9568
21300	Elmira, NY Chemung County, NY	0.8247
21340	El Paso, TX El Paso County, TX	0.8694
21500	Erie, PA Erie County, PA	0.8713

CBSA Code	Urban Area (Constituent Counties)	Wage Index
21660	Eugene-Springfield, OR Lane County, OR	1.1061
21780	Evansville, IN-KY Gibson County, IN Posey County, IN Vanderburgh County, IN Warrick County, IN Henderson County, KY Webster County, KY	0.8690
21820	Fairbanks, AK Fairbanks North Star Borough, AK	1.1297
21940	Fajardo, PR Ceiba Municipio, PR Fajardo Municipio, PR Luquillo Municipio, PR	0.4061
22020	Fargo, ND-MN Cass County, ND Clay County, MN	0.8166
22140	Farmington, NM San Juan County, NM	0.8051
22180	Fayetteville, NC Cumberland County, NC Hoke County, NC	0.9340
22220	Fayetteville-Springdale-Rogers, AR-MO Benton County, AR Madison County, AR Washington County, AR McDonald County, MO	0.8970
22380	Flagstaff, AZ Coconino County, AZ	1.1743
22420	Flint, MI Genesee County, MI	1.1425
22500	Florence, SC Darlington County, SC Florence County, SC	0.8130

CBSA Code	Urban Area (Constituent Counties)	Wage Index
22520	Florence-Muscle Shoals, AL Colbert County, AL Lauderdale County, AL	0.7871
22540	Fond du Lac, WI Fond du Lac County, WI	0.9293
22660	Fort Collins-Loveland, CO Larimer County, CO	0.9867
22744	Fort Lauderdale-Pompano Beach-Deerfield Beach, FL Broward County, FL	0.9946
22900	Fort Smith, AR-OK Crawford County, AR Franklin County, AR Sebastian County, AR Le Flore County, OK Sequoyah County, OK	0.7697
23020	Fort Walton Beach-Crestview-Destin, FL Okaloosa County, FL	0.8769
23060	Fort Wayne, IN Allen County, IN Wells County, IN Whitley County, IN	0.9176
23104	Fort Worth-Arlington, TX Johnson County, TX Parker County, TX Tarrant County, TX Wise County, TX	0.9709
23420	Fresno, CA Fresno County, CA	1.1009
23460	Gadsden, AL Etowah County, AL	0.7983
23540	Gainesville, FL Alachua County, FL Gilchrist County, FL	0.9312
23580	Gainesville, GA Hall County, GA	0.9109

CBSA Code	Urban Area (Constituent Counties)	Wage Index
23844	Gary, IN Jasper County, IN Lake County, IN Newton County, IN Porter County, IN	0.9250
24020	Glens Falls, NY Warren County, NY Washington County, NY	0.8473
24140	Goldsboro, NC Wayne County, NC	0.9143
24220	Grand Forks, ND-MN Polk County, MN Grand Forks County, ND	0.7565
24300	Grand Junction, CO Mesa County, CO	0.9812
24340	Grand Rapids-Wyoming, MI Barry County, MI Ionia County, MI Kent County, MI Newaygo County, MI	0.9184
24500	Great Falls, MT Cascade County, MT	0.8784
24540	Greeley, CO Weld County, CO	0.9684
24580	Green Bay, WI Brown County, WI Kewaunee County, WI Oconto County, WI	0.9709
24660	Greensboro-High Point, NC Guilford County, NC Randolph County, NC Rockingham County, NC	0.9011
24780	Greenville, NC Greene County, NC Pitt County, NC	0.9448

CBSA Code	Urban Area (Constituent Counties)	Wage Index
24860	Greenville-Mauldin-Easley, SC Greenville County, SC Laurens County, SC Pickens County, SC	0.9961
25020	Guayama, PR Arroyo Municipio, PR Guayama Municipio, PR Patillas Municipio, PR	0.3249
25060	Gulfport-Biloxi, MS Hancock County, MS Harrison County, MS Stone County, MS	0.9029
25180	Hagerstown-Martinsburg, MD-WV Washington County, MD Berkeley County, WV Morgan County, WV	0.8997
25260	Hanford-Corcoran, CA Kings County, CA	1.0870
25420	Harrisburg-Carlisle, PA Cumberland County, PA Dauphin County, PA Perry County, PA	0.9153
25500	Harrisonburg, VA Rockingham County, VA Harrisonburg City, VA	0.8894
25540	Hartford-West Hartford-East Hartford, CT Hartford County, CT Middlesex County, CT Tolland County, CT	1.1069
25620	Hattiesburg, MS Forrest County, MS Lamar County, MS Perry County, MS	0.7337

CBSA Code	Urban Area (Constituent Counties)	Wage Index
25860	Hickory-Lenoir-Morganton, NC Alexander County, NC Burke County, NC Caldwell County, NC Catawba County, NC	0.8976
25980	Hinesville-Fort Stewart, GA[1] Liberty County, GA Long County, GA	0.9110
26100	Holland-Grand Haven, MI Ottawa County, MI	0.9008
26180	Honolulu, HI Honolulu County, HI	1.1811
26300	Hot Springs, AR Garland County, AR	0.9113
26380	Houma-Bayou Cane-Thibodaux, LA Lafourche Parish, LA Terrebonne Parish, LA	0.7758
26420	Houston-Sugar Land-Baytown, TX Austin County, TX Brazoria County, TX Chambers County, TX Fort Bend County, TX Galveston County, TX Harris County, TX Liberty County, TX Montgomery County, TX San Jacinto County, TX Waller County, TX	0.9838
26580	Huntington-Ashland, WV-KY-OH Boyd County, KY Greenup County, KY Lawrence County, OH Cabell County, WV Wayne County, WV	0.9254
26620	Huntsville, AL Limestone County, AL Madison County, AL	0.9082

CBSA Code	Urban Area (Constituent Counties)	Wage Index
26820	Idaho Falls, ID Bonneville County, ID Jefferson County, ID	0.9080
26900	Indianapolis-Carmel, IN Boone County, IN Brown County, IN Hamilton County, IN Hancock County, IN Hendricks County, IN Johnson County, IN Marion County, IN Morgan County, IN Putnam County, IN Shelby County, IN	0.9908
26980	Iowa City, IA Johnson County, IA Washington County, IA	0.9483
27060	Ithaca, NY Tompkins County, NY	0.9614
27100	Jackson, MI Jackson County, MI	0.9309
27140	Jackson, MS Copiah County, MS Hinds County, MS Madison County, MS Rankin County, MS Simpson County, MS	0.8067
27180	Jackson, TN Chester County, TN Madison County, TN	0.8523

CBSA Code	Urban Area (Constituent Counties)	Wage Index
27260	Jacksonville, FL Baker County, FL Clay County, FL Duval County, FL Nassau County, FL St. Johns County, FL	0.8999
27340	Jacksonville, NC Onslow County, NC	0.8177
27500	Janesville, WI Rock County, WI	0.9662
27620	Jefferson City, MO Callaway County, MO Cole County, MO Moniteau County, MO Osage County, MO	0.8775
27740	Johnson City, TN Carter County, TN Unicoi County, TN Washington County, TN	0.7971
27780	Johnstown, PA Cambria County, PA	0.7920
27860	Jonesboro, AR Craighead County, AR Poinsett County, AR	0.7916
27900	Joplin, MO Jasper County, MO Newton County, MO	0.9406
28020	Kalamazoo-Portage, MI Kalamazoo County, MI Van Buren County, MI	1.0801
28100	Kankakee-Bradley, IL Kankakee County, IL	1.0485

CBSA Code	Urban Area (Constituent Counties)	Wage Index
28140	Kansas City, MO-KS Franklin County, KS Johnson County, KS Leavenworth County, KS Linn County, KS Miami County, KS Wyandotte County, KS Bates County, MO Caldwell County, MO Cass County, MO Clay County, MO Clinton County, MO Jackson County, MO Lafayette County, MO Platte County, MO Ray County, MO	0.9610
28420	Kennewick-Pasco-Richland, WA Benton County, WA Franklin County, WA	0.9911
28660	Killeen-Temple-Fort Hood, TX Bell County, TX Coryell County, TX Lampasas County, TX	0.8765
28700	Kingsport-Bristol-Bristol, TN-VA Hawkins County, TN Sullivan County, TN Bristol City, VA Scott County, VA Washington County, VA	0.7743
28740	Kingston, NY Ulster County, NY	0.9375

CBSA Code	Urban Area (Constituent Counties)	Wage Index
28940	Knoxville, TN Anderson County, TN Blount County, TN Knox County, TN Loudon County, TN Union County, TN	0.7881
29020	Kokomo, IN Howard County, IN Tipton County, IN	0.9349
29100	La Crosse, WI-MN Houston County, MN La Crosse County, WI	0.9758
29140	Lafayette, IN Benton County, IN Carroll County, IN Tippecanoe County, IN	0.9221
29180	Lafayette, LA Lafayette Parish, LA St. Martin Parish, LA	0.8374
29340	Lake Charles, LA Calcasieu Parish, LA Cameron Parish, LA	0.7556
29404	Lake County-Kenosha County, IL-WI Lake County, IL Kenosha County, WI	1.0389
29420	Lake Havasu City-Kingman, AZ Mohave County, AZ	0.9797
29460	Lakeland-Winter Haven, FL Polk County, FL	0.8530
29540	Lancaster, PA Lancaster County, PA	0.9363
29620	Lansing-East Lansing, MI Clinton County, MI Eaton County, MI Ingham County, MI	0.9931

CBSA Code	Urban Area (Constituent Counties)	Wage Index
29700	Laredo, TX Webb County, TX	0.8366
29740	Las Cruces, NM Dona Ana County, NM	0.8929
29820	Las Vegas-Paradise, NV Clark County, NV	1.1971
29940	Lawrence, KS Douglas County, KS	0.8343
30020	Lawton, OK Comanche County, OK	0.8211
30140	Lebanon, PA Lebanon County, PA	0.8954
30300	Lewiston, ID-WA Nez Perce County, ID Asotin County, WA	0.9465
30340	Lewiston-Auburn, ME Androscoggin County, ME	0.9200
30460	Lexington-Fayette, KY Bourbon County, KY Clark County, KY Fayette County, KY Jessamine County, KY Scott County, KY Woodford County, KY	0.9110
30620	Lima, OH Allen County, OH	0.9427
30700	Lincoln, NE Lancaster County, NE Seward County, NE	0.9759

CBSA Code	Urban Area (Constituent Counties)	Wage Index
30780	Little Rock-North Little Rock-Conway, AR Faulkner County, AR Grant County, AR Lonoke County, AR Perry County, AR Pulaski County, AR Saline County, AR	0.8672
30860	Logan, UT-ID Franklin County, ID Cache County, UT	0.8765
30980	Longview, TX Gregg County, TX Rusk County, TX Upshur County, TX	0.8370
31020	Longview, WA Cowlitz County, WA	1.1207
31084	Los Angeles-Long Beach-Santa Ana, CA Los Angeles County, CA	1.2208
31140	Louisville-Jefferson County, KY-IN Clark County, IN Floyd County, IN Harrison County, IN Washington County, IN Bullitt County, KY Henry County, KY Meade County, KY Nelson County, KY Oldham County, KY Shelby County, KY Spencer County, KY Trimble County, KY	0.9249
31180	Lubbock, TX Crosby County, TX Lubbock County, TX	0.8731

CBSA Code	Urban Area (Constituent Counties)	Wage Index
31340	Lynchburg, VA Amherst County, VA Appomattox County, VA Bedford County, VA Campbell County, VA Bedford City, VA Lynchburg City, VA	0.8774
31420	Macon, GA Bibb County, GA Crawford County, GA Jones County, GA Monroe County, GA Twiggs County, GA	0.9570
31460	Madera, CA Madera County, CA	0.7939
31540	Madison, WI Columbia County, WI Dane County, WI Iowa County, WI	1.0967
31700	Manchester-Nashua, NH Hillsborough County, NH	1.0359
31900	Mansfield, OH Richland County, OH	0.9330
32420	Mayagüez, PR Hormigueros Municipio, PR Mayagüez Municipio, PR	0.3940
32580	McAllen-Edinburg-Mission, TX Hidalgo County, TX	0.9009
32780	Medford, OR Jackson County, OR	1.0244

CBSA Code	Urban Area (Constituent Counties)	Wage Index
32820	Memphis, TN-MS-AR Crittenden County, AR DeSoto County, MS Marshall County, MS Tate County, MS Tunica County, MS Fayette County, TN Shelby County, TN Tipton County, TN	0.9232
32900	Merced, CA Merced County, CA	1.2243
33124	Miami-Miami Beach-Kendall, FL Miami-Dade County, FL	0.9830
33140	Michigan City-La Porte, IN LaPorte County, IN	0.9159
33260	Midland, TX Midland County, TX	0.9827
33340	Milwaukee-Waukesha-West Allis, WI Milwaukee County, WI Ozaukee County, WI Washington County, WI Waukesha County, WI	1.0080

CBSA Code	Urban Area (Constituent Counties)	Wage Index
33460	Minneapolis-St. Paul-Bloomington, MN-WI Anoka County, MN Carver County, MN Chisago County, MN Dakota County, MN Hennepin County, MN Isanti County, MN Ramsey County, MN Scott County, MN Sherburne County, MN Washington County, MN Wright County, MN Pierce County, WI St. Croix County, WI	1.1150
33540	Missoula, MT Missoula County, MT	0.8973
33660	Mobile, AL Mobile County, AL	0.7908
33700	Modesto, CA Stanislaus County, CA	1.2194
33740	Monroe, LA Ouachita Parish, LA Union Parish, LA	0.7900
33780	Monroe, MI Monroe County, MI	0.8941
33860	Montgomery, AL Autauga County, AL Elmore County, AL Lowndes County, AL Montgomery County, AL	0.8283
34060	Morgantown, WV Monongalia County, WV Preston County, WV	0.8528

CBSA Code	Urban Area (Constituent Counties)	Wage Index
34100	Morristown, TN Grainger County, TN Hamblen County, TN Jefferson County, TN	0.7254
34580	Mount Vernon-Anacortes, WA Skagit County, WA	1.0292
34620	Muncie, IN Delaware County, IN	0.8489
34740	Muskegon-Norton Shores, MI Muskegon County, MI	1.0055
34820	Myrtle Beach-North Myrtle Beach-Conway, SC Horry County, SC	0.8652
34900	Napa, CA Napa County, CA	1.4520
34940	Naples-Marco Island, FL Collier County, FL	0.9672
34980	Nashville-Davidson--Murfreesboro--Franklin, TN Cannon County, TN Cheatham County, TN Davidson County, TN Dickson County, TN Hickman County, TN Macon County, TN Robertson County, TN Rutherford County, TN Smith County, TN Sumner County, TN Trousdale County, TN Williamson County, TN Wilson County, TN	0.9504
35004	Nassau-Suffolk, NY Nassau County, NY Suffolk County, NY	1.2453

CBSA Code	Urban Area (Constituent Counties)	Wage Index
35084	Newark-Union, NJ-PA Essex County, NJ Hunterdon County, NJ Morris County, NJ Sussex County, NJ Union County, NJ Pike County, PA	1.1731
35300	New Haven-Milford, CT New Haven County, CT	1.1742
35380	New Orleans-Metairie-Kenner, LA Jefferson Parish, LA Orleans Parish, LA Plaquemines Parish, LA St. Bernard Parish, LA St. Charles Parish, LA St. John the Baptist Parish, LA St. Tammany Parish, LA	0.9103
35644	New York-White Plains-Wayne, NY-NJ Bergen County, NJ Hudson County, NJ Passaic County, NJ Bronx County, NY Kings County, NY New York County, NY Putnam County, NY Queens County, NY Richmond County, NY Rockland County, NY Westchester County, NY	1.2885
35660	Niles-Benton Harbor, MI Berrien County, MI	0.9066
35980	Norwich-New London, CT New London County, CT	1.1398

CBSA Code	Urban Area (Constituent Counties)	Wage Index
36084	Oakland-Fremont-Hayward, CA Alameda County, CA Contra Costa County, CA	1.6092
36100	Ocala, FL Marion County, FL	0.8512
36140	Ocean City, NJ Cape May County, NJ	1.1496
36220	Odessa, TX Ector County, TX	0.9475
36260	Ogden-Clearfield, UT Davis County, UT Morgan County, UT Weber County, UT	0.9153
36420	Oklahoma City, OK Canadian County, OK Cleveland County, OK Grady County, OK Lincoln County, OK Logan County, OK McClain County, OK Oklahoma County, OK	0.8724
36500	Olympia, WA Thurston County, WA	1.1537
36540	Omaha-Council Bluffs, NE-IA Harrison County, IA Mills County, IA Pottawattamie County, IA Cass County, NE Douglas County, NE Sarpy County, NE Saunders County, NE Washington County, NE	0.9441

CBSA Code	Urban Area (Constituent Counties)	Wage Index
36740	Orlando-Kissimmee, FL Lake County, FL Orange County, FL Osceola County, FL Seminole County, FL	0.9111
36780	Oshkosh-Neenah, WI Winnebago County, WI	0.9474
36980	Owensboro, KY Daviess County, KY Hancock County, KY McLean County, KY	0.8685
37100	Oxnard-Thousand Oaks-Ventura, CA Ventura County, CA	1.1951
37340	Palm Bay-Melbourne-Titusville, FL Brevard County, FL	0.9332
37380	Palm Coast, FL Flagler County, FL	0.8963
37460	Panama City-Lynn Haven, FL Bay County, FL	0.8360
37620	Parkersburg-Marietta-Vienna, WV-OH Washington County, OH Pleasants County, WV Wirt County, WV Wood County, WV	0.7867
37700	Pascagoula, MS George County, MS Jackson County, MS	0.8102
37764	Peabody, MA Essex County, MA	1.0747
37860	Pensacola-Ferry Pass-Brent, FL Escambia County, FL Santa Rosa County, FL	0.8242

CBSA Code	Urban Area (Constituent Counties)	Wage Index
37900	Peoria, IL Marshall County, IL Peoria County, IL Stark County, IL Tazewell County, IL Woodford County, IL	0.9038
37964	Philadelphia, PA Bucks County, PA Chester County, PA Delaware County, PA Montgomery County, PA Philadelphia County, PA	1.0979
38060	Phoenix-Mesa-Scottsdale, AZ Maricopa County, AZ Pinal County, AZ	1.0379
38220	Pine Bluff, AR Cleveland County, AR Jefferson County, AR Lincoln County, AR	0.7926
38300	Pittsburgh, PA Allegheny County, PA Armstrong County, PA Beaver County, PA Butler County, PA Fayette County, PA Washington County, PA Westmoreland County, PA	0.8678
38340	Pittsfield, MA Berkshire County, MA	1.0445
38540	Pocatello, ID Bannock County, ID Power County, ID	0.9343

CBSA Code	Urban Area (Constituent Counties)	Wage Index
38660	Ponce, PR Juana Díaz Municipio, PR Ponce Municipio, PR Villalba Municipio, PR	0.4289
38860	Portland-South Portland-Biddeford, ME Cumberland County, ME Sagadahoc County, ME York County, ME	0.9942
38900	Portland-Vancouver-Beaverton, OR-WA Clackamas County, OR Columbia County, OR Multnomah County, OR Washington County, OR Yamhill County, OR Clark County, WA Skamania County, WA	1.1456
38940	Port St. Lucie, FL Martin County, FL St. Lucie County, FL	0.9870
39100	Poughkeepsie-Newburgh-Middletown, NY Dutchess County, NY Orange County, NY	1.0920
39140	Prescott, AZ Yavapai County, AZ	1.0221
39300	Providence-New Bedford-Fall River, RI-MA Bristol County, MA Bristol County, RI Kent County, RI Newport County, RI Providence County, RI Washington County, RI	1.0696
39340	Provo-Orem, UT Juab County, UT Utah County, UT	0.9381

CBSA Code	Urban Area (Constituent Counties)	Wage Index
39380	Pueblo, CO Pueblo County, CO	0.8713
39460	Punta Gorda, FL Charlotte County, FL	0.8976
39540	Racine, WI Racine County, WI	0.9054
39580	Raleigh-Cary, NC Franklin County, NC Johnston County, NC Wake County, NC	0.9817
39660	Rapid City, SD Meade County, SD Pennington County, SD	0.9598
39740	Reading, PA Berks County, PA	0.9242
39820	Redding, CA Shasta County, CA	1.3731
39900	Reno-Sparks, NV Storey County, NV Washoe County, NV	1.0317

CBSA Code	Urban Area (Constituent Counties)	Wage Index
40060	Richmond, VA Amelia County, VA Caroline County, VA Charles City County, VA Chesterfield County, VA Cumberland County, VA Dinwiddie County, VA Goochland County, VA Hanover County, VA Henrico County, VA King and Queen County, VA King William County, VA Louisa County, VA New Kent County, VA Powhatan County, VA Prince George County, VA Sussex County, VA Colonial Heights City, VA Hopewell City, VA Petersburg City, VA Richmond City, VA	0.9363
40140	Riverside-San Bernardino-Ontario, CA Riverside County, CA San Bernardino County, CA	1.1468
40220	Roanoke, VA Botetourt County, VA Craig County, VA Franklin County, VA Roanoke County, VA Roanoke City, VA Salem City, VA	0.8660
40340	Rochester, MN Dodge County, MN Olmsted County, MN Wabasha County, MN	1.1214

CBSA Code	Urban Area (Constituent Counties)	Wage Index
40380	Rochester, NY Livingston County, NY Monroe County, NY Ontario County, NY Orleans County, NY Wayne County, NY	0.8811
40420	Rockford, IL Boone County, IL Winnebago County, IL	0.9835
40484	Rockingham County, NH Rockingham County, NH Strafford County, NH	0.9926
40580	Rocky Mount, NC Edgecombe County, NC Nash County, NC	0.9031
40660	Rome, GA Floyd County, GA	0.9134
40900	Sacramento--Arden-Arcade--Roseville, CA El Dorado County, CA Placer County, CA Sacramento County, CA Yolo County, CA	1.3572
40980	Saginaw-Saginaw Township North, MI Saginaw County, MI	0.8702
41060	St. Cloud, MN Benton County, MN Stearns County, MN	1.0976
41100	St. George, UT Washington County, UT	0.9021
41140	St. Joseph, MO-KS Doniphan County, KS Andrew County, MO Buchanan County, MO DeKalb County, MO	1.0380

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41180	St. Louis, MO-IL Bond County, IL Calhoun County, IL Clinton County, IL Jersey County, IL Macoupin County, IL Madison County, IL Monroe County, IL St. Clair County, IL Crawford County, MO Franklin County, MO Jefferson County, MO Lincoln County, MO St. Charles County, MO St. Louis County, MO Warren County, MO Washington County, MO St. Louis City, MO	0.9006
41420	Salem, OR Marion County, OR Polk County, OR	1.0884
41500	Salinas, CA Monterey County, CA	1.4987
41540	Salisbury, MD Somerset County, MD Wicomico County, MD	0.9246
41620	Salt Lake City, UT Salt Lake County, UT Summit County, UT Tooele County, UT	0.9158
41660	San Angelo, TX Irion County, TX Tom Green County, TX	0.8424

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41700	San Antonio, TX Atascosa County, TX Bandera County, TX Bexar County, TX Comal County, TX Guadalupe County, TX Kendall County, TX Medina County, TX Wilson County, TX	0.8856
41740	San Diego-Carlsbad-San Marcos, CA San Diego County, CA	1.1538
41780	Sandusky, OH Erie County, OH	0.8870
41884	San Francisco-San Mateo-Redwood City, CA Marin County, CA San Francisco County, CA San Mateo County, CA	1.5529
41900	San Germán-Cabo Rojo, PR Cabo Rojo Municipio, PR Lajas Municipio, PR Sabana Grande Municipio, PR San Germán Municipio, PR	0.4756
41940	San Jose-Sunnyvale-Santa Clara, CA San Benito County, CA Santa Clara County, CA	1.6141

CBSA Code	Urban Area (Constituent Counties)	Wage Index
41980	San Juan-Caguas-Guaynabo, PR Aguas Buenas Municipio, PR Aibonito Municipio, PR Arecibo Municipio, PR Barceloneta Municipio, PR Barranquitas Municipio, PR Bayamón Municipio, PR Caguas Municipio, PR Camuy Municipio, PR Canóvanas Municipio, PR Carolina Municipio, PR Cataño Municipio, PR Cayey Municipio, PR Ciales Municipio, PR Cidra Municipio, PR Comerío Municipio, PR Corozal Municipio, PR Dorado Municipio, PR Florida Municipio, PR Guaynabo Municipio, PR Gurabo Municipio, PR Hatillo Municipio, PR Humacao Municipio, PR Juncos Municipio, PR Las Piedras Municipio, PR Loíza Municipio, PR Manatí Municipio, PR Maunabo Municipio, PR Morovis Municipio, PR Naguabo Municipio, PR Naranjito Municipio, PR Orocovis Municipio, PR Quebradillas Municipio, PR Río Grande Municipio, PR San Juan Municipio, PR San Lorenzo Municipio, PR Toa Alta Municipio, PR Toa Baja Municipio, PR Trujillo Alto Municipio, PR Vega Alta Municipio, PR Vega Baja Municipio, PR Yabucoa Municipio, PR	0.4393

CBSA Code	Urban Area (Constituent Counties)	Wage Index
42020	San Luis Obispo-Paso Robles, CA San Luis Obispo County, CA	1.2441
42044	Santa Ana-Anaheim-Irvine, CA Orange County, CA	1.1993
42060	Santa Barbara-Santa Maria-Goleta, CA Santa Barbara County, CA	1.1909
42100	Santa Cruz-Watsonville, CA Santa Cruz County, CA	1.6429
42140	Santa Fe, NM Santa Fe County, NM	1.0610
42220	Santa Rosa-Petaluma, CA Sonoma County, CA	1.5528
42340	Savannah, GA Bryan County, GA Chatham County, GA Effingham County, GA	0.9152
42540	Scranton--Wilkes-Barre, PA Lackawanna County, PA Luzerne County, PA Wyoming County, PA	0.8333
42644	Seattle-Bellevue-Everett, WA King County, WA Snohomish County, WA	1.1755
42680	Sebastian-Vero Beach, FL Indian River County, FL	0.9217
43100	Sheboygan, WI Sheboygan County, WI	0.8920
43300	Sherman-Denison, TX Grayson County, TX	0.9024
43340	Shreveport-Bossier City, LA Bossier Parish, LA Caddo Parish, LA De Soto Parish, LA	0.8442

CBSA Code	Urban Area (Constituent Counties)	Wage Index
43580	Sioux City, IA-NE-SD Woodbury County, IA Dakota County, NE Dixon County, NE Union County, SD	0.8915
43620	Sioux Falls, SD Lincoln County, SD McCook County, SD Minnehaha County, SD Turner County, SD	0.9354
43780	South Bend-Mishawaka, IN-MI St. Joseph County, IN Cass County, MI	0.9761
43900	Spartanburg, SC Spartanburg County, SC	0.9025
44060	Spokane, WA Spokane County, WA	1.0559
44100	Springfield, IL Menard County, IL Sangamon County, IL	0.9102
44140	Springfield, MA Franklin County, MA Hampden County, MA Hampshire County, MA	1.0405
44180	Springfield, MO Christian County, MO Dallas County, MO Greene County, MO Polk County, MO Webster County, MO	0.8424
44220	Springfield, OH Clark County, OH	0.8876
44300	State College, PA Centre County, PA	0.8937

CBSA Code	Urban Area (Constituent Counties)	Wage Index
44700	Stockton, CA San Joaquin County, CA	1.2015
44940	Sumter, SC Sumter County, SC	0.8257
45060	Syracuse, NY Madison County, NY Onondaga County, NY Oswego County, NY	0.9787
45104	Tacoma, WA Pierce County, WA	1.1241
45220	Tallahassee, FL Gadsden County, FL Jefferson County, FL Leon County, FL Wakulla County, FL	0.8964
45300	Tampa-St. Petersburg-Clearwater, FL Hernando County, FL Hillsborough County, FL Pasco County, FL Pinellas County, FL	0.8852
45460	Terre Haute, IN Clay County, IN Sullivan County, IN Vermillion County, IN Vigo County, IN	0.9085
45500	Texarkana, TX-Texarkana, AR Miller County, AR Bowie County, TX	0.8144
45780	Toledo, OH Fulton County, OH Lucas County, OH Ottawa County, OH Wood County, OH	0.9407

CBSA Code	Urban Area (Constituent Counties)	Wage Index
45820	Topeka, KS Jackson County, KS Jefferson County, KS Osage County, KS Shawnee County, KS Wabaunsee County, KS	0.8756
45940	Trenton-Ewing, NJ Mercer County, NJ	1.0604
46060	Tucson, AZ Pima County, AZ	0.9229
46140	Tulsa, OK Creek County, OK Okmulgee County, OK Osage County, OK Pawnee County, OK Rogers County, OK Tulsa County, OK Wagoner County, OK	0.8445
46220	Tuscaloosa, AL Greene County, AL Hale County, AL Tuscaloosa County, AL	0.8496
46340	Tyler, TX Smith County, TX	0.8804
46540	Utica-Rome, NY Herkimer County, NY Oneida County, NY	0.8404
46660	Valdosta, GA Brooks County, GA Echols County, GA Lanier County, GA Lowndes County, GA	0.8027
46700	Vallejo-Fairfield, CA Solano County, CA	1.4359

CBSA Code	Urban Area (Constituent Counties)	Wage Index
47020	Victoria, TX Calhoun County, TX Goliad County, TX Victoria County, TX	0.8124
47220	Vineland-Millville-Bridgeton, NJ Cumberland County, NJ	1.0366
47260	Virginia Beach-Norfolk-Newport News, VA-NC Currituck County, NC Gloucester County, VA Isle of Wight County, VA James City County, VA Mathews County, VA Surry County, VA York County, VA Chesapeake City, VA Hampton City, VA Newport News City, VA Norfolk City, VA Poquoson City, VA Portsmouth City, VA Suffolk City, VA Virginia Beach City, VA Williamsburg City, VA	0.8884
47300	Visalia-Porterville, CA Tulare County, CA	1.0144
47380	Waco, TX McLennan County, TX	0.8596
47580	Warner Robins, GA Houston County, GA	0.8989
47644	Warren-Troy-Farmington Hills, MI Lapeer County, MI Livingston County, MI Macomb County, MI Oakland County, MI St. Clair County, MI	0.9904

CBSA Code	Urban Area (Constituent Counties)	Wage Index
47894	Washington-Arlington-Alexandria, DC-VA-MD-WV District of Columbia, DC Calvert County, MD Charles County, MD Prince George's County, MD Arlington County, VA Clarke County, VA Fairfax County, VA Fauquier County, VA Loudoun County, VA Prince William County, VA Spotsylvania County, VA Stafford County, VA Warren County, VA Alexandria City, VA Fairfax City, VA Falls Church City, VA Fredericksburg City, VA Manassas City, VA Manassas Park City, VA Jefferson County, WV	1.0827
47940	Waterloo-Cedar Falls, IA Black Hawk County, IA Bremer County, IA Grundy County, IA	0.8490
48140	Wausau, WI Marathon County, WI	0.9615
48260	Weirton-Steubenville, WV-OH Jefferson County, OH Brooke County, WV Hancock County, WV	0.8079
48300	Wenatchee, WA Chelan County, WA Douglas County, WA	0.9544

CBSA Code	Urban Area (Constituent Counties)	Wage Index
48424	West Palm Beach-Boca Raton-Boynton Beach, FL Palm Beach County, FL	0.9757
48540	Wheeling, WV-OH Belmont County, OH Marshall County, WV Ohio County, WV	0.6955
48620	Wichita, KS Butler County, KS Harvey County, KS Sedgwick County, KS Sumner County, KS	0.9069
48660	Wichita Falls, TX Archer County, TX Clay County, TX Wichita County, TX	0.8832
48700	Williamsport, PA Lycoming County, PA	0.8096
48864	Wilmington, DE-MD-NJ New Castle County, DE Cecil County, MD Salem County, NJ	1.0696
48900	Wilmington, NC Brunswick County, NC New Hanover County, NC Pender County, NC	0.9089
49020	Winchester, VA-WV Frederick County, VA Winchester City, VA Hampshire County, WV	0.9801
49180	Winston-Salem, NC Davie County, NC Forsyth County, NC Stokes County, NC Yadkin County, NC	0.9016

CBSA Code	Urban Area (Constituent Counties)	Wage Index
49340	Worcester, MA Worcester County, MA	1.0836
49420	Yakima, WA Yakima County, WA	0.9948
49500	Yauco, PR Guánica Municipio, PR Guayanilla Municipio, PR Peñuelas Municipio, PR Yauco Municipio, PR	0.3432
49620	York-Hanover, PA York County, PA	0.9518
49660	Youngstown-Warren-Boardman, OH-PA Mahoning County, OH Trumbull County, OH Mercer County, PA	0.8915
49700	Yuba City, CA Sutter County, CA Yuba County, CA	1.1137
49740	Yuma, AZ Yuma County, AZ	0.9281

[1] At this time, there are no hospitals located in this urban area on which to base a wage index. We use the average wage index of all of the urban areas within the State to serve as a reasonable proxy.

Table 2 - Proposed Inpatient Rehabilitation Facility Wage Index For Rural Areas For Discharges Occurring From October 1, 2009 Through September 30, 2010

State Code	Nonurban Area	Wage Index
1	Alabama	0.7587
2	Alaska	1.1898
3	Arizona	0.8453
4	Arkansas	0.7473
5	California	1.2275
6	Colorado	0.9570
7	Connecticut	1.1016
8	Delaware	0.9962
10	Florida	0.8504
11	Georgia	0.7612
12	Hawaii	1.0999
13	Idaho	0.7651
14	Illinois	0.8386
15	Indiana	0.8473
16	Iowa	0.8804
17	Kansas	0.8052
18	Kentucky	0.7803
19	Louisiana	0.7447
20	Maine	0.8644
21	Maryland	0.8883
22	Massachusetts[1]	1.1670
23	Michigan	0.8887
24	Minnesota	0.9059
25	Mississippi	0.7584
26	Missouri	0.7982
27	Montana	0.8658
28	Nebraska	0.8730

State Code	Nonurban Area	Wage Index
29	Nevada	0.9382
30	New Hampshire	1.0219
31	New Jersey[1]	-----
32	New Mexico	0.8812
33	New York	0.8145
34	North Carolina	0.8576
35	North Dakota	0.7205
36	Ohio	0.8588
37	Oklahoma	0.7732
38	Oregon	1.0218
39	Pennsylvania	0.8365
40	Puerto Rico1	0.4047
41	Rhode Island[1]	-----
42	South Carolina	0.8538
43	South Dakota	0.8603
44	Tennessee	0.7789
45	Texas	0.7894
46	Utah	0.8267
47	Vermont	1.0079
48	Virgin Islands	0.6971
49	Virginia	0.7861
50	Washington	1.0181
51	West Virginia	0.7503
52	Wisconsin	0.9373
53	Wyoming	0.9315
65	Guam	0.9611

[1] All counties within the State are classified as urban, with the exception of Massachusetts and Puerto Rico. Massachusetts and Puerto Rico have areas designated as rural; however, no short-term, acute care hospitals are located in the area(s) for FY 2010. The rural Massachusetts wage index is calculated as the average of all contiguous CBSAs. The Puerto Rico wage index is the same as FY 2009.

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Federal Register

Wednesday,
May 6, 2009

Part III

Environmental Protection Agency

40 CFR Parts 60 and 63
National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60 and 63

[EPA–HQ–OAR–2002–0051; FRL–8898–1]

RIN 2060–AO15

National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing amendments to the current National Emission Standards for Hazardous Air Pollutants (NESHAP) from the Portland Cement Manufacturing Industry. These proposed amendments would add or revise, as applicable, emission limits for mercury, total hydrocarbons (THC), and particulate matter (PM) from kilns and in-line kiln/raw mills located at a major or an area source, and hydrochloric acid (HCl) from kilns and in-line kiln/raw mills located at major sources. These proposed amendments also would remove the following four provisions in the current regulation: the operating limit for the average hourly recycle rate for cement kiln dust; the requirement that cement kilns only use certain type of utility boiler fly ash; the opacity limits for kilns and clinker coolers; and the 50 parts per million volume dry (ppmvd) THC emission limit for new greenfield sources. EPA is also proposing standards which would apply during startup, shutdown, and operating modes for all of the current section 112 standards applicable to cement kilns.

Finally, EPA is proposing performance specifications for use of mercury continuous emission monitors (CEMS), which specifications would be generally applicable and so could apply to sources from categories other than, and in addition to, portland cement, and updating recordkeeping and testing requirements.

DATES: Comments must be received on or before July 6, 2009. If any one contacts EPA by May 21, 2009 requesting to speak at a public hearing, EPA will hold a public hearing on May 26, 2009. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget (OMB) receives a copy of your comments on or before June 5, 2009.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2002–0051, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Fax:* (202) 566–9744.
- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center (6102T), National Emission Standards for Hazardous Air Pollutant From the Portland Cement Manufacturing Industry Docket, Docket ID No. EPA–HQ–OAR–2002–0051, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Attn:* Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* In person or by courier, deliver comments to: EPA Docket Center (6102T), Standards of Performance (NSPS) for Portland Cement Plants Docket, Docket ID No. EPA–HQ–OAR–2007–0877, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please include a total of two copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2002–0051. 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 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 EPA Docket Center, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry Docket, 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 Docket Center is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Mr. Keith Barnett, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Metals and Minerals Group (D243–02), Environmental Protection Agency, Research Triangle Park, NC 27711, *telephone number:* (919) 541–5605; *fax number:* (919) 541–5450; *e-mail address: barnett.keith@epa.gov.*

SUPPLEMENTARY INFORMATION:

The information presented in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

Categories and entities potentially regulated by this proposed rule include:

Category	NAICS code [1]	Examples of regulated entities
Industry	327310	Portland cement plants.
Federal government	.....	Not affected.
State/local/tribal government	.....	Portland cement plants.

[1] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility would be regulated by this proposed action, you should examine the applicability criteria in 40 CFR 63.1340 (subpart LLL). If you have any questions regarding the applicability of this proposed action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments to EPA?

Do not submit information containing CBI to EPA through *http://www.regulations.gov* or e-mail. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, Environmental Protection Agency, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2002–0051. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

C. Where can I get a copy of this document?

In addition to being available in the docket, an electronic copy of this proposed action is available on the Worldwide Web (WWW) through the Technology Transfer Network (TTN). Following signature, a copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg.* The TTN provides information and technology exchange in various areas of air pollution control.

D. When and where would a public hearing occur?

If anyone contacts EPA requesting to speak at a public hearing by May 21, 2009, a public hearing will be held on May 26, 2009. To request a public hearing contact Ms. Pamela Garrett, EPA, Office of Air Quality Planning and Standards, Sector Policy and Programs Division, Energy Strategies Group (D243–01), Research Triangle Park, NC 27711, telephone number 919–541–7966, *e-mail address: garrett.pamela@epa.gov* by the date specified above in the **DATES** section. Persons interested in presenting oral testimony or inquiring as to whether a public hearing is to be held should also contact Ms. Pamela Garrett at least 2 days in advance of the potential date of the public hearing.

If a public hearing is requested, it will be held at 10 a.m. at the EPA Headquarters, Ariel Rios Building, 12th Street and Pennsylvania Avenue, Washington, DC 20460 or at a nearby location.

II. Background Information

A. What is the statutory authority for these proposed amendments?

Section 112(d) of the Clean Air Act (CAA) requires EPA to set emissions standards for Hazardous Air Pollutants (HAP) emitted by major stationary sources based on performance of the maximum achievable control technology (MACT). The MACT standards for existing sources must be at least as stringent as the average emissions limitation achieved by the best performing 12 percent of existing sources (for which the administrator has emissions information) or the best performing 5 sources for source categories with less than 30 sources (CAA section 112(d)(3)(A) and (B)). This level of minimum stringency is called the MACT floor. For new sources, MACT standards must be at least as stringent as the control level achieved in practice by the best controlled similar source (CAA section 112(d)(3)). EPA also must consider more stringent ''beyond-the-floor'' control options. When considering beyond-the-floor options, EPA must consider not only the maximum degree of reduction in

emissions of HAP, but must take into account costs, energy, and nonair environmental impacts when doing so.

Section 112(k)(3)(B) of the CAA requires EPA to identify at least 30 HAP that pose the greatest potential health threat in urban areas, and section 112(c)(3) requires EPA to regulate, under section 112(d) standards, the area source [1] categories that represent 90 percent of the emissions of the 30 ''listed'' HAP (''urban HAP''). We implemented these listing requirements through the Integrated Urban Air Toxics Strategy (64 FR 38715, July 19, 1999).[2]

The portland cement source category was listed as a source category for regulation under this 1999 Strategy based on emissions of arsenic, cadmium, beryllium, lead, and polychlorinated biphenyls. The final NESHAP for the Portland Cement Manufacturing Industry (64 FR 31898, June 14, 1999) included emission limits based on performance of MACT for the control of THC emissions from area sources. This 1999 rule fulfills the requirement to regulate area source cement kiln emissions of polychlorinated biphenyls (for which THC is a surrogate). However, EPA did not include requirements for the control of the non-volatile metal HAP (arsenic, cadmium, beryllium, and lead) from area sources in the 1999 rule or in the 2006 amendments. To fulfill our requirements under section 112(c)(3) and 112(k), EPA is thus proposing to set emissions standards for these metal HAP from portland cement manufacturing facilities that are area sources (using particulate matter as a surrogate). In this proposal, EPA is proposing PM standards for area sources based on performance of MACT.

Section 112(c)(6) requires EPA to list, and to regulate under standards established pursuant to section 112(d)(2) or (d)(4), categories of sources accounting for not less than 90 percent of emissions of each of seven specific HAP: alkylated lead compounds; polycyclic organic matter; hexachlorobenzene; mercury; polychlorinated byphenyls; 2,3,7,8-tetrachlorodibenzofurans; and 2,3,7,8-tetrachloroidibenzo-p-dioxin. Standards established under CAA 112(d)(2) must reflect the performance of MACT. ''Portland cement manufacturing: non-hazardous waste kilns'' is listed as a source category for regulation under section 112(d)(2) pursuant to the section 112(c)(6) requirements due to emissions of polycyclic organic matter, mercury, and dioxin/furans (63 FR 17838, 17848, April 10, 1998); see also 63 FR at 14193 (March 24, 1998) (area source cement kilns' emissions of mercury, dibenzo-p-dioxins and dibenzo-p-furans, polycyclic organic matter, and polychlorinated biphenyls are subject to MACT).

Section 129(a)(1)(A) of the Act requires EPA to establish specific performance standards, including emission limitations, for ''solid waste incineration units'' generally, and, in particular, for ''solid waste incineration units combusting commercial or industrial waste'' (section 129(a)(1)(D)).[3] Section 129 defines ''solid waste incineration unit'' as ''a distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public.'' Section 129(g)(1). Section 129 also provides that ''solid waste'' shall have the meaning established by EPA pursuant to its authority under the [Resource Conservation and Recovery Act]. Section 129(g)(6).

In *Natural Resources Defense Council* v. *EPA,* 489 F. 3d 1250, 1257–61 (D.C. Cir. 2007), the court vacated the Commercial and Industrial Solid Waste Incineration Units (CISWI) Definitions Rule, 70 FR 55568 (Sept. 22, 2005), which EPA issued pursuant to CAA section 129(a)(1)(D). In that rule, EPA defined the term ''commercial or industrial solid waste incineration unit'' to mean a combustion unit that combusts ''commercial or industrial waste.'' The rule defined ''commercial or industrial waste'' to mean waste combusted at a unit that does not recover thermal energy from the combustion for a useful purpose. Under these definitions, only those units that combusted commercial or industrial waste and were not designed to, or did not operate to, recover thermal energy from the combustion would be subject to section 129 standards. The DC Circuit rejected the definitions contained in the CISWI Definitions Rule and interpreted the term ''solid waste incineration unit'' in CAA section 129(g)(1) ''to unambiguously include among the incineration units subject to its standards any facility that combusts any commercial or industrial solid waste material at all—subject to the four statutory exceptions identified in [CAA section 129(g)(1).]'' *NRDC* v. *EPA,* 489 F.3d 1250, 1257–58.

In response to the Court's remand and vacatur of the CISWI Definitions rule, EPA has initiated a rulemaking to define which secondary materials are ''solid waste'' for purposes of subtitle D (non-hazardous waste) of the Resource Conservation and Recovery Act when burned in a combustion unit. See Advance Notice of Proposed Rulemaking, 74 FR 41 (January 2, 2009) (soliciting comment on whether certain secondary materials used as alternative fuels or ingredients are solid wastes within the meaning of Subtitle D of the Resource Conservation and Recovery Act). That definition, in turn, would determine the applicability of section 129(a).

This definitional rulemaking is relevant to this proceeding because some portland cement kilns combust secondary materials as alternative fuels. However, there is no federal regulatory interpretation of ''solid waste'' for EPA to apply under Subtitle D of the Resource Conservation and Recovery Act, and EPA cannot prejudge the outcome of that pending rulemaking. Moreover, EPA has imperfect information on the exact nature of the secondary materials which portland cement kilns combust, such as information as to the provider(s) of the secondary materials, how much processing the secondary materials may have undergone, and other issues potentially relevant in a determination of whether these materials are to be classified as solid wastes. See 74 FR at 53–59. EPA therefore cannot reliably determine at this time if the secondary materials combusted by cement kilns are to be classified as solid wastes. Accordingly, EPA is basing all determinations as to source classification on the emissions information now available, as required by section 112(d)(3), and will necessarily continue to do so until the solid waste definition discussed above is promulgated. The current data base classifies all portland cement kilns as section 112 sources (*i.e.* subject to regulation under section 112). EPA notes, however, that the combustion of secondary materials as alternative fuels did not have any appreciable effect on the amount of HAP emitted by any source.[4]

[1] An area source is a stationary source of HAP emissions that is not a major source. A major source is a stationary source that emits or has the potential to emit 10 tons per year (tpy) or more of any HAP or 25 tpy or more of any combination of HAP.

[2] Since its publication in the Integrated Urban Air Toxics Strategy in 1999, EPA has amended the area source category list several times.

[3] CAA section 129 refers to the Solid Waste Disposal Act (SWDA). However, this act, as amended, is commonly referred to as the Resource Conservation and Recovery Act (RCRA).

[4] Development of the MACT Floors for the Proposed NESHAP for Portland Cement. April 15, 2009.

B. Summary of the National Lime Association v. EPA Litigation

On June 14, 1999 (64 FR 31898), EPA issued the NESHAP for the Portland Cement Manufacturing Industry (40 CFR part 63, subpart LLL).[5] The 1999 final rule established emission limitations for PM as a surrogate for non-volatile HAP metals (major sources only), dioxins/furans, and for greenfield[6] new sources total THC as a surrogate for organic HAP. These standards were intended to be based on the performance of MACT pursuant to sections 112(d)(2) and (3). We did not establish limits for THC for existing sources and non-greenfield new sources, nor for HCl or mercury for new or existing sources. We reasoned that emissions of these constituents were a function of raw material concentrations and so were essentially uncontrolled, the result being that there was no level of performance on which a floor could be based. EPA further found that beyond the floor standards for these HAP were not warranted.

Ruling on petitions for review of various environmental groups, the DC Circuit held that EPA had erred in failing to establish section 112(d) standards for mercury, THC (except for greenfield new sources) and hydrochloric acid. The court held that ''[n]othing in the statute even suggests that EPA may set emission levels only for those * * * HAPs controlled with technology.'' *National Lime Ass'n* v. *EPA,* 233 F. 3d 625, 633 (DC Cir. 2000). The court also stated that EPA is obligated to consider other pollution-reducing measures such as process changes and material substitution. *Id.* at 634. Later cases go on to hold that EPA must account for levels of HAP in raw materials and other inputs in establishing MACT floors, and further hold that sources with low HAP emission levels due to low levels of HAP in their raw materials can be considered best performers for purposes of establishing MACT floors. See, *e.g., Sierra Club* v. *EPA* (Brick MACT), 479 F. 3d 875, 882–83 (DC Cir. 2007).[7]

C. EPA's Response to the Remand

In response to the *National Lime Ass'n* mandate, on December 2, 2005, we proposed standards for mercury, THC, and HCl. (More information on the regulatory and litigation history may be found at 70 FR 72332, December 2, 2005.) We received over 1,700 comments on the proposed amendments. Most of these comments addressed the lack of a mercury emission limitation in the proposed amendments. On December 20, 2006 (71 FR 76518), EPA published final amendments to the national emission standards for these HAP. The final amendments contain a new source standard for mercury emissions from cement kilns and kilns/in-line raw mills of 41 micrograms per dry standard cubic meter, or alternatively the application of a limestone wet scrubber with a liquid-to-gas ratio of 30 gallons per 1,000 actual cubic feet per minute of exhaust gas. The final rule also adopted a standard for new and existing sources banning the use of utility boiler fly ash in cement kilns where the fly ash mercury content has been increased through the use of activated carbon or any other sorbent unless the cement kiln seeking to use the fly ash can demonstrate that the use of fly ash will not result in an increase in mercury emissions over its baseline mercury emissions (*i.e.,* emissions not using the mercury-laden fly ash). EPA also issued a THC standard for new cement kilns (except for greenfield cement kilns that commenced construction on or before December 2, 2005) of 20 parts per million (corrected to 7 percent oxygen) or 98 percent reduction in THC emissions from uncontrolled levels. EPA did not set a standard for HCl, determining that HCl was a pollutant for which a threshold had been established, and that no cement kiln, even under worst-case operating conditions and exposure assumptions, would emit HCl at levels that would exceed that threshold level, allowing for an ample margin of safety.

D. Reconsideration of EPA Final Action in Response to the Remand

At the same time we issued the final amendments, EPA on its own initiative made a determination to reconsider the new source standard for mercury, the existing and new source standard banning cement kiln use of certain mercury-containing fly ash, and the new source standard for THC (71 FR 76553, December 20, 2006). EPA granted reconsideration of the new source mercury standard both due to substantive issues relating to the performance of wet scrubbers and because information about their performance in the industry had not been available for public comment at the time of proposal but is now available in the docket. We also committed to undertake a test program for mercury emissions from cement kilns equipped with wet scrubbers that would enable us to resolve these issues. We further explained that we were granting reconsideration of the work practice requirement banning the use of certain mercury-containing fly ash in cement kilns to allow further opportunity for comment on both the standard and the underlying rationale and because we did not feel we had the level of analysis we would like to support a beyond-the-floor determination. We granted reconsideration of the new source standard for THC because the information on which the standard was based arose after the period for public comment. We requested comment on the actual standard, whether the standard is appropriate for reconstructed new sources (if any should occur) and the information on which the standard is based. We specifically solicited data on THC emission levels from preheater/precalciner cement kilns. We stated that we would evaluate all data and comments received, and determine whether in light of those data and comments it is appropriate to amend the promulgated standards.

EPA received comments on the notice of reconsideration from two cement companies, three energy companies, three industry associations, a technical consultant, one State, one environmental group, one ash management company, one fuels company, and one private citizen. As part of these comments, one industry trade association submitted a petition to withdraw the new source MACT standards for mercury and THC and one environmental group submitted a petition for reconsideration of the 2006 final action. A summary of these comments is available in the docket for this rulemaking.[8]

In addition to the reconsideration discussed above, EPA received a petition from Sierra Club requesting reconsideration of the existing source standards for THC, mercury, and HCl, and judicial petitions for review challenging the final amendments. EPA granted the reconsideration petition. The judicial petitions have been

[5] Cement kilns which burn hazardous waste are a separate source category, since their emissions of many HAP differ from portland cement kilns' as a result of the hazardous waste inputs. Rules for hazardous waste-burning cement kilns are found at subpart EEE of part 63.

[6] For purposes of the 1999 rule a new greenfield kiln is a kiln constructed after March 24, 1998, at a site where there are no existing kilns.

[7] In the remainder of the opinion, the court in *National Lime Ass'n* upheld EPA's standards for particulate matter and dioxin (on grounds that petitioner had not properly raised arguments in its opening brief), upheld EPA's use of particulate matter as a surrogate for HAP metals, and remanded for further explanation EPA's choice of an analytic method for hydrochloric acid.

[8] Summary of Comments on December 20, 2006 Final Rule and Notice of Reconsideration. April 15, 2009.

combined and are being held in abeyance pending the results of the reconsideration.

In March 2007 the DC Circuit court issued an opinion (*Sierra Club* v. *EPA,* 479 F. 3d 875 (DC Cir. 2007) (*Brick MACT*)) vacating and remanding section 112(d) MACT standards for the Brick and Structural Clay Ceramics source categories. Some key holdings in that case were:

- Floors for existing sources must reflect the average emission limitation achieved by the best-performing 12 percent of existing sources, not levels EPA considers to be achievable by all sources (479 F. 3d at 880–81);
- EPA cannot set floors of ''no control.'' The Court reiterated its prior holdings, including National Lime Ass'n, confirming that EPA must set floor standards for all HAP emitted by the major source, including those HAP that are not controlled by at-the-stack control devices (479 F. 3d at 883);
- EPA cannot ignore non-technology factors that reduce HAP emissions. Specifically, the Court held that ''EPA's decision to base floors exclusively on technology even though non-technology factors affect emissions violates the Act.'' (479 F. 3d at 883)

Based on the *Brick MACT* decision, we believe a source's performance resulting from the presence or absence of HAP in raw materials must be accounted for in establishing floors; i.e., a low emitter due to low HAP proprietary raw materials can still be a best performer. In addition, the fact that a specific level of performance is unintended is not a legal basis for excluding the source's performance from consideration. *National Lime Ass'n,* 233 F. 3d at 640.

The *Brick MACT* decision also stated that EPA may account for variability in setting floors. However, the court found that EPA erred in assessing variability because it relied on data from the worst performers to estimate best performers' variability, and held that ''EPA may not use emission levels of the worst performers to estimate variability of the best performers without a demonstrated relationship between the two.'' 479 F. 3d at 882.

The majority opinion in the *Brick MACT* case does not address the possibility of subcategorization to address differences in the HAP content of raw materials. However, in his concurring opinion Judge Williams stated that EPA's ability to create subcategories for sources of different classes, size, or type (section 112 (d)(1)) may provide a means out of the situation where the floor standards are achieved for some sources, but the same floors cannot be achieved for other sources due to differences in local raw materials whose use is essential. *Id.* at 884–85.[9]

After considering the implications of this decision, EPA granted the petition for reconsideration of all the existing source standards in the 2006 rulemaking.

A second court opinion is also relevant to this proposal. In *Sierra Club* v. *EPA*, 551 F. 3d 1019 (DC Cir. 2008) the court vacated the regulations contained in the General Provisions which exempt major sources from MACT standards during periods of startup, shutdown and malfunction (SSM)). The regulations (in 40 CFR 63.6(f)(1) and 63.6(h)(1)) provided that sources need not comply with the relevant section 112(d) standard during SSM events and instead must ''minimize emissions * * * to the greatest extent which is consistent with safety and good air pollution control practices.'' The current Portland Cement NESHAP does not contain specific provisions covering operation during SSM operating modes; rather it references the now-vacated rules in the General Provisions. As a result of the court decision, we are addressing them in this rulemaking. Discussion of this issue may be found in Section IV.G.

III. Summary of Proposed Amendments to Subpart LLL

This section presents the proposed amendments to the Portland Cement NESHAP. In the section presenting the amended rule language, there is some language that it not amendatory, but is presented for the reader's convenience. We are not reopening or otherwise considering unchanged rule language presented for the reader's convenience, and will not accept comments on such language.

A. Emissions Limits

We are proposing the following new emission limits in this action categorized below by their sources in a typical Portland cement production process.

[9] ''What if meeting the 'floors' is extremely or even prohibitively costly for particular plants because of conditions specific to those plants (*e.g.,* adoption of the necessary technology requires very costly retrofitting, or the required technology cannot, given local inputs whose use is essential, achieve the 'floor')? For these plants, it would seem that what has been 'achieved' under § 112(d)(3) would not be 'achievable' under § 112(d)(2) in light of the latter's mandate to EPA to consider cost. * * * [O]ne legitimate basis for creating additional subcategories must be the interest in keeping the relation between 'achieved' and 'achievable' in accord with common sense and the reasonable meaning of the statute. '' *Id.* at 884–85

Kilns and In-line Kiln/Raw Mills

Mercury. For cement kilns or in-line kilns/raw mills an emissions limit of 43 lb/million(MM) tons clinker for existing sources and 14 lb/MM tons clinker for new sources. Both proposed limits are based on a 30 day rolling average.

THC. For cement kilns or in-line kilns/raw mills an emissions limit of 7 parts per million by volume (ppmv) for existing sources and 6 ppmv for new sources, measured dry as propane and corrected to 7 percent oxygen, measured on a 30 rolling day average in each case. Because the proposed existing source standard would be more stringent than the new source standard of 50 ppmv contained in the 1999 final rule for greenfield new sources, we are also proposing to remove the 50 ppmv standard.

As an alternative to the THC standard, we are proposing that the cement kilns or in-line kilns/raw mills can meet a standard of 2 ppmv total combined organic HAP for existing sources or 1 ppmv total organic HAP combined for new sources, measured dry and corrected to 7 percent oxygen. We believe this standard is equivalent to the proposed THC standard as discussed in section IV.C. The alternative standard would be based on organic HAP emission testing and concurrent THC CEMS measurements that would establish a site specific THC limit that would demonstrate compliance with the total organic HAP limit. The site specific THC limit would be measured as a 30 day rolling average.

PM. For cement kilns or cement kilns/in-line raw mills an emissions limit of 0.085 pounds per ton (lb/ton) clinker for existing sources and 0.080 lb/tons clinker for new sources. Kilns and kiln/in-line raw mills where the clinker cooler gas is combined with the kiln exhaust and sent to a single control device for energy efficiency purposes (i.e., to extract heat from the clinker cooler exhaust) would be allowed to adjust the PM standard to an equivalent level accounting for the increased gas flow due to combining of kiln and clinker cooler exhaust.

Opacity. We are proposing to remove all opacity standards for kilns and clinker coolers because these sources will be required to monitor compliance with the PM emissions limits by more accurate means.

Hydrochloric Acid. For cement kilns or cement kilns/in-line raw mills an emissions limit of 2 ppmv for existing sources and 0.1 ppmv for new sources, measured dry and corrected to 7 percent oxygen. For facilities that are required to use a continuous emissions monitoring

system (CEMS), compliance would be based on a 30 day rolling average.

Clinker Coolers

For clinker coolers a PM emissions limit of 0.085 lb/ton clinker for existing sources and 0.080 lb/tons clinker for new sources.

Raw Material Dryers

THC. For raw materials dryers an emissions limit of 7 ppmv for existing sources and 6 ppmv for new sources, measured dry as propane and corrected to 7 percent oxygen, measured on a 30 day rolling average. Because the proposed existing source standard would be more stringent than the new source standard of 50 ppmv contained in the 1999 final rule for Greenfield new sources, we are also proposing to remove the 50 ppmv standard.

As an alternative to the THC standard, the raw material dryer can meet a standard of 2 ppmv total combined organic HAP for existing sources or 1 ppmv total organic HAP combined for new sources, measured dry and corrected to 7 percent oxygen. The alternative standard would be based on organic HAP emission testing and concurrent THC CEMS measurements that would establish a site specific THC limit that would demonstrate compliance with the total organic HAP limit. The site specific THC limit would be measured as a 30 day rolling average.

B. Operating Limits

EPA is proposing to eliminate the restriction on the use of fly ash where the mercury content of the fly ash has been increased through the use of activated carbon. Given the proposed emission limitation for mercury, whereby kilns or cement kilns/in-line raw mills must continuously meet the mercury emission limits described above (including when using these materials) there does not appear to be a need for such a provision. For the same reason, EPA is proposing to remove the requirement to maintain the amount of cement kiln dust wasted during testing of a control device, and the provision requiring that kilns remove from the kiln system sufficient amounts of dust so as not to impair product quality.

C. Testing and Monitoring Requirements

We are proposing the following changes in testing and monitoring requirements:

Kilns and kiln/in-line raw mills would be required to meet the following changed monitoring/testing requirements:

- CEMS (PS–12A) or sorbent trap monitors (PS–12B) to continuously measure mercury emissions, along with Procedure 5 for ongoing quality assurance.
- CEMS meeting the requirement of PS–8A to measure THC emissions for existing sources (new sources are already required to monitor THC with a CEM). Kilns and kiln/in-line raw mills meeting the organic HAP alternative to the THC limit would still be required to continuously monitor THC (based on the results of THC monitoring done concurrently with the Method 320 test), and would also be required to test emissions using EPA Method 320 or ASTM D6348–03 every five years to identify the organic HAP component of their THC emissions.
- Installation and operation of a bag leak detection system to demonstrate compliance with the PM emissions limit. If electrostatic precipitators (ESP) are used for PM control an ESP predictive model to monitor the performance of ESP controlling PM emissions from kilns would be required. As an alternative EPA is proposing that sources may use a PM CEMS that meets the requirements of PS–11. Though we are proposing the PM CEMS as an alternative compliance method, we are taking comment on requiring PM CEMS to demonstrate compliance.
- CEMS meeting the requirements of PS–15 would be required to demonstrate compliance with the HCl standard. If a facility is using a caustic scrubber to meet the standard, EPA Test Method 321 and ongoing continuous parameter monitoring of the scrubber may be used in lieu of a CEMS to demonstrate compliance. The M321 test must be repeated every 5 years.

For clinker coolers, EPA is proposing use of a bag leak detection system to demonstrate compliance with the proposed PM emissions limit. If an ESP is used for PM control on clinker coolers, an ESP predictive model to monitor the performance of ESP controlling PM emissions from kilns would be required. As an alternative, EPA is proposing that a PM CEMS that meets the requirements of PS–11 may be used.

Raw material dryers that are existing sources would be required to install and operate CEMS meeting the requirement of PS–8A to measure THC emissions. (New sources are already required to monitor THC with a CEM). Raw material dryers meeting the organic HAP alternative to the THC limit would still be required to continuously monitor THC (based on the results of THC monitoring done concurrently with the Method 320 test), and would also be required to test emissions using EPA Method 320 or ASTM D6348–03 every five years to identify the organic HAP component of their THC emissions.

New or reconstructed raw material dryers and raw or finish mills would be subject to longer Method 22 and, potentially, to longer Method 9 tests. The increase in test length duration is necessary to better reflect the operating characteristics of sources subject to the proposed rule.

IV. Rationale for Proposed Amendments to Subpart LLL

A. MACT Floor Determination Procedure for all Pollutants

The MACT floor limits for each of the HAP and HAP surrogates (mercury, total hydrocarbons, HCl, and particulate matter) are calculated based on the performance of the lowest emitting (best performing) sources in each of the MACT pool sources. We ranked all of the sources for which we had data based on their emissions and identified the lowest emitting 12 percent of the sources for which we had data, which ranged from two kilns for THC to 11 kilns for mercury for existing sources. For new source MACT, the floor was based on the best performing source. The MACT floor limit is calculated from a formula that is a modified prediction limit, designed to estimate a MACT floor level that is achievable by the average of the best performing sources (*i.e.*, those in the MACT pool) if the best performing sources were able to replicate the compliance tests in our data base. Specifically, the MACT floor limit is an upper prediction limit (UPL) calculated from: [10]

$$UPL = x_p + t * (V_T)^{0.5}$$

Where:

X_p = average of the best performing MACT pool sources,
t = Student's t-factor evaluated at 99 percent confidence, and
v_T = total variance determined as the sum of the within-source variance and the between-source variance.

The between-source variance is the variance of the average of the best performing source averages. The within-source variance is the variance of the MACT source average considering ''m'' number of future individual test runs used to make up the average to determine compliance. The value of ''m'' is used to reduce the variability to account for the lower variability when averaging of individual runs is used to determine compliance in the future. For example, if 30-day averages are used to

[10] More details on the calculation of the MACT floor limits are given in the memorandum Development of The MACT Floors For The Proposed NESHAP for Portland Cement. April 15, 2009.

determine compliance (m=30), the variability based 30-day average is much lower than the variability of the daily measurements in the data base, which results in a lower UPL for the 30-day average.

B. Determination of MACT for Mercury Emissions From Major and Area Sources

The limits for existing and new sources we are proposing here apply to both area and major new sources. These limits would also apply to area sources consistent with section 112(c)(6) of the Act, as EPA determined in the original rule. See 63 FR at 14193.

1. Floor Determination

Selection of Existing Source Floor

Cement kilns' emissions of mercury reflect exclusively the amounts of mercury in each kiln's feedstock and fuel inputs. The amounts of mercury in these inputs and their relative contributions to overall mercury kiln emissions vary by site. In many cases the majority of the mercury emissions result from the mercury present as a trace contaminant in the limestone, which typically comes from a proprietary quarry located adjacent to the plant. Limestone is the single largest input, by mass, to a cement kiln's total mass input, typically making up 80 percent of that loading. Mercury is also found as a trace contaminant in the other inputs to the kiln such as the additives that supply the required silica, alumina, and iron. Mercury is also present in the coal and petroleum coke typically used to fuel cement kilns.

Based on our current information, mercury levels in limestone can vary significantly, both within a single quarry and between quarries. Since quarries are generally proprietary, this variability is inherent and site-specific. Mercury levels in additives and fuels likewise vary significantly, although mercury emissions attributable to limestone often dominate the total due to the larger amount of mass input contributed by limestone (see further discussion of this issue at Other Options EPA considered in Setting Floor for Mercury below).

The first step in establishing a MACT standard is to determine the MACT floor. A necessary step in doing so is determining the amount of HAP emitted. In the case of mercury emitted by cement kilns, this is not necessarily a straightforward undertaking. Single stack measurements represent a snapshot in time of a source's emissions, always raising questions of how representative such emissions are of the source's emissions over time. This problem is compounded in the case of cement kilns, because cement kilns do not emit mercury uniformly. Our current data suggest that, for all kilns, the mercury content of the feed and fuels varies significantly from day-to-day. Because most cement kilns have no mercury emissions control, the variations in mercury inputs directly translate to a variability of mercury stack emissions. For modern preheater and preheater/precalciner kilns this problem is compounded because these kilns have in-line raw mills. With in-line raw mills, mercury is captured in the ground raw meal in the in-line raw mill and this raw meal (containing mercury) is returned as feed to the kiln. Mercury emissions may remain low during such recycling operations. However, as part of normal kiln operation raw mills must be periodically shut down for maintenance, and mercury-containing exhaust gases from the kiln are then bypassed directly to the main air pollution control device resulting in significantly increased mercury emissions at the stack. The result is that at any given time, mercury emissions from such cement kilns are either low or high, but rarely in equilibrium, so that single stack tests are likely to either underestimate or overestimate cement kilns' performance over time. Put another way, we believe that single short term stack test data (typically a few hours) are probably not indicative of long term emissions performance, and so are not the best indicator of performance over time. With these facts in mind, we carefully considered alternatives other than use of single short-term stack test results to quantify kilns' performance for mercury.

An alternative to short term stack test data would be to use mercury continuous monitoring data over a longer time period. Because no cement kilns in the United States have continuous mercury monitors, this option was not available. However, mercury is an element. Therefore, all the mercury that enters a kiln has to leave the kiln in some fashion. The available data indicate that almost no mercury leaves the kiln as part of the clinker (product). Therefore, our methodology assumes over the long term that all the mercury leaves the kiln as a stack emission with three exceptions:

1. If instead of returning all particulate captured in the particulate control device to the kiln, the source instead removes some of it from the circuit entirely, *i.e.*, the kiln does not reuse all (wastes some) cement kiln dust (CKD); or

2. The kiln is equipped with an alkali bypass, which means all CKD captured in the alkali bypass PM control is wasted, and/or;

3. If the kiln has a wet scrubber (usually for SO_2 control), the scrubber will remove some mercury which our methodology assumes will end up in the gypsum generated by the scrubber.

Based on these facts we decided that the most accurate method available to us to determine long term mercury emissions performance was to do a total mass balance. We did so by obtaining data on all the kiln mercury inputs (*i.e.*, all raw materials and all fuels) for a large group of kilns, and assuming all mercury that enters the kiln is emitted except for the three conditions noted above. Pursuant to letters mandating data gathering, issued under the authority of section 114, we obtained 30 days of daily data on kiln mercury concentrations in each individual raw material, fuel, and CKD for 89 kilns (which represent 59 percent of total kilns), along with annual mass inputs and the amount of material collected in the PM control device (or alkali PM control device) that is wasted rather than returned to the kiln.

These data were submitted to EPA as daily concentrations for the inputs, *i.e.*, samples of all inputs were taken daily and analyzed daily for their mercury content. We took the daily averages, calculated a mean concentration, and multiplied the mean concentration by annual materials use to calculate an annual mercury emission for each of the 89 kilns. If the facility wasted CKD, we subtracted out the annual mercury that left the system in the CKD. If the facility had a wet scrubber (the only control device currently in use among the sampled kilns with any substantial mercury capture efficiency), we subtracted out the annual mercury attributable to use of the scrubber. There are five cement kilns using wet scrubbers and EPA has removal efficiencies for four of these kilns (based on inlet/outlet testing conducted at EPA's request concurrent with the input sampling). We attributed a removal efficiency for the fifth kiln based on the average removal efficiency of the other four kilns.

We acknowledge that an additional source of uncertainty in the mass balance methodology for estimating the capture efficiencies of wet scrubbers is the variability in the mercury speciation ratios (elemental to divalent). These ratios, which are dependent on the amount of chlorine present and other factors, would be expected to vary at different kilns. Only the soluble divalent mercury fraction will be

captured by a wet scrubber. We note, however, that mercury speciation would be expected to have little effect on mercury emissions in the case where wet scrubbers, or other add-on controls such as activated carbon injection (ACI), are not used, because for most facilities, mercury captured in the PM controls is returned to the kiln. In cases where some of the collected PM is wasted, we had 30 days of actual mercury content data for wasted material.

For each kiln, we calculated an average annual emission factor, which is the average projected emission rate for each kiln. We did this by dividing calculated annual emissions by total inputs. We then ranked each kiln from lowest average emission factor to highest. The resulting emissions factors for 87 of the 89 ranged (relatively continuously) from 7 to 300 pounds of mercury per million tons of feed. Two kilns showed considerably higher numbers, approximately 1200 and 2000 pounds per ton of feed. These two facilities have atypically high mercury contents in the limestone in their proprietary quarries which are the most significant contributors to the high mercury emissions.

Based on these data and ranking methodology, the existing source MACT floor would be the average of the lowest emitting 12 percent of the kilns for which we have data, which would be the 11 kilns with lowest emissions (as calculated), shown in Table 1.

TABLE 1—MERCURY MACT FLOOR

Kiln code	Mercury emissions (lb/MM ton feed)
1233	7.14
1650	10.83
1589	11.11
1302	14.51
1259	15.16
1315	15.41
1248	18.09
1286	21.12
1435	22.89
1484	22.89
1364	23.92
MACT—Existing kilns	
Average: lb/MM tons feed (lb/MM tons clinker)	16.6 (27.4)
Variability ($t^*v_T^{0.5}$)	9.52
99th percentile: lb/MM tons feed (lb/MM tons clinker)	26 (43)
MACT—New kilns	
Average: lb/MM tons feed (lb/MM tons clinker)	7.1 (11.8)
Variability ($t^*v_T^{0.5}$)	1.3
99th percentile: lb/MM tons feed (lb/MM tons clinker)	8.4 (14)

The average emission rate for these kilns is 16.6 pounds per million tons (lb/MM) tons feed (27.4 lb/MM tons clinker). The emission rate of the single lowest emitting source is 7.1 lb/MM tons feed (11.8 lb/MM tons clinker).

As previously discussed above, we account for variability in setting floors, not only because variability is an element of performance, but because it is reasonable to assess best performance over time. Here, for example, we know that the 11 lowest emitting kiln emission estimates are averages, and that the actual emissions will vary over time. If we do not account for this variability, we would expect that even the kilns that perform better than the floor on average would potentially exceed the floor emission levels a significant part of the time—meaning that their performance was assessed incorrectly in the first instance.

For the 11 lowest emitting kilns, we calculated a daily emission rate using the daily concentration values and annual materials inputs divided by each kiln's operating days.[11] The results are shown in Table 1 and represent the average performance of each kiln over the 30-day period. We then calculated the average performance of the 11 lowest emitting kilns (17 lb/MM tons of feed) and the variances of the daily emission rates for each kiln which is a direct measure of the variability of the data set. This variability includes the day-to-day variability in the total mercury input to each kiln and variability of the sampling and analysis methods over the 30-day period, and it includes the variability resulting from site-to-site differences for the 11 lowest emitters. We calculated the MACT floor (26 lb/MM tons feed) based on the UPL (upper 99th percentile) as described earlier from the average performance of the 11 lowest emitting kilns, Students t-factor, and the total variability, which was adjusted to account for the lower variability when using 30 day averages.

EPA also has some information which tends to corroborate the variability factor used to calculate the floor for mercury. These data are not emissions data; they are data on the total mercury content of feed materials over periods of 12 months or longer. Because mercury emissions correlate with mercury content of feed materials, we believe an analysis of the variability of the feed materials is an accurate surrogate for the variability of mercury emissions over time. These long term data are from multiple kilns from a single company that are not ranked among the lowest emitters, but are nonetheless germane as a crosscheck on variability of mercury content of feed materials (including whether 30 days of sampling, coupled with statistically derived variability of that data set and a 99th percentile, adequately measures that variability).

One way of comparing the variability among different data sets with different average values is to calculate and compare the relative standard deviations (RSD), which is the standard deviation divided by the mean, of each set. If the RSD are comparable, then one can conclude that the variability among the data sets is comparable. The results of such an analysis are given in Table 2 below. The long term data represent long term averages of feed material mercury content based on 12 months of data or more, whereas the MACT data sets are for 30 consecutive days of data. The RSD of the long term data range from 0.29 to 1.05, and the RSD of the MACT floor kilns range from 0.10 to 0.89. This comparison suggests that our method of calculating variability in the proposed floor based on variances/99th percentile UPL appears to adequately encompass sources' long-term variability.

[11] In the daily calculations, we treated the CKD removal as if it was a control device, and applied the overall percent reduction rather that using the daily CKD concentration value. We used this approach because if we used daily CKD removal values, some days showed negative mercury emissions rates. This is because of the mercury recycling issues discussed above.

TABLE 2—COMPARISON OF LONG-TERM KILN FEED MERCURY CONCENTRATION AT ESSROC PLANTS WITH THE FEED MERCURY CONCENTRATION DATA FOR THE MACT FLOOR KILNS

Kiln	PPM Hg in feed		RSD	Source
	Mean	Standard deviation		
1248[a]	0.021	0.002	0.10	MACT floor kiln.[b]
1589[a]	0.021	0.002	0.10	MACT floor kiln.
1435	0.012	0.002	0.16	MACT floor kiln.
1484	0.012	0.002	0.16	MACT floor kiln.
1233	0.011	0.002	0.16	MACT floor kiln.
1650	0.025	0.005	0.22	MACT floor kiln.
Speed	0.055	0.016	0.29	Essroc.[c]
1286	0.006	0.002	0.32	MACT floor kiln.
1364	0.006	0.002	0.32	MACT floor kiln.
San Juan	0.322	0.108	0.34	Essroc.
Bessemer	0.021	0.007	0.35	Essroc.
Logansport	0.022	0.008	0.37	Essroc.
Naz III	0.016	0.010	0.61	Essroc.
Naz I	2.974	1.838	0.62	Essroc.
1302	0.006	0.004	0.68	MACT floor kiln.
1315	0.006	0.004	0.68	MACT floor kiln.
Martinsburg	0.023	0.017	0.89	Essroc.
1259	0.008	0.007	0.89	MACT floor kiln.
Picton	0.075	0.078	1.05	Essroc.

[a] Same feed sample applied to multiple kilns at the plant.
[b] MACT floor kilns' variabilities are all based on approximately 30 days of data.
[c] Essroc kiln's variabilities are all based on 12 months to three years of data.

We are proposing to express the floor as a 30-day rolling average for the following two reasons. First, as explained earlier, daily variations in mercury emissions at the stack for all kilns with in-line raw mills is greater than daily variability of mercury levels in inputs. This is because mercury is emitted in high concentrations during mill-off conditions, but in lower concentrations when mercury is recycled to the kiln via the raw mill ('mill-on'). We believe that 30 days is the minimum averaging time that allows for this mill-on/mill-off variation.

Second, a 30-day rolling average is tied to our proposed implementation regime, which in turn is based on the means by which the data used to generate the standard were developed. As explained above, the proposed floor reflects 30 days of sampling which are averaged, corresponding to the proposed 30-day averaging period. EPA is also proposing to monitor compliance by means of daily monitoring via a CEMS, so that the proposed implementation regime likewise mirrors the means by which the underlying data were gathered and used in developing the standard.

Critical to this variability calculation is the assumption that EPA is adequately accounting for variable mercury content in kiln inputs.[12] As noted, we did so based on 30 days of continuous sampling of all kiln inputs, plus use of a further statistical variability factor (based on that data set) and use of the 99th percentile UPL. The 30-day averaging time in the standard is a further means of accounting for variability, and accords with the data and methodology EPA used to develop the floor level.

We solicit comment on the accuracy and appropriateness of this analysis. The most pertinent information would of course be additional data of raw material and fuel mercury contents and usage to specific kilns (especially data from sampling over a longer period than 30 days).[13] EPA also expressly solicits further information regarding potential substitutability of non-limestone kiln inputs and whether kilns actually utilize inputs other than those reflected in the 30-day sampling effort comprising EPA's present data base for mercury, and if so, what mercury levels are in these inputs.

[12] Since only five kilns have stack control devices, variability of performance of these controls (wet scrubbers), although important, plays a less critical role in this analysis.

[13] Some advance commenters have posited a larger variability factor to reflect the historic known variation in mercury content in limestone and other inputs, as reflected in various geological surveys. However, at issue is not variability for the source category as a whole, but specific sources' variability. So any resort to information not coming directly from a best performer's own operating history must be accompanied by an explanation of its relevance for best performer's variability in order to be considered relevant. *See Brick MACT,* 479 F. 3d at 881–82.

Selection of New Source Floor

Based on Table 1, the average associated with the single lowest emitting kiln is 7 lb/MM tons feed (12 lb/MM tons clinker). Applying the UPL formula discussed earlier based on the daily emissions for the best performing kiln, we calculated its 99th percentile UPL of performance, which results in a new source MACT level of 8.4 lb/MM tons feed (14 lb/MM tons clinker).

Because this new source floor is expressed on a different basis than the standard EPA promulgated in December 2006, which was a 41 μg/dscm not to be exceeded standard, it is difficult to directly compare the new source floor proposed in this action to the December 2006 standard. The December 2006 new source mercury emissions limit was based on the performance of wet scrubber-equipped cement kilns. In our current analysis these wet scrubber-equipped kilns were among the lowest emitting kilns, but not the lowest emitting kiln used to establish this proposed new source limit. Based on this fact, we believe this proposed new source floor (and standard, since EPA is not proposing a beyond-the-floor standard) is approximately 30 percent lower than the December 2006 standard.

Other Options EPA Considered in Setting Floors for Mercury

EPA may create subcategories which distinguish among ''classes, types, and sizes of sources''. Section 112(d)(1). EPA has carefully considered that possibility

in considering potential standards for mercury emitted by portland cement kilns. Were EPA to do so, each subcategory would have its own floor and standard, reflecting performance of the sources within that subcategory. EPA may create a subcategory applicable to a single HAP, rather than to all HAP emitted by the source category, if the facts warrant (so that, for example, a subcategory for kilns emitting mercury, but a single category for kilns emitting HCl, is legally permissible with a proper factual basis). Normally, any basis for subcategorizing must be related to an effect on emissions, rather than to some difference among sources which does not affect emissions performance.

The subcategorization possibilities for mercury which we considered are the type of kiln, presence of an inline raw mill, practice of wasting cement kiln dust, mercury concentration of limestone in the kiln's proprietary quarry, or geographic location. Mercury emissions are not affected by kiln type (*i.e.,* wet or dry, pre-calcining or not) because none of these distinctions have a bearing on the amount of mercury inputted to the kiln or emitted by it. In contrast, the presence of an in-line raw mill affects mercury emissions in the short term because the in-line raw mill tends to collect mercury in the exhaust gas and transfer it to the kiln feed. However, since (as discussed above) the raw mill must be shut down periodically for maintenance while the kiln continues to operate, all or most of the collected mercury simply gets emitted during the raw mill shutdown and total mercury emissions over time are not changed.

The practice of wasting cement kiln dust does affect emissions. This practice means that a portion of the material collected on the PM control device is removed from the kiln system, rather than recycled to the kiln. Some of the mercury condenses on the PM collected on the PM control device, so wasting CKD also removes some mercury from the kiln system (and therefore it is not emitted). However, since this practice could be considered to ''control'' mercury, subcategorization by CKD wasting would be the same as subcategorizing by control device, which is not permissible. *See* 69 FR at 403 (Jan. 5, 2004).

There is no variation in kiln location (*i.e.,* geographical distinction) which would justify subcategorization. We examined the geographical distribution of mercury emissions and total mercury and found no correlation. For example, no one region of the country has kilns that tend to be all low- or high-emitting kilns.

We also rejected subcategorization by total mercury inputs. Subcategorization by this method would inevitability result in a situation where kilns with higher total mercury inputs would have higher emission limits. Total mercury inputs are correlated with mercury emissions. So a facility that currently has lower mercury inputs could potentially simply substitute a higher mercury raw material without any requirement to control the additional mercury. In addition, fuels and other additives are non-captive [14] situations, and thus do not readily differentiate kilns by ''size, class, or type''. Finally, because of the direct correlation of mercury emissions and mercury inputs, subcategorization by total mercury inputs could potentially be viewed as a similar situation to subcategorization by control device.

The subcategorization option that we believe is most pertinent would be to subcategorize by the facility's proprietary limestone quarry. All cement plans have a limestone quarry located adjacent to or very close to the cement plant. This quarry supplies limestone only to its associated plant, and is not accessible to other plants. Typically quarries are developed to provide 50 to 100 years of limestone, and the cement kiln is located based on the location of the quarry. See 70 FR at 72333. For this reason, we believe that a facility's proprietary quarry is an inherent part of the process such that the kiln and the quarry together can be viewed as the affected source. Also, the amount of mercury in the proprietary quarry can significantly affect mercury emission because (as noted above) limestone makes up about 80 percent of the total inputs to the kiln. Thus, kilns with mercury above a given level might be considered a different type or class of kiln because their process necessarily requires the use of that higher-mercury input.

The facts, however, do not obviously indicate sharp disparities in limestone mercury content that readily differentiate among types of sources. Figure 1 presents the average mercury contents of the proprietary quarries on the 89 kilns in EPA's present data base.

[14] 'Non-captive' means these materials do not necessarily come from the facility's proprietary quarry and the facility has choices for the source of these materials.

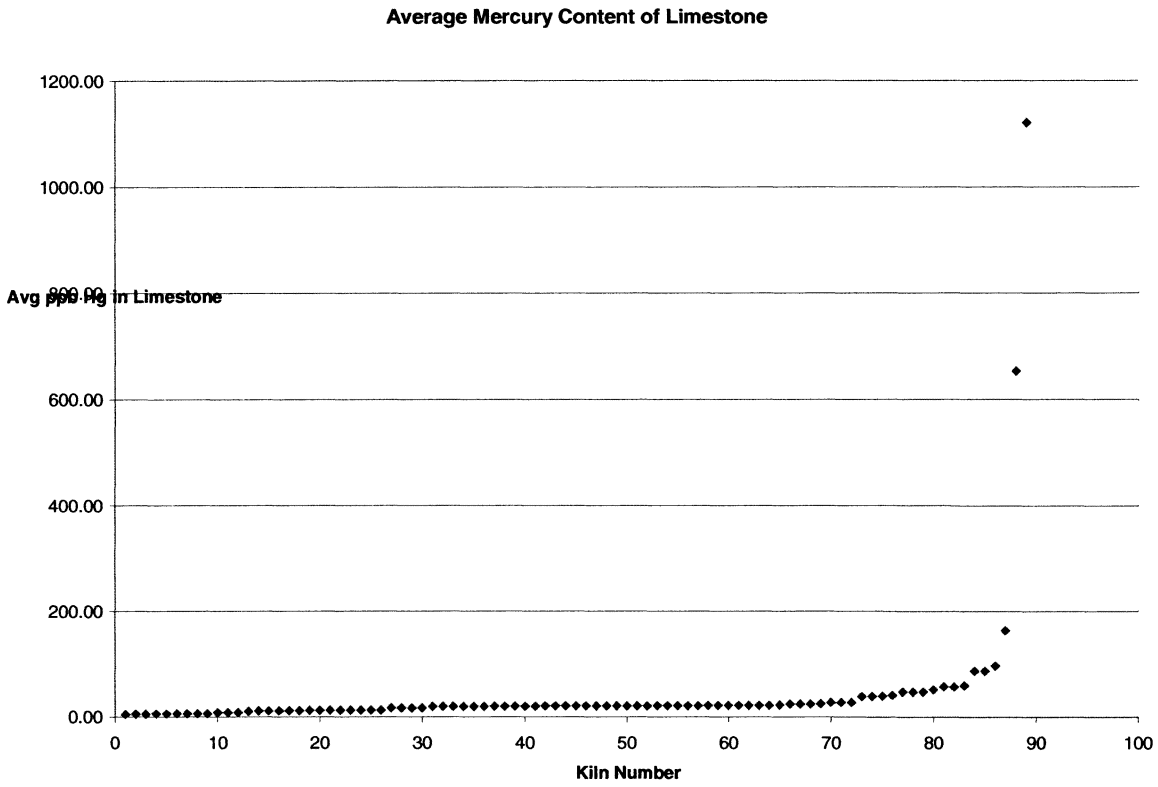


Figure 1. Average Mercury Concentration of Limestone

These data, as we presently evaluate them, do not readily support a subcategorization approach—putting aside for the moment the high mercury limestone kilns (at the far right of the distribution tail in Figure 1) which are discussed separately. As shown in Figure 1, mercury levels in limestone are more of a continuum with no immediately evident breakpoints (again, putting aside the high-mercury limestone kilns). More important, kilns with quarries with varied mercury content can and do have similar mercury emissions, and in many instances, limestone mercury is not the dominant source of mercury in the kilns' emissions notwithstanding that limestone is the principal volumetric input. Thus for about 55 percent of the kilns (49 of 89), non-limestone mercury accounted for greater than 50 percent of the kiln's mercury emissions.[15] For nearly 70 percent of the kilns (62 of 89), limestone mercury accounted for at least one-third of total mercury emissions.

TABLE 3—ORIGINS OF MERCURY IN PORTLAND CEMENT MANUFACTURING

[Sorted by limestone percent] [a]

Random number kiln code	Limestone mercury concentration (ppb)	Percent Hg from limestone [a]	Percent Hg from other raw materials	Percent Hg from fuels
1629	652.92	92	8	0
1647	40.88	89	5	7
1581	96.73	88	9	3
1376	27.43	87	5	8
1609	1120.75	87	13	0
1688	27.43	87	5	8
1690	27.43	87	5	8
1339	21.00	84	8	9
1324	21.30	83	1	16
1693	21.72	80	7	13
1692	20.23	79	13	8
1419	20.92	77	16	8
1248	20.92	76	17	6
1302	6.24	76	7	17
1686	51.21	76	19	6
1239	59.40	74	17	8

[15] In certain instances, percentages of non-limestone mercury are high because limestone mercury content was low. However, in many instances, non-limestone mercury contributions exceeded those from limestone even where limestone mercury contribution was relatively high. See Table 3.

TABLE 3—ORIGINS OF MERCURY IN PORTLAND CEMENT MANUFACTURING—Continued

[Sorted by limestone percent] [a]

Random number kiln code	Limestone mercury concentration (ppb)	Percent Hg from limestone [a]	Percent Hg from other raw materials	Percent Hg from fuels
1315	6.24	74	7	19
1265	12.18	73	16	11
1251	20.92	70	16	13
1592	46.99	68	11	21
1650	24.92	68	3	28
1643	22.02	67	1	33
1674	22.02	67	1	32
1225	46.99	66	11	23
1268	16.97	65	4	31
1226	21.45	64	11	26
1589	20.92	64	30	5
1200	86.65	63	5	32
1218	86.65	63	5	32
1415	20.00	63	29	7
1439	46.99	63	11	27
1421	13.00	62	27	11
1435	11.56	62	25	13
1463	12.18	62	13	25
1484	11.56	62	25	13
1481	39.12	60	35	5
1337	57.17	59	17	24
1375	20.67	59	21	20
1448	57.17	59	17	24
1615	20.67	58	21	21
1259	8.31	57	23	20
1327	20.67	57	21	23
1604	20.00	55	22	23
1256	21.63	54	41	5
1294	21.63	54	41	5
1343	21.63	54	41	5
1350	21.63	54	41	5
1220	21.54	53	40	6
1635	21.23	52	41	7
1638	39.00	48	3	48
1233	11.31	46	41	14
1240	21.23	44	3	53
1331	16.93	44	12	44
1417	39.00	44	3	53
1594	16.93	42	12	46
1371	20.10	40	16	44
1619	20.10	40	16	43
1660	16.93	39	11	50
1443	20.00	38	57	5
1396	20.43	35	61	4
1436	20.10	35	15	50
1286	5.67	33	2	65
1364	5.67	32	2	66
1582	24.59	30	13	57
1591	24.59	30	13	57
1655	24.59	30	13	57
1253	12.94	29	60	11
1323	12.94	29	60	11
1390	12.94	29	60	11
1639	12.94	29	60	11
1663	12.94	29	60	11
1308	6.15	27	1	72
1520	19.86	27	34	38
1521	6.15	27	1	72
1536	10.65	27	0	73
1246	20.00	26	65	9
1316	20.00	26	65	9
1559	5.00	26	19	55
1335	20.30	25	55	21
1437	21.20	25	50	25
1597	21.20	25	49	26
1219	11.25	20	71	8
1560	11.09	18	76	5
1494	5.22	17	54	28

TABLE 3—ORIGINS OF MERCURY IN PORTLAND CEMENT MANUFACTURING—Continued

[Sorted by limestone percent] [a]

Random number kiln code	Limestone mercury concentration (ppb)	Percent Hg from limestone [a]	Percent Hg from other raw materials	Percent Hg from fuels
1610	163.39	17	10	73
1530	5.22	15	53	32
1630	22.60	15	84	2
1538	8.42	10	89	1
1356	8.23	8	91	1

[a] The combined percentages of limestone, other raw materials, and fuels add to 100 percent.

These data seem to indicate that although quarry mercury content is important, other non-proprietary inputs can and do affect mercury emissions as well, often to an equal or greater extent. Quarries with similar limestone mercury content can and do have very different mercury emissions. These facts, plus the general continuum in the limestone mercury data, seem to mitigate against subcategorizing on this basis for the great bulk of industry sources.

Moreover, as stated above, subcategorization is limited by the CAA to size, class, or type of source. Both EPA and advance industry commenters [16] applied various statistical analyses to the mercury limestone quarry data set and these analyses indicated that there could be populations of quarries that were statistically different. However, it is unclear to us that a statistical difference in a population is necessarily the same as a distinction by size, class, or type. More compelling facts, at least in our present thinking, are the apparent continuum of limestone mercury levels, and the fact that limestone mercury levels are less of a driver of mercury emission levels than one would expect if this is to be the basis for subcategorization across a broad set of the facilities. EPA is also concerned that subcategorization by quarry mercury content may allow some higher-emitting facilities to do relatively less for compliance were they to be part of a separate subcategory where mercury levels of best performers were comparatively high. (Of course, these levels could be reduced by adopting standards reflecting beyond-the-floor determinations.) Conversely, the case could occur where a lower emitter might be subject to a greater degree of control than a high emitter. For example, if we were to establish a subcategory at 20 ppb mercury in the limestone, kilns at just below the 20 ppb level might be required to apply mercury controls while kilns just above the 20 ppb level, which would likely include kilns that would determine the floor level of control, would have to do nothing to meet the mercury standard.

Much of this analysis, however, does not apply to the kilns at the far end of the distribution, especially the two facilities shown in Figure 1 which have the highest quarry mercury contents which quarries appear to be outliers from the general population. These sources' mercury emissions are related almost entirely to the limestone mercury content, not to other inputs.

However, EPA is not proposing to create a separate subcategory for these high mercury sources. We note that if we set up a separate subcategory for these facilities, even if we proposed a beyond-the-floor standard based on the best estimated performance of control for these two facilities, their emissions limit would potentially be 500 to 800 lb/MM tons clinker, which is well above any other kiln, even when uncontrolled, in our data base, and 8 to 13 times the floor established for other existing sources (assuming no further subcategorization). Mercury in the air eventually settles into water or onto land where it can be washed into water. Once deposited, certain microorganisms can change it into methylmercury, a highly toxic form that builds up in fish, shellfish and animals that eat fish. Fish and shellfish are the main sources of methylmercury exposure to humans. (*See* section IV.4 for further discussion of mercury health effects.) Mercury is one of the pollutants identified for special control under the Act's air toxics provision (see section 112c(6)), and kilns in a high-mercury subcategory, no matter how well controlled, would still be allowed to emit large amounts (at least pending a section 112(f) residual risk determination)).

EPA is also mindful of the holding of *Brick MACT* and other decisions that EPA must account for raw material HAP contributions in establishing MACT floors, and the fact that raw materials may be proprietary or otherwise not obtainable category-wide does not relieve EPA of that obligation. See, *e.g.* 479 F. 3d at 882–83.

There are also competing considerations here. The concurring opinion in *Brick MACT* supports subcategorization in situations involving sources' dependence on high-HAP raw materials to avoid situations where a level of performance achieved by some sources proves unachievable by other sources even after application of best technological controls, viewing such sources as of a different type than others in the source category. 479 F. 3d at 884–85. A further consideration is that one of the high mercury kilns here has voluntarily entered into an enforceable agreement to install activated carbon (the best control technology currently available so far as is known) to control its mercury emissions and this agreement appears to have the support of directly affected stakeholders (local citizen groups, regional and state officials).[17] The company is poised to begin installation of the control technology. However, neither EPA nor the company believe that this source could physically achieve the level of the mercury floor derived from a single source category approach (*i.e.,* the no subcategorization approach proposed above) using activated carbon alone. We do not currently have any data on the possibility that this site may have portions of its existing quarry that have lower mercury content, or if the site could apply different mercury controls in addition to ACI to meet the proposed limit. Closure of this kiln and possibly other high mercury emitting kilns is a possible consequence of a single standard without subcategories.

EPA repeats that it is not proposing for mercury any subcategories for

[16] *See* Minutes of March 19, 2006 meeting between representative of the Portland Cement Association and E. Craig, USEPA.

[17] Minutes of meeting between EPA and representatives of Ash Grove Cement. February 27, 2009.

mercury for the reasons discussed above. Nonetheless, this remains an issue EPA intends to evaluate carefully based on public comment, and expressly solicits comment addressing all aspects of determinations whether or not to subcategorize. These comments should address not only the issue of a high-mercury subcategory (addressing plants in the upward right-hand tail of the distributional curve in Figure 1), but other sources as well. EPA also solicits comment regarding non-limestone inputs to cement kilns, and whether there is any potential basis for considering a valid subcategorization approach involving such materials.[18]

Other Alternatives Considered for Mercury Standard

EPA is proposing to rank sources by emission level in determining which are best performing. We also considered another option of ranking best performers based on their relative mercury removal efficiency, and presenting a standard so-derived as an alternative to the standard based on ranking by lowest emissions. The MACT floor for new sources is to be based on the performance of the ''best controlled'' similar source, and the term ''control'' can be read to mean control efficiency. It can also be argued that the critical terms of section 112 (d)(3)—''best controlled'' (new)/''best performing'' (existing)—do not specify whether ''best'' is to be measured on grounds of control efficiency or emission level. *See Sierra Club* v. *EPA,* 167 F.3d 658, 661 (''average emissions limitation achieved by the best performing 12 percent of units' * * * on its own says nothing about how the performance of the best units is to be calculated''). Existing source floors determined and expressed in terms of control efficiency are also arguably consistent with the requirement that the floor for existing sources reflect ''average emission limitation achieved'', since ''emission limitation'' includes standards which limit the ''rate'' of emissions on a continuous basis—something which percent reduction standards would do. CAA section 302(k). There are also instances where Congress expressed performance solely in terms of numerical limits, rather than performance efficiency, suggesting that Congress was aware of the distinction and capable of delineating it. See CAA section 129(a)(4).[19]

There are also arguments that percent reduction standards are not legally permissible. The *Brick MACT* opinion states, arguably in *dicta,* that best performers are those emitting the least HAP (see 479 F. 3d at 880 (''section [112 (d)(3)] requires floors based on emission levels actually achieved by best performers (those with the lowest emission levels)'').[20] More important, the opinion stresses that raw material inputs must be accounted for in determining MACT floors. *Id.* at 882–83. A problem with a percent reduction standard here is that it would downplay the role of HAP inputs on emissions by allowing more HAP to be emitted provided a given level of removal efficiency reflecting the average of best removal efficiencies is achieved. For these reasons, EPA is not proposing an alternative standard for mercury expressed as percent reduction reflecting the average of the best removal efficiencies. EPA solicits comment on this alternative from both a legal and policy standpoint, however.

2. Beyond the Floor Determination

We are not proposing any beyond-the-floor standards for mercury. When we establish a beyond the floor standard we typically identify control techniques that have the ability to achieve an emissions limit more stringent than the MACT floor. Under the proposed amendments, most existing kilns would have to have installed both a wet scrubber and activated carbon injection (ACI) for control of mercury, HCl and THC.[21] To achieve further reductions in mercury beyond what can be achieved using wet scrubber and ACI in combination, the available options would include closing the kiln and relocating to a limestone quarry having lower mercury concentrations in the limestone, transporting low-mercury limestone in from long distances, switching other raw materials to lower the amount of limestone in the feed, wasting CKD, and installing additional add-on control devices. For reasons discussed further below we believe that all but the latter option (add-on controls) are either cost prohibitive or too site specific to serve as the basis of a national potential beyond the floor standard. For that reason, we estimated the cost and incremental reduction in mercury emissions associated with installing another control device in series to the other controls. The add-on controls considered included a wet scrubber and ACI. Because ACI is less costly and is expected to have a higher removal efficiency as well as being potentially capable of removing elemental mercury (using halogenated carbon) which a scrubber cannot remove, we selected ACI as the beyond-the-floor control option (i.e., the kiln would now have an additional ACI system in series with the wet scrubber/ACI system required to meet the MACT floors for mercury, THC, and HCl).

We estimated the costs and emission reductions for a 1.2 million tpy kiln as it would be representative of the impacts of other kilns. Annualized costs for an additional ACI system would be $1.254 million per year. The quantity of mercury leaving the upstream controls would be an estimated 3.3 lb/yr. Assuming a 90 percent control efficiency, the additional ACI system would remove about 3.0 lb/yr of mercury for a cost-effectiveness of approximately $420,000 per lb of mercury reduction. A 90 percent removal efficiency may be optimistic given the lower level of mercury entering the device and a removal efficiency on the order of 70 percent is more likely. At this efficiency, the additional mercury controlled would be 2.3 lb/yr for a cost effectiveness of approximately $540,000 per pound of mercury removed. At either control efficiency, we believe cost of between $420,000 and $540,000 per pound of mercury removed is not justified and we are therefore not selecting this beyond-the-floor option.

There are two potential feasible process changes that have the potential to affect mercury emissions. These are removing CKD from the kiln system and substituting raw materials, including fly ash, or fossil fuels with lower-mercury inputs. Although substituting low-mercury materials and fuel may be feasible for some facilities, this alternative would depend on site-specific circumstances and, therefore, must be evaluated on a site-by-site basis and EPA's current view is that it would not be a uniformly applicable (or quantifiable) control measure on which a national standard could be based (although as noted earlier, EPA is expressly soliciting quantified comment regarding potential substitutability of non-limestone kiln inputs). In addition, in the case of substitution of lower

[18] One of these high-mercury sources suggested that because it is an area source, EPA develop a mercury standard for it based upon Generally Available Control Technology (GACT) rather than MACT. See section 112(d)(5) of the Act. Aside from questions about whether use of activated carbon is a generally available control technology here, EPA has already determined that all cement kilns' mercury emissions are subject to MACT under authority of section 112(c)(6). *See* 63 FR at 14193.

[19] *See* also section 112(i)(5)(A), which allows sources that achieve early reductions based on measured rates of removal efficiency a reprieve from MACT.

[20] The issue of whether best performers can be based on source's removal efficiency was not presented in *Brick MACT,* or any of the other decided cases.

[21] Summary of Environmental and Cost Impacts of Proposed Revisions to Portland Cement NESHAP (40 CFR Part 63, subpart LLL), April 15, 2009.

mercury inputs, we believe that mandating lower mercury materials (such as a ban on fly ash containing mercury as a raw material) would not result in mercury reduction beyond those achieved at the floor level of control.

Based on material balance data (feed and fuel usage, control device catch recycling and wasting, and mercury concentrations) that we gathered with our survey of 89 kilns, 58 percent of kilns waste some amount of CKD while 42 percent waste none. Among kilns that waste CKD, the percentage reduction in mercury emissions by wasting CKD ranged from 0.13 percent to 82 percent, with an average of 16.5 percent and median of 7 percent. For kilns that waste some CKD, CKD as a percentage of total feed ranges from 0.16 percent to 13.7 percent, with a mean of 4.5 percent. Any additional emission reductions that can be achieved by wasting CKD depend on several site-specific factors including:

- The concentration of mercury in raw feed and fuel materials.
- The concentration of mercury in the CKD.
- The amount of CKD already being wasted.
- The dynamics of mercury recirculation and accumulation—Internal loops for mercury exist between the control device and kiln feed storage and the kiln for long dry and wet kilns. For preheater and precalciner kilns, there is usually an additional internal loop involving the in-line raw mill. These internal loops and the distribution of mercury throughout the process are not predictable and can only be determined empirically.
- Mercury speciation may affect the extent to which mercury accumulates in the CKD, with particulate and oxidized mercury more likely to accumulate while elemental mercury is likely emitted and not affected by CKD wasting.

Reducing mercury emissions through the wasting of CKD may be feasible for some kilns that do not already waste CKD or by wasting additional CKD for some kilns that already practice CKD wasting. However the degree to which CKD can be used to reduce mercury emissions cannot be accurately estimated due to several factors. For example, increasing the amount of CKD wasted would result in a reduction in the mercury concentration of the CKD, so that, over time, the effectiveness of wasting CKD decreases. We do not have long-term data to quantify the relationship between amount of CKD wasted, CKD mercury concentration and emissions.

The ability to reduce mercury emissions by wasting more CKD also is affected by the mercury species present. The particulate and oxidized species of mercury can accumulate in CKD, but not the elemental form. Therefore wasting CKD will not necessarily control elemental mercury. We do not have data that would allow us to quantify the effect of mercury speciation. By wasting CKD, additional raw materials would be required to replace the CKD as well as additional fuel to calcine the additional raw materials, thereby offsetting to some extent the benefits of wasting CKD. There is the further potential consideration of additional waste generation, an adverse cross-media impact EPA is required to consider is making beyond-the-floor determinations. The interaction of these factors is complex and has not been adequately studied.

One cement plant has investigated the potential to reduce mercury emissions by wasting CKD. This facility, using mercury CEMS and material balance information, estimated that wasting 100 percent of CKD when the raw mill is off (about 19,000 tons of CKD or 16 percent of total baghouse catch, or 1 percent of total feed) would reduce mercury emissions by about 4 percent. This facility did not estimate the reductions in mercury emissions by wasting more CKD. As with the potential to reduce mercury emissions using raw materials substitution, the effectiveness of CKD wasting in reducing emissions may provide cement plants the ability to reduce mercury emissions but the degree of reduction will have to be determined on a site-by-site basis.

Because the degree to which mercury emissions can be reduced by material substitutions or through the wasting of CKD are site specific, these process-related work practices were not considered as beyond-the-floor options.

As a result of these analyses, we determined that, considering the technical feasibility and costs, there is no reasonable beyond the floor control option, and are proposing a mercury emission limit based on the MACT floor level of control.

C. Determination of MACT for THC Emissions From Major and Area Sources

The limits for existing and new sources we are proposing here apply to both area and major new sources. We have applied these limits to area sources consistent with section 112(c)(6). *See* 63 FR 14193 (THC as a surrogate for the 112(c)(6) HAP polycyclic organic matter and polychlorinated biphenyls, plus determination to control all THC emissions from the source category under MACT standards).

1. Floor Determination

Selection of Existing Source Floor

For reasons previously discussed in the initial proposal of the Portland Cement NESHAP (63 FR 14197, March 24, 1998), we are proposing to use THC as a surrogate for non-dioxin organic HAP that are emitted from the kiln (as is the current rule). The THC data used to develop the MACT floor were obtained from 12 kilns using CEMS to continuously measure the concentration of THC exiting each kiln's stack. Only kilns 1 (regenerative thermal oxidizer (RTO)) and kilns 11 and 12 (ACI) have emissions controls which remove or destroy THC. We also obtained THC data from manual stack tests, typically based on 3 one hour runs per test. The CEMS data are superior to the results of a single stack test for characterizing the long term performance and in determining the best performing kilns with respect to THC emissions for several reasons. The manual stack test is of short duration and only represents a snapshot in time; consequently, it provides no information on the variability in emissions over time due to changes in raw material feed or in kiln operating conditions. In contrast, the CEMS data include measurements that range from 31 consecutive days to almost 900 days of operation for the various kilns. This extended duration of the CEMS test data gives us confidence that for any particular kiln CEMS data will capture the variability associated with the long-term THC emissions data, and thus give the most accurate representation of a source's performance. In addition, a MACT standard based on CEMS data would be consistent with the way we are proposing to implement the THC emission limit (*i.e.,* by requiring continuous monitoring with a THC CEMS).

In order to set MACT floors we are ranking the kilns based on the average THC emissions levels (in ppmv) achieved (*i.e.,* each kiln's averaged performance, averaged over the number of available measurements. This ranking is shown in Table 4.

TABLE 4.—SUMMARY OF THC CEMS DATA AND MACT FLOOR

Kiln	Average	Number of readings	Kiln type	In-line raw mill
Kiln 1	4.0	35	Preheater/precalciner	Yes.
Kiln 2	5.6	695	Wet	No.
Kiln 3	6.8	692	Long dry	No.
Kiln 4	6.8	31	Preheater/precalciner	Yes.
Kiln 5	11.1	702	Long dry	No.
Kiln 6	23.7	470	Preheater/precalciner	No.
Kiln 7	45.0	742	Preheater/precalciner	Yes.
Kiln 8	51.6	774	Preheater/precalciner	Yes.
Kiln 9	51.9	843	Preheater/precalciner	Yes.
Kiln 10	62.8	880	Preheater/precalciner	Yes.
Kiln 11 and Kiln 12 Combined	748.1	790	Wet	No.
Existing Source Average (ppmvd at 7% O2, propane).	4.8			
Variability ($t*v_T^{0.5}$)	1.9			
Existing Source 99th percentile (ppmvd at 7% O2, propane).	7			
New Source Average (ppmvd at 7% O2, propane).	4.0			
Variability ($t*v_T^{0.5}$)	1.5			
New Source 99th percentile (ppmvd at 7% O2, propane).	6			

The average performance of the best performing 12 percent of kilns (2 kilns) is 4.8 ppmvd THC (a daily average expressed as propane at 7 percent oxygen). We calculated variability based on the variances in the performance of the two lowest emitting kilns. This includes day-to-day variability at the same kiln, variability among the two lowest emitting kilns, and because one dataset included 695 daily measurements, it represents long term variability at a single kiln. We calculated the MACT floor (7 ppmvd) based on the UPL (upper 99th percentile) as described earlier from the average performance of the 2 lowest emitting kilns, Student's t-factor, and the total variability, which was adjusted to account for the lower variability when using 30 day averages.

In this case the proposed new and existing source MACT floors are almost identical because the best performing 12 percent of kilns (for which we have emissions information) is only two sources. The reason we look to the best performing 12 percent of sources is that the cement kiln source category consists of 30 or more kilns. Section 112(d)(3)(A) of the Clean Air Act provides that standards for existing sources shall not be less stringent than ''the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information), * * * in the category or subcategory for categories and subcategories with 30 or more sources.'' A plain reading of the above statutory provisions is to apply the 12 percent rule in deriving the MACT floor for those categories or subcategories with 30 or more sources. The parenthetical ''(for which the Administrator has emissions information)'' in section 112(d)(3)(A) modifies the best performing 12 percent of existing sources, which is the clause it immediately follows.

However, in cases where there are 30 or more sources but little emission data this results in only a few kilns setting the existing source floor with the result that the new and existing source MACT floors are almost identical. In contrast, if this source category had less than 30 sources, we would be required to use the top five best performing sources, rather than the two that comprise the top 12 percent. Section 112 (d)(3)(B).

We are seeking comment on whether, with the facts of this rulemaking, we should consider reading the intent of Congress to allow us to consider five sources rather than just two. First, it seems evident that Congress was concerned that floor determinations should reflect a minimum quantum of data: At least data from five sources for source categories of less than 30 sources (assuming that data from five sources exist). Second, it does not appear that this concern would be any less for source categories with 30 or more sources. The concern, in fact, would appear to be greater.[22] We note further that if we were to use five sources as best THC performers here, the existing source floor would be 10 ppmvd. We are specifically requesting comment on interpretive and factual issues relating to the proposed THC floors, and also reiterate requests for further THC performance data, especially from kilns equipped with CEMs.

[22] As noted, basing the proposed existing source THC floor on data from two sources (*i.e.* 12 percent of the 15 sources for which we have CEM data) largely eliminates the distinction between new and existing source THC floors. Yet this is an important statutory distinction.

Selection of New Source MACT Floor

The new source MACT floor would be the best performing similar source accounting for variability, which would be 6 ppmvd. We used the same procedure in estimating variability for the new source based on the 35 observations reported.

Alternative Organic HAP Standards

EPA is also proposing an alternative floor for non-dioxin organic HAP, based on measuring the organic HAP itself rather than the THC surrogate. This equivalent alternative limit would provide additional flexibility in determining compliance, and it would be appropriate for those rare cases in which methane and ethane comprise a disproportionately high amount of the organic compounds in the feed because these non-HAP compounds could be emitted and would be measured as THC. A previous study that compared total organic HAP to THC found that the organic HAP was 23 percent of the THC. We also analyzed additional data submitted during the development of this proposed rule that included simultaneous measure of organic HAP species and THC. Data were available from tests at five facilities, and the organic HAP averaged 24 percent of the THC. Based on these analyses, we are proposing an equivalent alternative

emission limit for organic HAP species of 2 ppmv (*i.e.,* 24 percent of the 7 ppmv MACT standard for THC) for existing sources and 1 ppmvd for new sources. The specific organic compounds that will be measured to determine compliance with the alternative to the THC limit are benzene, toluene, styrene, xylene (ortho-, meta-, and para-), acetaldehyde, formaldehyde, and naphthalene. These were the organic HAP species that were measured along with THC in the cement kiln emissions tests that were reviewed. Nearly all of these organic HAP species were identified in an earlier analysis of the organic HAP concentrations in THC in which the average concentration of organic HAP in THC was 23 percent.

Other Options Considered

We also examined the THC results to determine if subcategorization by type of kiln was warranted and concluded that the data were insufficient for determining that a distinguishable difference in performance exists based on the type of kiln. The top performing kilns in Table 4 include various types: wet, long dry, and preheater/precalciner kilns; older (wet kilns) and newer (precalciner kilns); and those with and without in-line raw mills. Although the type of kiln and the design and operation of its combustion system may have a minor effect on THC emissions, the composition of the feed and the presence of organic compounds in the feed materials apparently have a much larger effect. For example, organic compounds in the feed materials may volatilize and be emitted before the feed material reaches the high temperature combustion zone of the kiln where they would have otherwise been destroyed.

We also evaluated creating separate subcategories for kilns with in-line raw mills and those without. With an in-line raw mill kiln, exhaust is used to dry the raw materials during the grinding of the raw meal. This drying step can result in some organic material being volatilized, thus increasing the THC emissions in the kiln exhaust. This means that kilns with in-line raw mills would, on average, have higher emissions than kilns without in-line raw mills. The existence, or absence, of a raw mill is believed to have a distinct effect on emissions of THC, as one would expect. It is difficult to generalize that difference because the effect of the raw mill will vary based on the specific organic constituents of the raw materials. In tests at one facility, THC emissions, on average, were 35 percent higher with the raw mill on than when the raw mill was off.[23]

This physical difference could justify subcategorization based on the presence of an in-line raw mill. There are also potential policy reasons for doing so. By not subcategorizing, use of in-line raw mills may be discouraged because, to meet a THC standard, in-line raw mill-equipped kilns would potentially have to utilize an RTO. Use of RTOs has various significant adverse environmental consequences, including increase in emissions of criteria pollutants, and significant extra energy utilization with attendant increases in carbon dioxide (CO_2) gas emissions.[24]

EPA has performed floor calculations for subcategories of kilns with and without in-line raw mills. The result of that calculation, where we were using the top 12 percent, was that the floor for kilns with in-line raw mills was actually lower than the floor for those without, which is atypical: sources with in-line raw mills will typically have higher emissions because of the extra volatilization. We believe this result is the artifact of the small data set used to calculate the existing source MACT floor. Based on these results, we have concluded that the current data are not sufficient to allow us to subcategorize by the presence of an in-line raw mill, but would consider subcategorizing if additional data become available. We are specifically requesting comment on subcategorization by the presence or absence of an in-line raw mill and requesting data on this issue.

2. Beyond the Floor Determination

Practices and technologies that are available to cement kilns to control emissions of organic HAP include raw materials material substitution, ACI systems and limestone scrubber and RTO. We do not think it is appropriate to develop a beyond-the-floor control option based on material substitution here because substitution options are site specific.

We examined the use of either ACI systems or RTO (with a dedicated wet scrubber)[25] as the basis for potential beyond-the-floor THC standards for existing and new sources. (We did not examine other beyond-the-floor regulatory options for existing or new sources because there are no controls that would, on average, generate a greater THC reduction than a combination of a wet scrubber/RTO.) These technologies are currently in limited use in the source category. At one facility, activated carbon is injected into the flue gas and collected in the PM control device. The activated carbon achieved a THC emissions reduction of approximately 50 percent, and the collected carbon is then injected into the kiln in a location that insures destruction of the collected THC. The THC emissions from this facility are the highest for any facility for which we have data due to very unusual levels of organic material in the limestone and may not be representative of the performance that can be achieved by kilns with more typical THC emissions.[26]

ACI has been demonstrated in other source categories, such as various types of waste incinerators including municipal waste incinerators, to reduce dioxin/furan by over 95 percent.[27] The actual performance of ACI systems on cement kiln THC emissions are expected to be less than that achieved on dioxin/furan emissions as kiln flue gases are a mixture of volatile and semi-volatile organic compounds, which vary according to the organic constituents of raw materials. We have therefore conservatively estimated that ACI systems can reduce THC emissions by 75 to 80 percent. A second facility has a continuously operated limestone scrubber followed by an RTO. This facility has been emission tested and showed volatile organic compound (VOC), which are essentially the same as THC, emission levels of 4 ppmv (at 7 percent oxygen), and currently has a permit limit for VOC of approximately 9 ppmv. The RTO has a guaranteed destruction efficiency of 98 percent of the combined emissions of carbon monoxide and THC. Based on this information, we believe this facility represents the best possible control performance to reduce THC emissions.

In assessing the potential beyond-the-floor options for THC, we first determined that most existing kilns would have to install an ACI system for control of THC and/or mercury. A few kilns would be expected to install an RTO in order to get the THC proposed reductions. To evaluate the feasibility of

[23] E-mail and attachments. B. Gunn, National Cement Company of Alabama to K. Barnett. USEPA. March 12, 2009. THC Mill on/Mill Off Variability.

[24] Summary of Environmental and Cost Impacts of Proposed Revisions to Portland Cement NESHAP (40 CFR Part 63, subpart LLL), April 15, 2009.

[25] A wet scrubber is needed as a pretreatment step before gases are amenable to destruction in an RTO.

[26] The same facility that uses ACI has a second control scheme for THC consisting of a wet scrubber/RTO in series. However, due to operational problems, this system has not operated more than a few months at a time and data from it are not representative of the performance of these control devices.

[27] (Chi and Chang, Environmental Science and Technology, vol. 39, issue 20, October 2005; Roeck and Sigg, Environmental Protection, January 1996).

beyond-the-floor controls, we assumed that a kiln already expected to install an ACI system would install in series an RTO including a wet scrubber upstream of the RTO to protect the RTO. We estimated the costs and emission reductions for a 1.2 million tpy kiln as the cost effectiveness of the beyond-the-floor option would be similar for all kilns. Annualized costs for an additional RTO system would be $3.8 million per year. The quantity of THC leaving the upstream controls would be an estimated 18 tpy. At higher THC concentrations, for example 15 ppmv and above, an RTO will have a removal efficiency of about 98 percent. This mass of THC leaving the device upstream of and entering the RTO is equivalent to a THC concentration of about 3 ppmv. At this low level, an RTO's removal efficiency is expected to be no better than 50 percent. At a 50 percent control efficiency, the RTO would reduce THC emission by about 9 tpy for a cost-effectiveness of approximately $411,000 per ton of THC removal. If the organic HAP fraction of the THC is 24 percent, 2 tpy of organic HAP would be removed at a cost effectiveness of approximately $1.7 million per ton of organic HAP removed. At a cost effectiveness of $411,000 per ton of THC and $1.7 million per ton of organic HAP, we believe the cost of the additional emission reduction is not justified (this is a far higher level than EPA has deemed justified for non-dioxin organic HAP in other MACT standards, for example). In addition to the high cost of control, the additional energy requirements, 7.1 million kwh/yr and 81,000 MMBtu/yr, would be significant. Increased CO_2 emissions attributable to this energy use would be on the order of 9,900 tpy per source.[28] The additional energy demands would also result in increased emissions of NO_X (20 tpy), CO, (8 tpy), SO_2 (27 tpy), and PM10 (1 tpy) per source. Because of the high costs and minimal reductions in THC and organic HAP as well as the secondary impacts and additional energy requirements, we are not selecting this beyond-the-floor option.

Therefore we are proposing for cement kilns an existing source THC emissions limit of 7 ppmvd and a new source limit of 6 ppmvd, measured as propane and corrected to 7 percent oxygen. We are also proposing for an alternative equivalent organic HAP emissions limit of 2 ppmvd for existing kilns and 1 ppmvd for new kilns.

[28] Summary of Environmental and Cost Impacts of Proposed Revisions to Portland Cement NESHAP (40 CFR Part 63, subpart LLL), April 15, 2009.

THC Standard for Raw Material Dryers

Some plants may dry their raw materials in separate dryers prior to or during grinding. See 63 FR at 14204. This drying process can potentially lead to organic HAP and THC emissions in a manner analogous to the release of organic HAP and THC emissions from kilns when hot kiln gas contacts incoming feed materials. The methods available for reducing THC emissions (and organic HAP) is the same technology described for reducing THC emissions from kilns and in-line kiln/raw mills. Based on the similarity of the emissions source and controls, we are also proposing to set the THC emission limit of materials dryers at 7 ppmvd (existing sources) and 6 ppmvd (new sources).

The current NESHAP has an emissions limit of 50 ppmvd for new greenfield sources. The limit is less stringent than the proposed changes in the THC emissions limits for new (as well as existing) sources. For that reason, we are proposing to remove the 50 ppmvd emissions limit for this rule.

D. Determination of MACT for HCl Emissions From Major Sources

In developing the MACT floor for HCl, we collected over 40 HCl emissions measurements from stack tests based on EPA Methods 321 and 26. Studies have suggested that Method 26 is biased significantly low due to a scrubbing effect in the front half of the sampling train (*see* 63 FR at 14182). Because of this bias, we used the HCl data measured at 27 kilns using Method 321 in determining the proposed floors for existing and new sources. The data in ppmv corrected to 7 percent oxygen (O_2) were ranked by emissions level and the top 12 percent (4 kilns) lowest emitting kilns identified.[29] The top 4 kilns were limited to major sources, and to sources where we had a minimum of three test runs to allow us to account for variability in setting the floor. (Note that neither of these decisions significantly changed the final result of the floor calculation). These emissions data are shown in Table 5. The average of the four lowest emitting kilns is 0.31 ppmvd. The variability for the 4 lowest emitting kilns includes the run-to-run variability of three runs for each stack test and the variability across the 4 lowest emitting kilns.

We calculated the MACT floor (2 ppmvd) based on the upper 99th percentile UPL from the average performance of the 4 lowest emitting kilns and their variances as described earlier. If we had used the five lowest emitting kilns that calculated floor would be 5 ppmvd.[30]

TABLE 5—HCL MACT FLOOR

Kiln	HCl emissions (ppmvd @ 7% O_2)
1	0.02
2	0.02
3	0.22
4, 5 (one stack) [a]	0.97
6	1.21
7	1.32
8	1.76
9	1.95
10	2.57
11	2.57
12	4.30
13	7.15
14	9.84
15	11.06
16	12.83
17	12.83
18	13.60
19	15.65
20	18.54
21	18.93
22	19.19
23	19.86
24	28.28
25	33.06
26	34.68
27	56.14
MACT—Existing	
Average (Top 4)	0.31
Variability ($t^*v_T^{0.5}$)	1.94
99th percentile	2
MACT—New	
Average	0.02
Variability ($t^*v_T^{0.5}$)	0.12
99th percentile	0.1

[a] Because these two kilns exhaust through a single stack they were treated as a single source for the HCl floor determination.

MACT for new kilns is based on the performance of the lowest emitting kiln. The average HCl emissions for the lowest emitting kiln in this data set is 0.02 ppmv. Using the same statistical technique to apply run-to-run variability for that kiln's emissions data, the HCl MACT floor for new kilns is 0.14 ppmvd at 7 percent O_2.

[29] EPA notes that this floor determination, like the one for THC discussed in the preceding section, raises the issue of whether a floor determination for source categories with 30 sources or greater should be based on the performance of less than five sources. As discussed above, the literal language of section 112 (d)(3)(A) supports basing the floor on the average performance of the best performing 12 per cent of sources, even where the total number of such sources is less than five. We solicited comment on that issue in the preceding section and repeat the solicitation here.

[30] Development of the MACT Floors for the Proposed NESHAP for Portland Cement, April 15, 2009.

For facilities that do not use wet scrubbers to meet the HCl limit, these standards would be based on a 30-day rolling average, consistent with the proposed use of CEMS (i.e., continuous measurements) for compliance. See section E below.

It should be noted that these emission limits, as well as many of the data from the lowest-emitting kilns, are below the published detection level of the test method (EPA test method 321) as it currently exists for one specific path length and test condition. As discussed further in section IV.I., EPA believes these source-supplied, recent data and detection limits are correct, and EPA is proposing to revise the detection limit for Method 321 in light of this data.

Beyond the Floor Standard for HCl

Based on the HCl emissions data, most kilns (both existing and new) would have to install limestone scrubbers in order to comply with the proposed floors for HCl. Scrubbers are expected to reduce HCl emissions by an average of at least 99 percent. Scrubbers added to reduce HCl emissions will also reduce emissions of SO_2 and will remove oxidized mercury as well.

In examining a beyond-the-floor option for HCl, we evaluated the use of a more efficient HCl scrubber.[31] We assumed a spray chamber scrubber is sufficient to meet the MACT floor, and that scrubber is expected to remove HCl at an efficiency of 99 percent (as just noted). However, we estimate that a packed-bed scrubber would have removal efficiency greater than a spray chamber due to its increased surface area and opportunity for contact between the scrubbing liquid and the acid gases. We estimated the costs and emission reductions for a 1.2 million tpy kiln as the cost-effectiveness results would be similar for all kilns. Annual costs for a packed bed scrubber for a 1.2 million tpy kiln would be approximately $2.2 million.

Assuming a control efficiency of 99.9 percent, the incremental emission reduction using the beyond-the-floor packed-bed scrubber, that is, the reduction in HCl emissions after initial control by the MACT floor control (a spray chamber scrubber), would be about 2.4 tpy. At an annual cost of $2.2 million, the cost effectiveness is $929,000 per ton of HCl removed. Adverse non-air quality impacts, such as energy costs, water impacts, and solid waste impacts would be expected to be similar for both the floor and beyond-the-floor level of control. See Impacts memorandum, Table 7. Considering the high costs, high cost effectiveness and small additional emissions reduction (and adverse cross-media impacts), we do not believe that a beyond-the-floor standard for HCl is justified.

Other Alternatives for HCl Standards

One option to HCl standards that we considered would be to set a standard that used SO_2 as a surrogate for HCl. The reason to allow this option would be that some kilns already have SO_2 controls and monitors. Acid gas controls that remove SO_2 also remove HCl at equal or greater efficiency.[32] However, we are not proposing this option because we have no data to demonstrate a direct link between HCl emissions and SO_2 emissions—that is—it is unclear that ranking best HCl performers based on SO_2 emissions would in fact identify lowest emitters or best controlled HCl sources. We are requesting comment on the efficacy of using SO_2 as a surrogate for HCl, and data demonstrating that SO_2 is or is not a good surrogate for HCl.

We also considered the possibility of proposing a health-based standard for HCl. Section 112(d)(4) allows the Administrator to set a health-based standard for a limited set of HAP: ''pollutants for which a health threshold has been established''. EPA may consider that threshold, with an ample margin of safety, in establishing standards under section 112 (d). In the 2006 rule, EPA determined that HCl was a ''health threshold pollutant'' and relied on this authority in declining to establish a standard for HCl. 71 FR at 76527–29. We are taking comment on a health-based standard.

However, we are not proposing a health-based standard here. The choice to propose a MACT standard, and not a health-based standard, is based on the fact that, in addition to the direct effect of reducing HCl emissions, setting a MACT standard for HCl is anticipated to result in a significant amount of control for other pollutants emitted by cement kilns, most notably SO_2 and other acid gases, along with condensable PM, ammonia, and semi-volatile compounds. For example, the additional reductions of SO_2 alone attributable to the proposed MACT standard for HCl are estimated to be 126,000 tpy in the fifth year following promulgation of the HCl standard.[33] These are substantial reductions considering the low number of facilities. Although MACT standards may only address HAP, not criteria pollutants, Congress fully expected MACT standards to have the collateral benefit of controlling criteria pollutants as well, and viewed this as an important benefit of the air toxics program.[34] It therefore is appropriate that EPA consider such benefits in determining whether to exercise its discretionary section 112 (d)(4) authority.

Though this is not our preferred approach for the reasons discussed above, we request comment on a health-based standard for HCl and other information on HCl health and environmental effects we should consider. Commenters should also address the issue of other environmental benefits which might result from control of HCl at a MACT level, including control of other acid gases and control of secondary PM (i.e., PM condensing from acid gases). We will consider these comments in making an ultimate determination as to whether to adopt a health-based standard for HCl.

Finally, we determined that even if we opted to set a health-based standard, we would still need to set a numerical emission limit given that section 112(d)(4) requires that an actual emission standard be in place. In order to determine this level, we conducted a risk analysis of 68 facilities using a screening level dispersion model (AERSCREEN). Utilizing site specific stack parameters and worst-case meteorological conditions, AERSCREEN predicted the highest long term ground level concentration surrounding each facility. The results of this analysis indicated that an emission limit of 23 ppmv or less would result in no exceedances of the RfC for HCl with a margin of safety.[35] Although, as discussed above, EPA is not proposing a health-based standard, EPA solicits comment on the level of 23 ppmv (as a not-to-exceed standard) should EPA decide to pursue the option of a health-based standard.

E. Determination of MACT for Non-Volatile Metals Emissions From Major and Area Sources

PM serves as a surrogate for non-volatile metal HAP (a determination upheld in *National Lime Ass'n,* 233 F. 3d at 637–39). Existing and new major sources are presently subject to a PM

[31] We could identify no other control options for acid gas removal that would consistently achieve emissions reduction beyond the floor level of control.

[32] Institute of Clean Air Companies. Acid Gas/SO_2 Control Technologies. Wet Scrubbers. *http://www.icac.com/i4a/pages/index.cfm?pageid=3401*

[33] Summary of Environmental and Cost Impacts of Proposed Revisions to Portland Cement NESHAP (40 CFR Part 63, subpart LLL), April 15, 2009.

[34] *See* S. Rep. No. 101–228, 101st Cong. 1st sess. at 172.

[35] Derivation of a Health-Based Stack Gas Concentration Limit for HCl in Support of the National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, April 10, 2009.

limit of 0.3 lb/ton of feed which is equivalent to 0.5 lb/ton clinker. EPA is proposing to amend this standard, and also is proposing PM standards for existing and new area source cement kilns. In all instances, EPA is proposing to revise these limits because they do not appear to represent MACT, but rather a level which is achievable by the bulk of the industry. See 63 FR at 14198. This is not legally permissible. *Brick MACT,* 479 F. 3d at 880–81.

For this proposal, we compiled PM stack test data for 45 kilns from the period 1998 to 2007. EPA ranked the data by emissions level and the lowest emitting 12 percent, 6 kilns, was used to develop the proposed existing source MACT floor.

As for the previous floors discussed above, we calculated the variances of each lowest emitting kiln and accounted for variability by determining the 99th percentile UPL as described earlier. The average performance for each of the lowest emitting kilns was generally based on the average of 3 runs which comprise a stack test. Consequently, the variability represents the short term variability at a kiln (e.g., a 3 hour stack test period) and the variability across the 6 lowest emitting kilns. (This analysis is consistent with the way we would propose to determine compliance, i.e., conduct 3 runs to perform a stack test.) For the lowest emitting kiln (whose performance was used to establish the proposed new source floor), there were only 3 runs and the results of these runs were relatively close together, a circumstance which would lead to an inaccurate (and inadequate) estimation of the kiln's long term variability were these data to be used for that purpose. However, we know the 6 lowest emitting kilns are equipped with fabric filters that are similar with respect to performance because they are similar in design and operation, and the larger dataset provides a much better estimate of the variability associated with a properly operated fabric filter of this design. Consequently, for the proposed new source floor, we used the average performance of the lowest emitting kiln and the variability associated with the best fabric filters to assess the lowest emitting kiln's variability.

The emissions for the top six kilns ranged from 0.005 to 0.008 lb/ton clinker. Accounting for variability as described above, we calculated an existing source MACT floor of 0.085 lb/ton clinker. For new kilns, the limit is based on the best lowest emitting kiln, which has emissions of 0.005 lb/ton clinker. Accounting for variability results in a calculated new source MACT floor of 0.080 lb/ton clinker. These PM emissions data are summarized in Table 6.

TABLE 6—PM MACT FLOOR

Kiln	PM emissions (lb/ton clinker)
1	0.005
2	0.0075
3	0.0075
4	0.0081
5	0.0108
6	0.0232
MACT—Existing	
Average	0.010
Variability ($t^*v_T^{0.5}$)	0.075
99th percentile	0.085
MACT—New	
Average	0.005
Variability ($t^*v_T^{0.5}$)	0.075
99th percentile	0.080

EPA is also proposing to set a PM standard based on MACT for existing and new area source cement kilns. Portland cement kilns are a listed area source category for urban HAP metals pursuant to section 112(c)(3), and control of these metal HAP emissions (via the standard for the PM metal surrogate) is required to ensure that area sources representing 90 percent of the area source emissions of urban metal HAP are subject to section 112 control, as required by section 112(c)(3). EPA is proposing that this standard reflect MACT, rather than GACT, because there is no essential difference between area source and major source cement kilns with respect to emissions of either HAP metals or PM. Thus, the factors that determine whether a cement kiln is major or area are typically a function of the source's HCl or formaldehyde emissions, rather than its emissions of HAP metals. As a result, there are kilns that are physically quite large that are area sources, and kilns that are small that are major sources. Both large and small kilns have similar HAP metal and PM emissions characteristics and controls. Given that EPA is developing major and area sources for PM at the same time in this rulemaking, a common control strategy consequently appears warranted for these emissions. We thus have included all cement kilns in the floor calculations for the proposed PM standard, and have developed common PM limits based on MACT for both major and area sources.

Consideration of Beyond-the-Floor Standards

There is very little difference in the proposed floor levels for PM for either new or existing sources, and we believe that a well-performing baghouse represents the best performance for PM. To evaluate beyond-the-floor controls, we examined the feasibility of replacing an existing ESP or baghouse with a new baghouse equipped with membrane bags which might result in a slightly better performance for PM (reflected in the modest increment between the proposed floors for new and existing sources). We estimated the costs and emission reductions for a 1.2 million tpy kiln. The cost-effectiveness results will be similar for all kilns. Under the MACT floor, baseline emissions of 0.34 lb/ton of clinker are reduced to 0.085 lb/ton of clinker, a reduction in PM emissions of 51 tpy. Further reducing emissions down to the proposed PM limit for new sources would incrementally reduce emissions by an additional 3 tpy. The annualized cost of a baghouse with membrane bags would be $1.73 million per year, or a cost effectiveness of $576,000/ton of PM (far greater than any PM reduction EPA has ever considered achievable under section 112(d)(2) or warranted under other provisions of the Act which allow consideration of cost). Assuming that the metal HAP portion of total PM is 1 percent, the cost effectiveness would be about $58 million per ton of metal HAP. Based on these costs and the small resulting emission reductions, we believe a PM beyond-the-floor standard is not justified for existing sources and not technically feasible for new sources.

Other Standards for PM

Emissions from fabric filters or ESP are typically measured as a concentration (grains per dry standard cubic feet) and then converted to the desired format using standard conversions (54,000 dry cubic feet per minute of exhaust gas per ton of feed, 1.65 tons of feed per ton of clinker). All of the data used to set the proposed PM emissions limit were converted in that fashion. Therefore, the basis of the proposed PM standard is actually a concentration level. There are certain cases where this conversion must be adjusted, however. Some kilns and kiln/in-line raw mills combine the clinker cooler gas with the kiln exhaust and send the combined emissions to a single control device. There are significant energy savings (and attendant greenhouse gas emission reductions) associated with this practice, since heat can be extracted from the clinker cooler

exhaust. However, there need to be different conversion factors from concentration to mass per unit clinker. In the case where clinker cooler gas is combined with the kiln exhaust the standard would need to be adjusted to allow for the increased gas flow. If this allowance is not made, then the effective level of the PM standard would be reduced (the result being that the proposed standard would not properly reflect best performing kilns' performance, and also discouraging use of a desirable energy efficiency measure). *See* 73 FR at 64090–91 (Oct. 28, 2008). Therefore, we are proposing that facilities that combine the kiln and clinker cooler gas flows prior to the PM control would be allowed to convert the equivalent concentration standards (which are 0.0067 or 0.0063 lb/ton clinker for new and existing sources, respectively) to a lb/ton clinker standard using their combined gas flows (dry standard cubit feet per ton of feed). It should be noted that this provision will not result in any additional PM emissions to the atmosphere compared to the same kiln if it did not combine the clinker cooler and kiln exhaust, and may actually decrease emissions slightly due to improvements in overall process efficiency.

In addition to proposing to amend the PM standard for kilns we are proposing to similarly amend the PM emissions limit for clinker coolers. Fabric filters are the usual control for both cement kilns and clinker coolers. As EPA noted in our proposed revision to Standards of Performance for Portland Cement Plants (73 FR 34078, June 16, 2008) we believe that the current clinker cooler controls can meet the same level of PM control that can be met by the cement kiln. Therefore, we are proposing as MACT the same PM emissions limits for both clinker coolers and kilns.

In sum, because we believe that the costs of a beyond-the-floor standard for PM are not justified, we are proposing a PM standard for existing kilns and clinker coolers of 0.085 lb/ton of clinker, and for new kilns and clinker coolers of 0.080 lb/ton of clinker.

F. Selection of Compliance Provisions

For compliance with the mercury emissions standards we are proposing to require continuous or integrated monitoring (either instrument based or sorbent trap based). As explained earlier in this preamble, we do not believe that short term emission tests provide a good indication of long term mercury emissions from cement kilns. We considered the option of requiring cement kilns to measure and analyze mercury content of all inputs to the kiln, as was done to gather the data used to develop the proposed standards. However, that data gathering was done based on a daily analysis of all inputs to the kiln. If we were to make that the compliance option and require daily analyses, the cost would be comparable to the cost of a mercury monitoring system. If we were to allow less frequent analyses to reduce costs, then we are concerned that the accuracy may be reduced (and the standard would no longer be implemented in the same manner as it was developed). In addition, in order to meet the proposed mercury emission limits, we anticipate that many facilities will install add-on controls, which will create another variable that would make the measurement of mercury content of inputs (instead of continuous or integrated stack measurement) significantly less accurate. In order to determine an outlet emissions rate based on input measurements, the control device would have to be tested under various operating conditions to insure that the removal efficiency could be accurately calculated, and continuous monitoring of control device parameters (i.e. parametric monitoring) would be necessary. Given issues related to input monitoring, and the cost associated with control device monitoring, plus a desire to implement the standard in a manner consistent with its means of development, we believe that a continuous or integrated mercury measure at the stack is the preferred option, and are proposing that sources demonstrate compliance with mercury monitoring systems that meet either the requirements of PS–12A or PS–12B.[36]

We are not aware of any cement kilns in the U.S. that have continuous mercury monitoring systems. However, there are numerous utility boilers that have installed and certified mercury CEMS. We see no technical basis to say that these continuous mercury monitoring systems will not work as well on a cement kiln as they do on a utility boiler. In addition, we are aware that there are 34 cement kilns that have operating continuous mercury monitors in Germany.[37] There were problems in the application of continuous mercury monitoring systems when they were first installed on these German cement kilns, but their performance has been improved so they now provide acceptable performance. We are requesting comment on the feasibility of applying mercury continuous monitoring systems to cement kilns in the United States.

Generally, we propose and promulgate monitoring system performance specifications and performance test methods in accordance with their development, independent of publication of source category emissions control regulations. There are circumstances dictating that we publish such measurement procedures and requirements simultaneously with an emissions regulation because of integral technical relationships between the standard and the monitoring performance specifications and test methods and because such a combination is convenient and cost-effective. Such combined publication also allows commenters to prepare comprehensive comments on not only the performance specifications or test methods but also on their specific applications. In today's notice, we are reproposing to amend 40 CFR part 60, appendix B by adding Performance Specification 12A—Specifications and Test Procedures For Total Vapor Phase Mercury Continuous Emission Monitoring Systems in Stationary Sources. We are also proposing to amend 40 CFR part 60, appendix B by adding Performance Specification 12B—Specifications and Test Procedures For Monitoring Total Vapor Phase Mercury Emissions from Stationary Sources Using a Sorbent Trap Monitoring System, and proposing to amend 40 CFR part 60 Appendix F by adding Procedure 5—Quality Assurance Requirements for Vapor Phase Mercury Continuous Monitoring Systems Used at Stationary Sources for Compliance Determination.[38]

We previously promulgated versions of these performance specifications with the Clean Air Mercury Rule (CAMR). On March 14, 2008, the Court of Appeals for the District of Columbia Circuit issued its mandate vacating CAMR on other grounds not related to these performance specifications. We are reproposing these performance specifications today. We also want to make clear that these performance specifications are generally applicable,

[36] Information related to the development of Performance Specifications 12A and 12B can be found in dockets EPA–HQ–OAR–2002–0056 and EPA–HQ–OAR–2007–0164.

[37] E-mail and attachment. M. Bernicke, Federal Environment Agency to A. Linero, Florida Department of Environmental Protection. February 8, 2009.

[38] Notwithstanding the connections between the performance specifications and this proposal, the mercury monitoring performance specifications remain technically independent from the proposed standards, as they exist independent of the proposed standard (see following paragraph in text above). Furthermore, EPA has adopted, and would continue to adopt such specifications and protocols, whether or not it were amending the NESHAP for portland cement kilns.

i.e. apply wherever mercury CEMS are required and so are not limited in applicability to portland cement kilns.

In PS–12A, we refer to and apply a span value, a Hg concentration that is constant and related (i.e., twice) to the applicable emissions limit. The span value is used in assessing the mercury CEMS performance and in defining calibration standards. We expect that mercury emissions from these facilities to be highly variable including short term periods of concentrations exceeding the span value. We request comment on whether the proposed approach for establishing CEMS calibration ranges and assessing performance will adequately assure the accuracy of the reported average emissions that might include measurements at concentrations above the span value. If not, what alternative approaches should we consider?

For demonstrating compliance with the proposed THC emissions limit we are proposing the use of a CEMS meeting the requirements of PS–8A. This requirement already exists for new kilns. There are existing kilns that already have THC CEMS, and indeed, EPA used CEMS data from these kilns as the basis for the proposed standards. As previously noted, changes in raw materials can materially affect THC emissions without any obvious indication that emissions have changed. For this reason, and to be consistent with the means by which EPA developed the proposed standard, we believe (subject to consideration of public comment) a CEMS is necessary to insure continuous compliance.

If a source chooses to comply with the proposed alternative equivalent organic HAP emissions limit,[39] rather than the THC limit, we are not proposing the use of a continuous monitor to directly measure total organic HAP. We are instead proposing to use EPA Method 320 to determine the actual organic HAP content of the THC at a specific facility. Thereafter, compliance would be measured based on the facility's THC measurement at the time of the Method 320 test for organics. The proposed rule thus provides that THC is measured concurrently, using a CEM, at the time of a Method 320 test and that if the Method 320 test indicates compliance with the alternative organic HAP standard, then the THC emissions measured using a CEMS would become that facility's THC limit. That THC limit would have to be met based on a 30-day average, which (as noted) would be measured with a CEM.

For demonstrating compliance with the proposed PM emissions limit, we are proposing the installation and operation of a bag leak detection (BLD) system, along with stack testing using EPA method 5 conducted at a frequency of five years. If an ESP is used for PM control, an ESP predictive model to monitor the performance of ESP controlling PM emissions from kilns would be required, as well as a stack performance test conducted at a frequency of five years. As an alternative a PM CEMS that meets the requirements of PS–11 may be used. We are also proposing to eliminate the current requirement of using an opacity monitor to demonstrate continuous requirement with a PM standard for kilns and clinker coolers as use of an opacity monitor would be superfluous under the monitoring regimes we are proposing (an issue discussed further in the following paragraph).

We previously proposed use of BLD systems for PM as part of our review of the Portland Cement Standards for Performance under section 111 of the Act (73 FR 34072, June 16, 2008). Our rationale for extending the requirement to existing kilns is that given the stringent level of the proposed PM emissions limits, we do not believe that opacity is an accurate indicator of compliance with the proposed PM emissions limit. As just noted, were we to adopt this requirement, we would also remove the opacity standard and opacity continuous monitoring requirements for any source that uses a PM CEMS or bag leak detector to determine compliance with a PM standard. (Some opacity requirements, such as those for materials handling operations, would remain in place.)

As also just noted, we are also proposing to allow the use of a PM CEMS as an alternative to the BLD to determine compliance. However, we are specifically soliciting comment on making the use of a PM CEMS a requirement. We note that in the original 1999 rule we included a requirement that kilns and clinker install and maintain a PM CEMS to demonstrate compliance with the PM emissions limit, but we deferred compliance with that requirement until EPA had developed the necessary performance specification for a PM CEMS. See 64 FR at 31903–04. These performance specifications are now available. In addition, continuous monitors give a far better measure of sources' performance over time than periodic stack tests. Moreover, as discussed below, we do not believe that use of a PM CEMS would increase the stringency of the standard. Therefore, we are soliciting comment on the option of requiring use of PM CEMS to monitor compliance with a PM standard.

For demonstrating compliance with the HCl emissions limit we are proposing the use of a CEMS that meets the requirements of PS–15 if the source does not use a limestone wet scrubber for HCl control. As with mercury and THC, HCl emissions can be significantly affected by inputs to the kiln without any visible indications. For this reason we believe that a continuous method of compliance is warranted, with one exception. If the source uses a limestone wet scrubber for HCl control, we believe that HCl emissions will be minimal even if kiln inputs change because limestone wet scrubbers are highly efficient in removing HCl. For this reason we are proposing to require sources using a limestone wet scrubber to perform an initial compliance test using EPA Test Method 321, and to test every 5 years thereafter. These EPA Test Method 321 testing requirements would also apply to sources using CEMS. In addition, for sources with in-line raw mills that are not using a wet scrubber for HCl control, we are proposing to require testing with raw mill on and raw mill off. Our review of the available data where a kiln was tested with raw mill on/raw mill off indicated that the change in raw mill operating conditions had a significant influence on HCl emissions.[40] We are specifically requesting comment on our assumption that a wet scrubber will consistently maintain a low level of HCl emissions, even if feed conditions change, and thus that it is appropriate to use a short term performance test rather then a continuous monitor for kilns that install wet scrubbers.

One option we considered would be to require SO_2 monitoring in lieu of HCl monitoring. The reason to allow this option would be that some kilns already have SO_2 monitors, and this monitoring technology is less expensive and more mature than HCl monitors. If a source is using a wet scrubber for HCl control, then indication that the scrubber is removing SO_2 is also a positive indication that HCl is being removed. However, we are not proposing this because we have no data to demonstrate a direct link between HCl emissions and SO_2 emissions. For example, if a source has a scrubber-equipped kiln and notes

[39] We assume that sources would do so if they cannot meet the (proposed) THC standard of 7 ppmvd for existing sources and 6 ppmvd for new sources, but can demonstrate that their organic HAP emissions are lower than the (alternative) MACT limit for organics (or, put the other way, that their THC emissions contain more than the normal amount of non-HAP organics).

[40] E-mail and attachments from K. Barnett to J. Pew, Earthjustice. September 2, 2008.

an SO_2 emissions increase, is the increase due to a drop-off in scrubber performance or to an increase in sulfur compounds in the raw materials? If it is simply a change in raw materials' sulfur content, then the change may have no relevance to HCl emissions. If the SO_2 emission increase is due to a reduction in scrubber efficiency, then the change in SO_2 emission might mean that HCl emissions have changed. We are requesting comment on the efficacy of using SO_2 as a surrogate for HCl for purposes of monitoring compliance, and data demonstrating whether SO_2 is a good surrogate for HCl for this purpose.

One issue in using a CEMS to measure compliance with these proposed standards is whether the use of a continuous monitor results in an increase in the stringency of the standard, if that standard was developed based on short term emissions tests or other data and is a not-to-exceed standard. As explained earlier, EPA obtained mercury data from thirty daily samples of fuel and raw materials and used statistical techniques to account for further variability in inputs, operation, and measurement. The proposed hydrogen chloride emissions limits were derived using statistical techniques to account for variability in components such as fuel and raw material, process operation, and measurement procedures. The proposal would require direct, continuous measurement of mercury and, for those facilities not using a wet scrubber as a control device, hydrogen chloride. Compliance with these emissions limits for these facilities is determined by assessing the 30-day average emissions with the appropriate emissions limit. With respect to mercury, as explained in section IV.B.1. above, not only do continuous monitoring and 30-day averaging accord well with the means used to gather these underlying data, but continuous monitoring and 30-day averaging are needed because cement kilns do not emit mercury in relatively equal amounts day-by-day but, due to the mill-on/mill-off phenomenon, in varying small and large amounts. With respect to hydrogen chloride, use of a 30-day average provides a way to account for the potential short-term variability inherent in values obtained from continuous data collection and analysis, so that CEM-based compliance, in combination with 30-day averaging, does not make the proposed standard more stringent than a not-to-exceed standard based on stack testing. Therefore, subject to consideration of public comment, we believe the use of continuous monitoring techniques for mercury and HCl, in combination with 30-day averaging times, is appropriate.

G. Selection of Compliance Dates

For existing sources we are proposing a compliance date of 3 years after the promulgation of the new emission limits for mercury, THC, PM, and HCl to take effect. This is the maximum period allowed by law. See section 112(i)(3)(A). We believe a 3-year compliance period is justified because most facilities will have to install emissions control devices (and in some cases multiple devices) to comply with the proposed emissions limits.

In the December 2006 rule amendments we included operating requirements relating to the amount of cement kiln dust wasted versus dust recycled, and also a requirement that the source certify that any fly ash used as a raw material did not come from a boiler using sorbent to remove mercury from the boiler's exhaust. These provisions are unnecessary should EPA adopt the proposed standards, and EPA is proposing to remove them. Removal of these requirements would take effect once the affected source is required to comply with a numerical mercury limit.

For new sources, the compliance date will be the date of publication of the final rule or startup, whichever is later. In determining the proposal date that determines if a source is existing or new, we are retaining the date of December 5, 2005 for HCl, THC, and mercury, i.e., any source that commenced construction after December 5, 2005, is a new source for purposes of the emission standards changed in these amendments. For PM, we are proposing that the date that determines if a source is existing or new will be May 6, 2009.

In proposing this determination, we considered three possible dates, including March 24, 1998; December 5, 2005; and the proposal date of these amendments. Section 112(a)(4) of the Act states that a new source is a stationary source if ''the construction or reconstruction of which is commenced after the Administrator first proposes regulations under this section establishing an emissions standard applicable to such source.'' ''First proposes'' could refer to the date EPA first proposes standards for the source category as a whole, or could refer to the date the agency first proposes standards under a particular rulemaking record. The definition is also ambiguous with regard to whether it refers to a standard for the source as a whole, or to a HAP-specific standard (so that there could be different new source standards for different HAP which are regulated at different times).

We believe that the section 112(a)(4) definition can be read to apply pollutant-by-pollutant, and can further be read to apply to the rulemaking record under which a standard is developed. The evident intent of the definition plus the substantive new source provisions is that it is technically more challenging and potentially more costly to retrofit a control system to an existing source than to incorporate controls when a source is initially designed. *See* 71 FR at 76540–541. If, for example, we were to choose March 24, 1998, as the date to delineate existing versus new sources, then numerous kilns that would be required to meet new source standards would have to retrofit controls that they could not have reasonably anticipated at the time the source was originally designed.[41]

We also considered selecting the proposal date of these amendments as the date that delineates new and existing sources but, for HAP other than PM, rejected that option. The mercury and THC standards being proposed here arise out of the rulemaking proposed on December 2, 2005. This notice is issued in response to petitions for reconsideration of the standards from that rulemaking. The proposed standard for HCl likewise arises out of the rulemaking proposed in December 2, 2005 and its reconsideration, where EPA proposed standards for HCl. *See* 70 FR at 72335–37. Thus, it is reasonable to view the December 2, 2005, proposal as the date on which EPA first proposed standards for HCl as part of this rulemaking. We are soliciting comment on the appropriate date to regard the standards for THC and HCl as being ''first proposed.''

For PM, the choices are the 1998 date on which EPA proposed PM standards, or the date of this proposal (the first

[41] Two other provisions of the Act are pertinent here as well. Section 112(i)(1) requires preconstruction review for, among other sources, all new sources subject to a new source standard. Such preconstruction review would be impossible if new sources included sources which began operation pursuant to an historic new source standard, which standard was later amended. Such a source would, of course, have already been operating. In addition, section 111(a)(2) defines ''new source'' as a stationary source ''the construction or reconstruction of which is commenced after the publication of regulations (or, if earlier,) ''proposed regulations prescribing a standard of performance under this section.'' Such standard must be reviewed periodically at least every 8 years. EPA's longstanding interpretation of this provision is that only sources commencing construction (or which are reconstructed) after the date of a revised new source performance standard would be subject to that revised standard. There seems no evident reason to interpret the section 112(a)(4) definition differently from the section 111(a)(2) definition.

date EPA proposed revision to the PM standard, based on a new rulemaking record). Subject to consideration of public comment, we believe the appropriate date is the date of this proposal. *See* 71 FR at 76540–41 (applying new source standards to sources which began operation many years in the past is inconsistent with idea that new source standards may be more stringent because they can be implemented at time of initial design of the source, thus avoiding retrofit expense).

H. Discussion of EPA's Sector-Based Approach for Cement Manufacturing

What is a Sector-Based Approach?

Sector-based approaches are based on integrated assessments that consider multiple pollutants in a comprehensive and coordinated manner to manage emissions and CAA requirements. One of the many ways we can address sector-based approaches is by reviewing multiple regulatory programs together whenever possible. This approach essentially expands the technical analyses on costs and benefits of particular technologies, to consider the interactions of rules that regulate sources. The benefit of multi-pollutant and sector-based analyses and approaches include the ability to identify optimum strategies, considering feasibility, costs, and benefits across the different pollutant types while streamlining administrative and compliance complexities and reducing conflicting and redundant requirements, resulting in added certainty and easier implementation of control strategies for the sector under consideration.

Portland Cement Sector-Based Approach

Multiple regulatory requirements currently apply to the cement industry sector. In order to benefit from a sector-based approach for the cement industry, EPA analyzed how the NESHAP under reconsideration relates to other regulatory requirements currently under review for portland cement facilities. The requirements analyzed affect HAP and/or criteria pollutant emissions from cement kilns and cover the NESHAP reconsideration, area source NESHAP, NESHAP technology review and residual risk, and the New Source Performance Standard (NSPS) revision. The results of our analyses are described below.

The first relationship is the interaction between the NESHAP THC standard and the co-benefits for VOC and carbon monoxide (CO) control. The THC limit for new sources in the NESHAP will also control VOC and CO to the limit of technical feasibility. For this reason the proposed NSPS relies on the THC NESHAP limit for new sources to represent best demonstrated technology (BDT) for VOC and CO for this source category. *See* 73 FR 34082.

Another interaction relates to the more stringent PM emission limit being proposed under the NESHAP reconsideration. As noted, there is a legal requirement to regulate listed urban HAP metals from area source cement kilns under section 112(c)(3), and we are proposing PM standards for area source cement kilns pursuant to that obligation.[42] In addition, we are required under CAA section 112(f) to evaluate the residual risk for toxic air pollutants emitted by this source category and to perform a technology review for this source category under section 112(d)(6). Revisions to the PM standard for new and existing major sources under the NESHAP will maximize environmental benefits due to the achievement of greater PM emission reductions and will also reduce the possibility for additional control requirements as we consider the implication these revisions have in developing future requirements under residual risk and technology review increasing certainty to this sector.

To reduce conflicting and redundant requirements for the cement industry regarding the control of PM emissions, EPA is proposing to place language in both the NESHAP and the NSPS making it clear that if a particular source has two different requirements for the same pollutant, they are to comply with the most stringent emission limit, and are not subject to the less stringent limit.

Another issue being addressed as part of our cement sector strategy is condensable PM. Particulate emissions consist of both a filterable fraction and a condensable fraction. The condensable fraction exists as a gas in an exhaust stream and condenses to form particulate once the gas enters the ambient air. In this rulemaking, AP–42 emission factors were used to calculate emission reductions of $PM_{2.5}$ filterable due to the PM standard.[43] There are insufficient data to assess if the cement industry is a significant source of condensable PM. The measurement of condensable PM is important to EPA's goal of reducing ambient air concentrations of $PM_{2.5}$. While the Agency supports reducing condensable PM emissions, the amount of condensable PM captured by Method 5 (the PM compliance test method specified in the NSPS) is small relative to methods that specifically target condensable PM, such as Method 202 (40 CFR part 51, Appendix M). Since promulgation of Method 202 in 1991, EPA has been working to overcome problems associated with the accuracy of Method 202 and has proposed improvements to Method 202 on March 25, 2009 (74 FR 12970). EPA expects promulgation of these improvements within a year. Barring promulgation of these improvements, EPA has identified already-approved procedures to be conducted in conjunction with Method 202; these procedures reduce the impact of potential problems in accounting for the condensable portion of $PM_{2.5}$.[44] The condensable portion of PM will become important as the $PM_{2.5}$ implementation rule, which requires consideration of both the filterable and condensable portions of $PM_{2.5}$ for state implementation plan, new source review, and prevention of significant deterioration decisions, begins implementation on January 1, 2011. (*see* 72 FR 20586, April 25, 2007.) In order to assist in future sector strategy development, we are considering any data available on the levels of condensable PM emitted by the cement industry; any condensable PM emission test data collected using EPA Conditional Method 39, EPA Method 202 (40 CFR part 51, Appendix M), or their equivalent, factors affecting those condensable PM emissions, and potential controls. We welcome submission of these data, as well as comments and suggestions on whether or how to include the condensable portion of $PM_{2.5}$ in the PM emissions limit.

Another benefit of evaluating regulatory requirements across pollutants in the context of a sector approach is addressing the relationship between the regulatory requirements for SO_2, mercury, and HCl emissions. Although SO_2 emission reductions would be required in the proposed NSPS, mercury and HCl emissions reduction are required in the Portland Cement NESHAP reconsideration. The integrated analysis of these regulatory requirements showed that alkaline wet scrubbers achieve emission reductions for SO_2, mercury, and HCl from cement kilns. This control technology maximizes the co-benefits of emission

[42] Memo from K. Barnett, EPA to Sharon Nizich, EPA. Extension of Portland Cement NESHAP PM limits to Area Sources. May 2008.

[43] AP–42, Fifth Edition, Volume I Chapter 11: Mineral Products Industry. Section 11.6 January 1995 p. 11.6–15.

[44] *See* response to the third question of Frequently Asked Questions for Method 202, available at *www.epa.gov/ttn/emc/methods/method202.html#amb.*

reductions while minimizing cost. For example, a new facility that under the NSPS determines a moderate level of SO_2 reduction might consider using a lime injection system because it is lower cost. However, if the same facility would have to use some type of add-on control to meet the NESHAP new source mercury and/or HCl emission limits, instead of considering each standard in isolation, would determine that the most cost effective overall alternative might be to use a wet scrubber for controlling SO_2, mercury, and/or HCl. By coordinating requirements at the same time, the facility can determine which control technology minimizes the overall cost of air pollution control and can avoid stranded costs associated with piecemeal investments in individual control equipment for SO_2, mercury, and/or HCl.

The integrated sector-based analysis for the cement industry also showed that SO_2 emission reductions from existing sources are possible as co-benefits if wet scrubbers are employed to control either mercury and/or HCl from existing sources under the NESHAP. We evaluated the co-benefits of the use of wet scrubbers in reducing SO_2 and the effects on $PM_{2.5}$ and $PM_{2.5}$ nonattainment areas (NAA), including the co-benefits of reducing SO_2 in mandatory Federal Class I areas (Class I areas).[45]

Another interaction addressed in the context of the sector approach is monitoring requirements. To ensure that our sector strategy reduces administrative and compliance complexities associated with complying with multiple regulations, our rulemaking recognizes that where monitoring is required, methods and reporting requirements should be consistent in the NSPS and NESHAP where the pollutants and emission sources have similar characteristics.

New Source Review and the Cement Sector-Based Approach

The proposed MACT requirements for cement facilities have a potential to result in emissions reductions of air pollutants that are regulated under the CAA's major new source review (NSR) program. Specifically, operating a wet scrubber to meet MACT requirements for mercury and/or HCl at a portland cement plant has the added environmental benefit of reducing large amounts of SO_2, a regulated NSR pollutant. For a typical wet scrubber, with a 90 percent removal efficiency for SO_2, this could result in an annual reduction of thousands of tons of SO_2 from an uncontrolled kiln (reduction will vary greatly depending on the type and age of the kiln, sulfur content of feed materials, and fuel type). These collateral SO_2 and other criteria pollutant emissions reductions resulting from the application of MACT may be considered for ''netting'' and ''offsets'' purposes under the major NSR program.

The term ''netting'' refers to the process of considering certain previous and prospective emissions changes at an existing major source over a contemporaneous period to determine if a ''net emissions increase'' will result from a proposed modification. If the ''net emissions increase'' is significant, then major NSR applies. Section 173(a)(1)(A) of the Act requires that a major source or major modification planned in a nonattainment area obtain emissions offsets as a condition for approval. These offsets are generally obtained from existing sources located in the vicinity of the proposed source and must offset the emissions increase from the new source or modification and provide a net air quality benefit.

An emissions reduction must be ''surplus,'' among other things, to be creditable for NSR netting and offset purposes. Typically emission reduction required by the CAA are not considered surplus. For example, emissions reductions already required by an NSPS, or those that are relied upon in a State implementation plan (SIP) for criteria pollutant attainment purposes (e.g., Reasonable Available Control Technology, reasonable further progress, or an attainment demonstration), are not creditable for NSR offsets (or netting) since this would be ''double counting'' the reductions. Also, any emissions reductions already counted in previous major modification ''netting'' may not be used as offsets. However, emissions reductions that are in excess of, or incidental to the MACT standards, are not precluded from being surplus even though they result from compliance with a CAA requirement. Therefore, provided such reductions are not being double counted, they may qualify as surplus and can be used either as netting credits at the source or be sold as emissions offsets to other sources in the same non-attainment area provided the reductions meet all otherwise applicable CAA requirements for being a creditable emission reduction for use as an offset or for netting purposes.

Since SO_2 is presumed a $PM_{2.5}$ precursor in all prevention of significant deterioration and nonattainment areas unless a state specifically demonstrates that it is not a precursor, SO_2 may be used as a emission reduction credit for either SO_2 or $PM_{2.5}$, at an offset ratio is 40-to-1 (40 tons of SO_2 to 1 ton of $PM_{2.5}$) See 72 FR 28321–28350 (May 16, 2008).

Given that many states have concerns over a lack of direct $PM_{2.5}$ emissions offsets for areas that are designated nonattainment for $PM_{2.5}$, cement plants that generate creditable reductions of SO_2 from applying MACT controls may realize a financial benefit if they can sell the emissions credits as SO_2 and/or $PM_{2.5}$ offsets. It is difficult to quantify the exact financial benefit, since offset prices are market driven and vary widely in the U.S.

National Ambient Air Quality Standards

Portland cement kilns emit several pollutants regulated under the NAAQS, including $PM_{2.5}$, SO_2, NO_X, and precursors to ozone. In addition, several pollutants emitted from cement kilns are transformed in the atmosphere into $PM_{2.5}$, including SO_2, NO_X, and VOC. Emissions of NO_X and VOC are also precursors to ozone. Thus, implementation of the Cement NESHAP, which could lead to substantial reductions in criteria pollutants and precursor emissions as co-benefits, could help areas around the country attain these NAAQS.

Screening analyses showed that 23 cement facilities were located in 24hr $PM_{2.5}$ NAA and 39 facilities in Ozone NAA. Control strategies for reducing emissions of THC, mercury, HCl, and PM from cement plants under the Cement NESHAP have the co-benefits of reducing SO_2 and direct $PM_{2.5}$ emissions. These co-benefits could provide states with emission reductions for areas required to have attainment plans.

Regional Haze, Reasonable Progress, and the Cement Sector-Based Strategy

The Cement NESHAP can also have an impact on regional haze. Under section 169A of the CAA, States must develop SIPs to address regional haze. The purpose of the regional haze program is the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I areas which impairment results from manmade air pollution under the regional haze regulations, the first Regional Haze SIPs were due in December 2007 (40 CFR 51.308(b)); these SIP submittals must address several key elements, including Best Available Retrofit Technology (BART),

[45] Areas designated as mandatory Class I Federal areas are those national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks which were in existence on August 7, 1977. Visibility has been identified as an important value in 156 of these areas. *See* 40 CFR part 81, subpart D.

Reasonable Progress, and long-term strategies. Screening analyses showed that there are 14 cement facilities within a distance of 50 km Class 1 Areas.

A potential benefit for cement facilities utilizing wet scrubbers to comply with this rule is a level of certainty for satisfying a facility's BART requirements for SO_2 under the regional haze program. This rule may establish a framework for States to include certain control measures or other requirements in their regional haze SIPs where such a program would be ''better than BART.'' A facility must comply with BART as expeditiously as practicable but no later than 5 years after the regional haze SIP is approved. A state may be able to rely on this rule to satisfy the BART requirements for a NESHAP affected source utilizing a wet scrubber if (1) the compliance date for a source subject to this NESHAP falls within the BART compliance timeframe, (2) the proposed controls are more cost effective than the controls that would constitute BART, and (3) the visibility benefits of the controls are at least as effective as BART.

States may also allow sources to ''average'' emissions across any set of BART-eligible emissions units within a fence-line, provided the emissions reductions from each pollutant being controlled for BART are equal to those reductions that would be obtained by simply controlling each of the BART-eligible units that constitute the BART-eligible source (40 CFR 51.308(e)(2)). This averaging technique may also be advantageous to cement facilities subject to this NESHAP that also have BART-subject sources.

Under the regional haze rule, States may develop an alternative ''better than BART'' program in lieu of source-by-source BART. The alternative program must achieve greater reasonable progress than BART would toward the national visibility goal. The alternative program may allow more time for compliance than source-by-source BART would have allowed. Any reductions relied on for a better than BART analysis must be surplus as of the baseline year the State relies on for purposes of developing its regional haze SIP (i.e., 2002) and can include reductions from non-BART and BART sources.[46] Visibility analyses must verify that the alternative program, on average, gets greater visibility improvement than BART and that no degradation in visibility on the best days occurs (40 CFR 51.308(e)(3)).

EPA believes that emissions units at cement sources found to be subject to BART and that will be required to install controls or otherwise achieve emissions reductions per the regional haze regulations can benefit from this Cement NESHAP to potentially satisfy the regional haze requirements. EPA will need to demonstrate that the implementation of the cement NESHAP will result in SO_2 emissions reductions and related visibility improvements that are greater than reductions achieved through the application of BART controls. If EPA demonstrates that the SO_2 emissions reductions and visibility and air quality improvements resulting from the rule are better than BART, this demonstration, when incorporated into the Regional Haze SIP, may be anticipated to fulfill federal regulatory requirements associated with SO_2 BART requirements for cement facilities.

Additionally, the level of control achieved through the Cement NESHAP may contribute toward, and possibly achieve, the visibility improvements needed to satisfy the reasonable progress requirements of the regional haze rule for cement facilities through the first Regional Haze planning period. States can submit the relevant regional haze SIP amendments once this rule becomes final.

Health Benefits of Reducing Emissions From Portland Cement Kilns

Implementation of the Cement NESHAP, which could lead to substantial reductions in $PM_{2.5}$, SO_2, and toxic air pollutants, could reduce numerous health effects.

Section VI.G of this preamble provides a summary of the monetized human health benefits of this proposed regulation based on the Regulatory Impact Analysis available in this docket that includes more detail regarding the costs and benefits of this proposed regulation.

As mentioned before, Portland cement kilns emit several criteria pollutants with known human health effects, including $PM_{2.5}$, SO_2, NO_X, and precursors to ozone. Exposure to $PM_{2.5}$ is associated with significant respiratory and cardiac health effects, such as premature mortality, chronic bronchitis, nonfatal heart attacks, hospital admissions, emergency department visits, asthma attacks, and work loss days.[47] Exposure to SO_2 and NO_X is associated with increased respiratory effects, including asthma attacks, hospital admissions, and emergency department visits. Exposure to ozone is associated with significant respiratory health effects, such as premature mortality, hospital admissions, emergency department visits, acute respiratory symptoms, school loss days.

In addition, Portland cement kilns emit toxic air pollutants, including mercury and HCl. Potential exposure routes to mercury emissions include both inhalation and subsequent ingestion through the consumption of fish containing methylmercury. Mercury in the air eventually settles into water or onto land where it can be washed into water. Once deposited, certain microorganisms can change it into methylmercury, a highly toxic form that builds up in fish, shellfish and animals that eat fish. Fish and shellfish are the main sources of methylmercury exposure to humans. Methylmercury builds up more in some types of fish and shellfish than others. The levels of methylmercury in fish and shellfish depend on what they eat, how long they live and how high they are in the food chain. Mercury exposure at high levels can harm the brain, heart, kidneys, lungs, and immune system of people of all ages. Research shows that most people's fish consumption does not cause a health concern. However, it has been demonstrated that high levels of methylmercury in the bloodstream of unborn babies and young children may harm the developing nervous system, making the child less able to think and learn.[48] HCl is an upper respiratory irritant at relatively low concentrations and may cause damage to the lower respiratory tract at higher concentrations.[49]

I. Other Changes and Areas Where We are Requesting Comment

Startup, Shutdown and Malfunction

The cement kiln source category is presently exempt from compliance with the generally applicable section 112 standards during periods of startup, shutdown and malfunction. *See* Table 1 to subpart LLL of Part 63, which cross-references the exemption found in the General Provisions (*see, e.g.,* 40 CFR 63.6(f)(1) (exemption from non-opacity emission standards) and (h)(1) (exemption from opacity and visible emission standards)). With respect to those exemptions, we note that on December 19, 2008, in a decision addressing a challenge to the 2002, 2004, and 2006 amendments to those

[46] November 18, 2002 memo from EPA's Office of Air Quality Planning and Standards entitled ''2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, $PM_{2.5}$, and Regional Haze Programs.''

[47] USEPA, Air Quality Criteria for Particulate matter, chapter 9.2 (October 2004).

[48] For more information *see http://www.epa.gov/mercury/about.htm.*

[49] For more information *see http://www.epa.gov/oppt/aegl/pubs/tsd52.pdf.*

provisions, the Court of Appeals for the District of Columbia Circuit vacated the SSM exemption. *Sierra Club* v. *EPA,* 551 F. 3d 1019 (D.C. Cir. 2008). Industry petitioners have filed petitions for re-hearing, asking the Court to re-consider its decision. The Court has not yet acted on these petitions.

EPA recognizes that there are different modes of operation for any stationary source, and those modes generally include start-up, normal operations and shut-down. EPA also recognizes that malfunctions may occur. EPA further recognizes that the Clean Air Act does not require EPA to set a single emission standard under section 112(d) that applies during all operating periods. *See Sierra Club* v. *EPA,* 551 F. 3d at 1027. In light of this decision, EPA is proposing not to apply the SSM exemption to the emission standards proposed in this rule. Rather, EPA is proposing that the proposed standards described above apply during both normal operations and periods of startup, shut-down, and malfunction. For the same reason, EPA is further proposing that the SSM exemption not apply to the other section 112 standard applicable to cement kilns, for dioxins (*see* sections 63.1343(b)(3) and (c)(3)), which standard is not otherwise addressed or reopened in this proposed rule.

We base this proposal on the emissions information available to us at this time. *See* CAA 112(d)(3)(A) (standards are based on the average emission limitation achieved by the best performing 12 percent of sources ''for which the Administrator has emissions information''). Specifically, our emissions database has no data showing that emissions during periods of startup, shut-down, and malfunction are different than during normal operation.

We believe that startup and shutdown are both somewhat controlled operating modes for cement kilns (although occurring over different time periods) so that emissions during these operating modes may not be significantly different from those during normal operation. However, we recognize that shutdowns can vary (planned or emergency) and that startups can occur from a cold or a hot kiln, but we currently lack data on HAP emissions that occur during these modes of operation. We further recognize that malfunction conditions are largely unanticipated occurrences for which control strategies are mainly reactive.

EPA requests comment on the proposed approach to addressing emissions during start-up, shutdown and malfunction and the proposed standards that would apply during these periods. EPA specifically requests that commenters provide data and any supporting documentation addressing emissions during start-up, shut-down and malfunctions. If based on the data and information received in response to comments, EPA were to set different standards for periods of start-up, shutdown or malfunction, EPA asks for comment on the level of specificity needed to define these periods to assure clarity regarding when standards for those periods apply.

Data used to set existing source floors. The emissions standards included in the proposed rule were calculated using the emissions information available to the Administrator, in accordance with EPA's interpretation of the requirements of section 112(d)(3) of the Act. In developing this proposed rule, we specifically sought data from as many kilns as possible, given the time constraints when we began our data collection process. Given that there are 152 kilns in this source category, the 12 percent representing the best performing kilns would be 19 kilns. However, in some cases we have emission data from as few as 12 cement kilns, which means that existing source floors were proposed using as few as 2 kilns (although we are soliciting comment on an alternative interpretation that would allow EPA to base floors on a minimum of five sources' performance in all instances where those data exist). EPA expects that more emissions information from other kilns, both with and without similar process and control characteristics, would lead to a better characterization of emissions from the entire population of cement kilns, as well as a better description of intra-source, inter-source, and test method variability, and that statistical techniques can be employed to provide the expected distribution of emissions for the cement kiln population. EPA thus requests commenters to provide additional emissions information on cement kilns' performance.

HCl Test Data and Methods. In some instances, the emissions standards included in the proposed rule were calculated using emissions information provided to EPA that appears to be below detection levels established more than 15 years ago. More specifically, Method 321 as it currently exists identifies a practical lower quantification range for hydrogen chloride from 1000 to 5000 parts per billion for a specific path length and test conditions. Many of the best performing sources with respect to HCl emissions report both values and detection levels below 1000 parts per billion. It is not surprising that detection levels should decrease as improvements in analytical methods occur over time, and EPA is proposing to revise the detection limits in Method 321 to reflect these improvements. While EPA believes lower detection levels are achievable, EPA did not receive the emissions information and other data necessary to assess independently the detection levels, some as low as 20 parts per billion, achieved and reported by sources.

Without additional data or detection limit calculations, EPA could maintain the old detection limit, accept the source-provided limit, or modify the source-provided limit to an expected new acceptable level. Selection of an appropriate detection limit is no trivial matter, as the detection limit could impact how the available data would be used in average emissions calculations. EPA could choose not to use any data below the detection limit in calculations. EPA could also choose to set all data below the detection limit at a value corresponding to one-half the detection limit for average calculation purposes, reasoning that any amount of emissions between zero and the detection limit could occur when the detection limit is recorded. Indeed, this approach, setting all data below the detection limit at a value corresponding to one-half the detection limit, was chosen by the sources that provided emissions information to EPA. EPA could also set all data below the detection limit at a value corresponding to the detection limit, or to zero, for average calculation purposes. Finally, EPA could apply statistical techniques to available emissions information both above and below the detection limit to provide the expected distribution of HCl emissions for the cement kiln population. A further issue, with any of these possible approaches, would be to assess sources' operating variability.

EPA based the HCl emissions limitations contained in the proposal using the source-provided detection limits and setting all data below the detection limit at a value corresponding to the detection limit for average calculation purposes. Should EPA receive additional emissions information sufficient to calculate detection limits from already-received data or emissions information including detection limit calculations from other sources, EPA would be able to ascertain and revise, if necessary, the new detection limits and to calculate a different HCl standard.

EPA requests additional HCl emissions information, including such information as needed to calculate detection limits, as well as detection

limit calculations. Moreover, EPA requests comments on which way, if any, to set the emission detection limit and to handle emissions information below the detection limit for use in this rule. For those commenters who believe EPA's proposed emission detection limit may not be suitable, EPA requests commenters to provide their views of acceptable detection limits and processes to calculate averages from data that are below the detection limit, as well as examples of sample calculations using those processes. We are also requesting comment on the same issues relating to the use of a CEMS meeting the requirements of PS–15 to measure HCl emissions.

Potential Regulation of Open Clinker Piles

In the current rule, we regulate enclosed clinker storage facilities, but not open clinker piles. We are aware of two facilities where a facility has stored clinker in open piles, and fugitive emissions from those piles have reportedly resulted in measurable emissions of hexavalent chromium.[50] However, we do not have information to evaluate the extent of emission potential from unenclosed clinker storage facilities. We are requesting comment and information as to how common the practice of open clinker storage is, appropriate ways to detect or measure fugitive emissions (ranging from open-path techniques to continuous digital or intermittent manual visible emissions techniques), any measurements of emissions of hexavalent chromium (or other HAP) from these open storage piles, potential controls to reduce emissions, or any other factors we should consider. Based on comments received, we may (or may not) take action to regulate these open piles in the final action on this rulemaking.

Submission of Emissions Test Results to EPA. Compliance test data are necessary for many purposes including compliance determinations, development of emission factors, and determining annual emission rates. EPA has found it burdensome and time consuming to collect emission test data because of varied locations for data storage and varied data storage methods.

One improvement that has occurred in recent years is the availability of stack test reports in electronic format as a replacement for bulky paper copies.

In this action, we are taking a step to improve data accessibility for stack tests (and in the future continuous monitoring data). Portland cement sources will have the option of submitting to WebFIRE (an EPA electronic data base), an electronic copy of stack test reports as well as process data. Data entry requires only access to the Internet and is expected to be completed by the stack testing company as part of the work that it is contracted to perform. This option would become available as of December 31, 2011.

Please note that the proposed option to submit source test data electronically to EPA would not require any additional performance testing. In addition, when a facility elects to submit performance test data to WebFIRE, there would be no additional requirements for data compilation; instead, we believe industry would greatly benefit from improved emissions factors, fewer information requests, and better regulation development as discussed below. Because the information that would be reported is already required in the existing test methods and is necessary to evaluate the conformance to the test methods, facilities would already be collecting and compiling these data. One major advantage of electing to submit source test data through the Electronic Reporting Tool (ERT), which was developed with input from stack testing companies (who already collect and compile performance test data electronically), is that it would provide a standardized method to compile and store all the documentation required by this proposed rule. Another important benefit of submitting these data to EPA at the time the source test is conducted is that these data will substantially reduce the effort involved in data collection activities in the future. This results in a reduced burden on both affected facilities (in terms of reduced manpower to respond to data collection requests) and EPA (in terms of preparing and distributing data collection requests). Finally, another benefit of electing to submit these data to WebFIRE electronically is that these data will greatly improve the overall quality of the existing and new emissions factors by supplementing the pool of emissions test data upon which emissions factors are based and by ensuring that data are more representative of current industry operational procedures. A common complaint we hear from industry and regulators is that emissions factors are out-dated or not representative of a particular source category. Receiving recent performance test results would ensure that emissions factors are updated and more accurate. In summary, receiving these test data already collected for other purposes and using them in the emissions factors development program will save industry, State/local/tribal agencies, and EPA time and money.

As mentioned earlier, the electronic data base that will be used is EPA's WebFIRE, which is a Web site accessible through EPA's technology transfer network (TTN). The WebFIRE website was constructed to store emissions test data for use in developing emission factors. A description of the WebFIRE data base can be found at *http://cfpub.epa.gov/oarweb/index.cfm?action=fire.main*. The ERT will be able to transmit the electronic report through EPA's Central Data Exchange (CDX) network for storage in the WebFIRE data base. Although ERT is not the only electronic interface that can be used to submit source test data to the CDX for entry into WebFIRE, it makes submittal of data very straightforward and easy. A description of the ERT can be found at *http://www.epa.gov/ttn/chief/ert/ert_tool.html.* The ERT can be used to document the conduct of stack tests data for various pollutants including PM, mercury, and HCl. Presently, the ERT does not handle dioxin/furan stack test data, but the tool is being upgraded to handle dioxin/furan stack test data. The ERT does not currently accept opacity data or CEMS data.

EPA specifically requests comment on the utility of this electronic reporting option and the burden that owners and operators of portland cement facilities estimate would be associated with this option.

Definition of affected source. In the final amendments published on December 20, 2006, we indicated that we were changing paragraph (c) in § 63.1340 to clarify that crushers were part of the affected source for this rule (71 FR 76532). However, we omitted the rule language changes to that paragraph. This language has been added to this proposed rule.

V. Comments on Notice of Reconsideration and EPA Final Action in Response To Remand

As previously noted, EPA received comments on the notice of reconsideration and the final action taken in December 2006. A summary of

[50] Information on the study of hexavalent chromium emissions believed to result from clinker piles and the rules adopted by the South Coast Air Quality Management District may be found at *http://www.aqmd.gov/RiversideCement/RiversideCement.html.*

these comments is available in the docket for this rulemaking.[51]

We are not responding to these comments in this proposed action. We will provide responses to these comments, and other comments received on these proposed amendments, when we take final action on this proposal.

VI. Summary of Cost, Environmental, Energy, and Economic Impacts of Proposed Amendments

A. What are the affected sources?

There are currently 93 portland cement manufacturing facilities located in the U.S. and Puerto Rico that we expect to be affected by these proposed amendments. In 2005, these facilities operated 163 cement kilns and associated clinker coolers. We have no estimate of the number of raw material dryers that are separate from the kilns.

Based on capacity expansion data provided by the Portland Cement Association, we anticipate that 20 new kilns and associated clinker coolers will be built in the five years after the promulgation of final standards representing 24 million tpy of clinker capacity. Some of these new kilns will be built at existing facilities and some at new greenfield facilities. The location of the kiln (greenfield or currently existing facility) has no bearing on our estimated cost and environmental impacts. We based new kiln impacts on a 1.2 million tpy clinker kiln. This kiln is the smallest size anticipated for new kilns based on kilns built in the last five years or currently under construction. Using the smallest anticipated kiln size provides a conservative estimate of costs because control costs per unit of capacity tend to be higher for smaller kilns.

B. How are the impacts for this proposal evaluated?

For these proposed Portland Cement NESHAP amendments, the EPA utilized three models to evaluate the impacts of the regulation on the industry and the economy. Typically in a regulatory analysis, EPA determines the regulatory options suitable to meet statutory obligations under the CAA. Based on the stringency of those options, EPA then determines the control technologies and monitoring requirements that may be selected to comply with the regulation. This is conducted in an Engineering Analysis. The selected control technologies and monitoring requirements are then evaluated in a cost model to determine the total annualized control costs. The annualized control costs serve as inputs to an Economic Impact Analysis model that evaluates the impacts of those costs on the industry and society as a whole.

The Economic Impact Analysis model uses a single-period static partial-equilibrium model to compare a pre-policy cement market baseline with expected post-policy outcomes in cement markets. This model was used in previous EPA analyses of the portland cement industry (EPA, 1998; EPA, 1999b). The benchmark time horizon for the analysis is assumed to be short and producers have some constraints on their flexibility to adjust factors of production. This time horizon allows us to capture important transitory impacts of the program on existing producers. The model uses traditional engineering costs analysis as ''exogenous'' inputs (i.e., determined outside of the economic model) and computes the associated economic impacts of the proposed regulation.

For the Portland Cement NESHAP, EPA also employs the Industrial Sector Integrated Solutions (ISIS) model which conducts both the engineering cost analysis and the economic analysis in a single modeling system. The ISIS model is a dynamic and integrated model that simulates potential decisions made in the cement industry to meet an environmental policy under a regulatory scenario. ISIS simultaneously estimates (1) optimal industry operation to meet the demand and emission reduction requirements, (2) the suite of control technologies needed to meet the emission limit, (3) the engineering cost of controls, and (4) economic impacts of demand response of the policy, in an iterative loop until the system achieves the optimal solution. The peer review of the ISIS model can be found in the docket.[52] This model will be revised based on peer review comments and comments on this proposed rule and will be used to develop the cost and economic impacts of the final rule.

In a Technical Memo to the docket, we provide a comparison of these models to provide an evaluation of how the differences between the models may impact the resulting estimates of the impacts of the regulation. For example, the Engineering Analysis and Economic Impact Analysis evaluate a snapshot of implementation of the proposed rule in a given year (i.e., 2018, based on 2005 dollars) while ISIS evaluates impacts of compliance dynamically over time (i.e., 2013–2018). In general, given the optimization nature of ISIS, ISIS accounts for more flexibility when estimating the impacts of the regulation. For example, when optimizing to meet an emission limit, ISIS allows for the addition of new kilns, as well as kiln retirements, replacements, and expansions and the installation of controls. In the Engineering Analysis the existing kiln population is assumed to be constant even though normal kiln retirements occur. Overall, we anticipate the total control costs from the Engineering Analysis to be higher than that of ISIS. With higher cost estimates serving as the basis for the Economic Impact Analysis along with other modeling differences, we expect the results presented from the EIA model will be higher in impact than those presented by ISIS.

In addition, we have not yet developed ISIS modules to calculate non-air environmental impacts and energy impacts. Therefore, these sections only contain impacts calculated by the traditional engineering methods

C. What are the air quality impacts?

For the proposed Portland Cement NESHAP, EPA estimated the emission reductions that would occur due to the implementation of the proposed emission limits. EPA estimated emission reductions based on the control technologies selected by the engineering analysis. These emission reductions are based on 2005 emission baselines.

Under the proposed limit for mercury, we have estimated that the emissions reductions would be 13,800 lb/yr for existing kilns. Based on our 1.2 million tpy model kiln, mercury emissions would be reduced by 120 lb/yr for each new kiln, or about 2,400 lb/yr 5 years after promulgation of the final standards.

Under the proposed limits for THC, we have estimated that the emissions reductions would be 13,000 tpy for existing kilns, which represent an organic HAP reduction of 3,100 tpy. For new kilns, THC emissions would be reduced by 50 tpy per kiln or about 920 tpy 5 years after promulgation of the final standard. This represents an organic HAP reduction of 192 tpy.

Under the proposed limit for HCl, we have estimated that emissions would be reduced by 2,700 tpy for existing kilns. Emissions of HCl from new kilns would be 45 tpy per kiln or 900 tpy 5 years after promulgation of the final standards.

The proposed emission limits for PM represent a lowering of the PM limit from 0.5 lb/ton of clinker to 0.085 lb/ton

[51] Summary of Comments on December 20, 2006 Final Rule and Notice of Reconsideration. April 15, 2009.

[52] *See* Industrial Sector Integrated Solutions Model dated December 23, 2008 and Review of ISIS Documentation Package dated April 15, 2009.

of clinker for existing kilns and for new kilns, a lowering to 0.080 lb/ton of clinker. We have estimated that PM emissions would be reduced by 10,600 tpy for existing kilns. For new kilns, emission reductions would be 150 tpy per kiln, or about 3,100 tpy 5 years after promulgation of the final standards.

The proposed standards for mercury, THC and HCl will also result in concurrent control of SO_2 emissions. For kilns that use an RTO to comply with the THC emissions limit it is necessary to install an alkaline scrubber upstream of the RTO to control acid gas and to provide additional control of PM and to avoid plugging and fouling of the RTO. Scrubbers will also be used to control HCl and mercury emissions. Reductions in SO_2 emissions associated with controls for mercury, THC and HCl are estimated at 1,600 tpy, 7,300 tpy, and 107,000 tpy, respectively. Total reduction in SO_2 emissions from existing kilns would be an estimated 116,000 tpy. A new 1.2 million tpy kiln equipped with a scrubber will reduce SO_2 emissions by 1,000 tpy on average or about 20,000 tpy in the fifth year after promulgation of the final standards.

These controls will also reduce emissions of secondary $PM_{2.5}$ (and coarse PM ($PM_{10-2.5}$) as well). This is PM that results from atmospheric transformation processes of precursor gases, including SO_2.

In addition to this traditional estimation of emission reductions, EPA employed the ISIS model to estimate emission reductions. The estimation of emission reductions in the ISIS model accounts for the optimization of the industry and includes the addition of new kilns, kiln retirements, replacements, and expansions as well as installation of controls. Using the ISIS model, in 2013 we estimate reductions of 11,400 lbs of mercury, 11,670 tons of THC, 2,780 tons of HCl, 10,530 tons of PM and 160,000 tons of SO_2 compared to total emissions in 2005. More information on the ISIS model and results can be found in the ISIS TSD and in a Technical Memo to the docket.

D. What are the water quality impacts?

We estimated no water quality impacts for the proposed amendments. The requirements that might result in the use of alkaline scrubbers will produce a scrubber slurry liquid waste stream. However, we assume the scrubber slurry produced will be dewatered and added back into the cement-making process as gypsum. Water from the dewatering process will be recycled back to the scrubber. The four facilities that currently use wet scrubbers in this industry report no water releases at any time. However, the use of scrubbers could create potential for water release due to system purges. We are requesting comment and data on water quality impacts, on what, if any, regulations might apply, and if we should add any requirements to this rule to prevent or control these purges. The addition of scrubbers will increase water usage by about 2,700 million gallons per year. For a new 1.2 million tpy kiln, water usage will be 36 million gallons per year or 720 million gallons per year 5 years after promulgation of the final standards.

We note that some preproposal commenters have stated that some new and existing facilities may be located in areas where there is not sufficient water to operate a wet scrubber. However, we are not mandating the use of wet scrubber technology in these regulations, and we believe that sufficient alternative controls exist for mercury and acid gas controls that this issue would not preclude a facility from meeting these proposed emissions limits. However, we are also soliciting comment on this issue.

E. What are the solid waste impacts?

The potential for solid waste impacts are associated with greater PM control for kilns, waste generated by ACI systems and solids resulting from solids in scrubber slurry water. As explained above, we have assumed little or no solid waste is expected from the generation of scrubber slurry because the solids from the slurry are used in the finish mill as a raw material. The PM captured in the kiln fabric filter (cement kiln dust) is essentially recaptured raw material, intermediate materials, or product. Based on the available information, it appears that most captured PM is typically recycled back to the kilns to the maximum extent possible. Therefore we estimate that any additional PM captured would also be recycled to the kiln to the extent possible.

Where equipped with an alkali bypass, the bypass will have a separate PM control device and that PM is typically disposed of as solid waste. An alkali bypass is not required on all kilns. Where one is present, the amount of solid waste generated from the alkali bypass is minimal, usually about 1 percent of total CKD in control devices, because the bypass gas stream is a small percentage of total kiln exhaust gas flow and the bypass gas stream does not contact the feed stream in the raw mill.

Waste collected in the polishing baghouse associated with ACI that might be added for mercury or THC control cannot be recycled to the kiln and would be disposed of as solid waste. An estimated 120,000 tpy of solid waste would be generated from the use of ACI systems on existing kilns. Each new kiln equipped with an ACI system would be expected to generate 1,800 tons of solid waste per kiln or, assuming 14 of the 20 new kilns would add ACI systems, about 25,000 tpy in the fifth year after promulgation of the final standards.

In addition to the solid waste impacts described above, there is a potential for an increase in solid waste if a facility elects to control mercury emission by increasing the amount of CKD wasted rather than returned to process. This will be a site-specific decision, and we have no data to estimate the potential solid waste that may be generated by this practice. However, we expect the total amount to be small for two reasons. First, wasting cement kiln dust for mercury control represents a significant expense to a facility because it would be essentially wasting either raw materials or product. So we anticipate this option will not be used if the amount of CKD wasted would be large. Second, we believe that cement manufacturers will add the additional CKD to the finish mill to the maximum extent possible rather than waste the material.

We are requesting comment on the potential for increases in solid waste generation, on what, if any regulations might apply, and if we should add any requirements to this rule to prevent or control the potential additional solid waste requirements.

F. What are the secondary impacts?

Indirect or secondary air quality impacts include impacts that would result from the increased electricity usage associated with the operation of control devices as well as water quality and solid waste impacts (which were just discussed) that would occur as a result of these proposed revisions. We estimate these proposed revisions would increase emissions of criteria pollutants from utility boilers that supply electricity to the portland cement facilities. We estimate increased energy demand associated with the installation of scrubbers, ACI systems, and RTO. The increases for existing kilns are estimated to be 1,600 tpy of NO_X, 800 tpy of CO, 2,700 tpy of SO_2 and about 80 tpy of PM. For new kilns (assuming that of the 20 new kilns to start up in the 5 years following promulgation of the final standard 20 will add alkaline scrubbers, 2 will add an RTO, 14 will install ACI systems, and 20 will install membrane bags instead of cloth bags in their baghouses), increases in secondary air pollutants are

estimated to be 410 tpy of NO_X, 210 tpy of CO, 690 tpy of SO_2 and 20 tpy of PM. We also estimated increases of CO_2 to be 775,000 tpy (existing kilns) and 200,000 tpy (new kilns).

G. What are the energy impacts?

The addition of alkaline scrubbers, ACI systems, and RTO added to comply with the proposed amendments will result in increased energy use due to the electrical requirements for the scrubber and ACI systems and increased fan pressure drops, and natural gas to fuel the RTO. We estimate the additional national electrical demand to be 705 million kWhr per year and the natural gas use to be 600,000 MMBtu per year for existing kilns. For new kilns, assuming of the 20 new kilns to start up in the 5 years following promulgation of the final standard that 20 will add alkaline scrubbers, 2 will add an RTO, and 14 will install ACI systems, the electrical demand is estimated to be 180 million kWhr per year and the natural gas use to be 160,000 MMBtu per year.

H. What are the cost impacts?

Under the proposed amendments, existing kilns are expected to add one or more control devices to comply with the proposed emission limits. In addition, each kiln would be required to install CEMS to monitor mercury, THC and HCl while bag leak detectors (BLDs) would be required to monitor performance of all baghouses.

We performed two separate cost analyses for this proposed rule. In the engineering cost analysis, we estimated the cost of the proposed amendments based on the type of control device that was assumed to be necessary to comply with the proposed emission standards. Based on baseline emissions of mercury, THC, HCl and PM for each kiln and the removal efficiency necessary to comply with the proposed emission limit for each HAP, an appropriate control device was identified. In assigning control devices to each kiln where more than one control device would be capable of reducing emissions of a particular HAP below the limit, we assumed that the least costly control would be installed. For example, if a kiln could use either a scrubber or ACI to comply with the proposed limit for mercury, it was assumed that ACI would be selected over a scrubber because an ACI system would be less costly. ACI also is expected to achieve a higher removal efficiency than a scrubber for mercury. In some instances, a more expensive technology was considered appropriate because the selected control reduced emissions of multiple pollutants. For example, even though ACI would be less costly than a scrubber for controlling mercury, if the kiln also had to reduce HCl emissions, we assumed that a scrubber would be applied to control HCl as well as mercury because ACI would not control HCl. However, for many kilns, our analysis assumes that multiple controls will have to be added because more than one control will be needed to control all HAP. For example, ACI may be considered necessary to meet the limits for THC and/or mercury. For the same kiln, a scrubber would also be required to reduce HCl emissions. In this case we would allocate the cost of the control to controlling HCl emissions, not to the cost of controlling mercury emissions. In addition, once we assigned a particular control device, in most cases we assumed mercury and THC emissions reductions would equal the control device efficiency, and not the minimum reduction necessary to meet the emissions limit. We believe this assumption is warranted because it matches costs with actual emissions reductions. In the case of PM and HCl, we assumed the controlled facility would emit at the average level necessary to meet the standard (i.e., we assumed for PM that the controlled facility would emit at 0.01 lb/ton clinker, the average emission level, not 0.085 lb/ton clinker, the actual emissions limit), because the proposed emissions levels are extremely low.

In a separate analysis performed using the ISIS model, we input into ISIS the baseline and controlled emissions rates for each pollutant, along with the maximum percent reduction achievable for a particular control technology, and allowed ISIS to base the control required on optimizing total production costs. In addition, the ISIS model accounts for normal kiln retirements that would occur even in the absence of any regulatory action (i.e., as new kilns come on-line, older, less efficient and more costly to operate kilns are retired). In the first cost analysis, total national annual costs assume that all kilns currently operating continue to operate while 20 new kilns come on-line.

Table 8 presents the resulting add-on controls each approach estimated was necessary to meet the proposed emissions limits.

TABLE 8—CONTROL INSTALLATION COMPARISON

	LSW	ACI	LWS+ACI	RTO	MB	FF	WS+RTO
Engineering Analysis	5	36	111	0	35	5	12
ISIS Model	7	34	107	10	17	0	11

In the engineering analysis we estimated the total capital cost of installing alkaline scrubbers and ACI systems for mercury control, including monitoring systems, would be $72 million with an annualized cost of $28 million. The estimated capital cost of installing ACI systems and RTO/scrubbers to reduce THC emissions would be $322 million with annualized cost of $103 million. The capital cost of adding scrubbers for the control of HCl is estimated to be $692 million with an annualized cost of $109 million. The capital cost of adding membrane bags to existing baghouse and the replacement of ESP's with baghouses would be $54 million with annualized cost of $17 million. The total capital cost for the proposed amendments would be an estimated $1.14 billion with an annualized cost of $256 million.

The estimated emission control capital cost per new 1.2 million tpy kiln is $17.6 million and the annualized costs are estimated at $1.25 million for mercury control, $1.3 million for THC control, $1.8 million for HCl control and $270,000 for PM control. National annualized cost by the end of the fifth year will be an estimated $92.4 million.

In the ISIS results, we are not able to separate costs by pollutant because the model does an overall optimization of the production and air pollution control costs. The total annual costs of the ISIS model are $222 million in 2013. These impacts assume that in 2013 nine new kilns are installed and net four kilns are retired. These retirements include two kilns that we have determined may close due to not being able to meet the mercury emission limits due to unusually high mercury contents in their proprietary quarries (i.e., the mercury content of the raw material at limestone quarries).

I. What are the economic impacts?

EPA employed both a partial-equilibrium economic model and the

ISIS model to analyze the impact on the industry and the economy.

The Economic Impact Analysis model estimates the average national price for portland cement could be 4 percent higher with the NESHAP, or $3.30 per metric ton, while annual domestic production may fall by 8 percent, or 7 million tons per year. Because of higher domestic prices, imports are expected to rise by 2 million metric tons per year.

As domestic production falls, cement industry revenues are projected to decline by 4 percent, or $340 million. Overall, net production costs also fall by $140 million with compliance cost increases ($240 million) offset by cost reductions associated with lower cement production. Operating profits fall by $200 million, or 16 percent. Other projected impacts include reduced demand for labor. Employment falls by approximately 8 percent, or 1,200 employees. EPA identified six domestic plants with negative operating profits and significant utilization changes that could temporarily idle until market demand conditions improve. The plants are small capacity plants with unit compliance costs close to $5 per ton and $50 million total change in operating profits. Since these plants account for approximately 2.5 percent of domestic capacity, a decision to permanently shut down these plants would reduce domestic supply and lead to additional projected market price increases.[53]

The estimated domestic social cost of the proposed amendments is $684 million. There is an estimated $89 million surplus gain for other countries producing cement. The social cost estimates are significantly higher than the engineering analysis estimates, which estimated annualized costs of $370 million. This is a direct consequence of EPA's assumptions about existing domestic plants' pricing behavior. Under baseline conditions without regulation, the existing domestic cement plants are assumed to choose a production level that is less than the level produced under perfect competition. The imposition of additional regulatory costs tends to widen the gap between price and marginal cost in these markets and contributes to additional social costs. For more detail see the Regulatory Impact Analysis (RIA).

Using the ISIS model, we estimate cement demand to drop 1.9 percent in 2013 or 2.5 million tons with an average annual drop in demand at 1.5 percent or 2.2 million tons per year during the 2013–2018 time period. The drop in demand will affect the level of imports, and imports are likely to rise slightly over the policy horizon. In 2013, imports rise 1.39 percent or 0.44 million tons with an annual average of 0.39 percent or 0.13 million tons per year throughout 2013–2018. ISIS estimates the average national price for portland cement in the 2013–2018 time period to be 1.2 percent higher with the NESHAP, or $0.96 per metric ton. However, some markets could see an increase by up to 6.7 percent. Total annualized control cost for the proposed NESHAP amendments is projected to be $222 million in 2013.

With respect to the baseline case in 2013, ISIS identified a net retirement of 2.4 million tons of capacity. The retirements affect 4 kilns at 4 facilities. As a result of the proposed NESHAP amendments, the cost to produce a ton of cement (production, imports, transportation and control technology) increases from $56.11 per ton at baseline to $57.47 per ton as a result of these proposed amendments ($1.36/ton), resulting in an increase of about 2.7 percent over the analysis period of 2013 to 2018. With respect to baseline in 2013 ISIS projects the revenue of the cement industry to fall by 1.2 percent or about $91 million. More information on this model can be found in the ISIS TSD and in a Technical Memo to the docket.

J. What are the benefits?

We estimate the monetized co-benefits of this proposed NESHAP to be $4.4 billion to $11 billion (2005$, 3 percent discount rate) in the year of full implementation (2013); using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between these two estimates.[54] The benefits at a 7 percent discount rate are $4.0 billion to $9.7 billion (2005$) [55]. A summary of the monetized benefits estimates at discount rates of 3 percent and 7 percent is in Table 9.

TABLE 9—SUMMARY OF THE MONETIZED BENEFITS ESTIMATES FOR THE PROPOSED PORTLAND CEMENT NESHAP

Pollutant	Emission reductions (tons)	Total monetized benefits (millions of 2005 dollars, 3% discount) [1]	Total monetized benefits (millions of 2005 dollars, 7 percent discount) [1]
Direct $PM_{2.5}$	6,300	$1,200 to $2,800	$1,000 to $2,500.
$PM_{2.5}$ precursors	140,000	$3,300 to $8,000	$3,000 to $7,200.
Grand total		$4,400 to $11,000	$4,000 to $9,700.

[1] All estimates are for the analysis year (full implementation, 2013), and are rounded to two significant figures so numbers may not sum across rows. $PM_{2.5}$ precursors reflect emission reductions of SO_X. All fine particles are assumed to have equivalent health effects, and the monetized benefits incorporate the conversion from precursor emissions to ambient fine particles.

These benefits estimates are the monetized human health co-benefits of reducing cases of morbidity and premature mortality among populations exposed to $PM_{2.5}$ from installing controls to limit hazardous air pollutants (HAPs), such as mercury, hydrochloric acid, and hydrocarbons. We generated estimates that represent the total monetized human health benefits (the sum of premature mortality and morbidity) of reducing $PM_{2.5}$ and $PM_{2.5}$ precursor emissions. We base the estimate of human health benefits derived from the $PM_{2.5}$ and $PM_{2.5}$ precursor emission reductions on the approach and methodology laid out in the TSD that accompanied the RIA for

[53] In addition to the six plants identified that could temporarily idle or permanently shut down, there are two plants that are at risk of closure because they may not be able to meet the existing source mercury emissions limit, even if they apply the best controls. We did not assume they would close in this analysis because there may be site-specific mercury control alternative that would allow them to remain open.

[54] Roman *et al.,* 2008. Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S. Environ. Sci. Technol., 42, 7, 2268–2274.

[55] Using alternate emission reductions generated by the ISIS model, the benefits results are similar to those shown here. Although the ISIS model estimates different emission reductions, the increased SO_2 reductions offset the fewer $PM_{2.5}$ reductions. More information on the health benefits estimated for the ISIS results can be found in the ISIS TSD.

the revision to the National Ambient Air Quality Standard for Ground-level Ozone (NAAQS), March 2008 with three changes explained below.

For context, it is important to note that in quantifying PM benefits the magnitude of the results is largely driven by the concentration response function for premature mortality. Experts have advised EPA to consider a variety of assumptions, including estimates based both on empirical (epidemiological) studies and judgments elicited from scientific experts, to characterize the uncertainty in the relationship between $PM_{2.5}$ concentrations and premature mortality. For this proposed NESHAP we cite two key empirical studies, one based on the American Cancer Society cohort study [56] and the extended Six Cities cohort study.[57] Alternate models identified by experts describing the relationship between $PM_{2.5}$ and premature mortality would yield higher and lower estimates depending upon the assumptions that they made, but most of the expert-based estimates fall between the two epidemiology-based estimates (Roman *et al.* 2008).

EPA strives to use the best available science to support our benefits analyses. We recognize that interpretation of the science regarding air pollution and health is dynamic and evolving. One of the key differences between the method used in this analysis of PM-cobenefits and the methods used in recent RIAs is that, in addition to technical updates, we removed the assumption regarding thresholds in the health impact function. Based on our review of the body of scientific literature, we prefer the no-threshold model. EPA's draft Integrated Science Assessment (2008), which is currently being reviewed by EPA's Clean Air Scientific Advisory Committee, concluded that the scientific literature consistently finds that a no-threshold log-linear model most adequately portrays the PM-mortality concentration-response relationship while recognizing potential uncertainty about the exact shape of the concentration-response function. It is important to note that while CASAC provides advice regarding the science associated with setting the National Ambient Air Quality Standards, typically other scientific advisory bodies provide specific advice regarding benefits analysis.

Using the threshold model at 10 μg/m^3 without the two technical updates, we estimate the monetized benefits to be $3.1 billion to $6.5 billion (2005$, 3 percent discount rate) and $2.8 billion to $5.9 billion (2005$, 7 percent discount rate) in the year of full implementation. Approximately 75 percent of the difference between the old methodology and the new methodology for this rule is due to removing thresholds with 25 percent due to the two technical updates, but this percentage would vary depending on the combination of emission reductions from different sources and $PM_{2.5}$ precursor pollutants. For more information on the updates to the benefit-per-ton estimates, please refer to the RIA for this proposed rule that is available in the docket.

The question of whether or not to assume a threshold in calculating the co-benefits associated with reductions in $PM_{2.5}$ is an issue that affects the benefits calculations not only for this rule but for many future EPA rulemakings and analyses. Due to these implications, we solicit comment on appropriateness of both the no-threshold and threshold model for PM benefits analysis.

To generate the benefit-per-ton estimates, we used a model to convert emissions of direct $PM_{2.5}$ and $PM_{2.5}$ precursors into changes in $PM_{2.5}$ air quality and another model to estimate the changes in human health based on that change in air quality. Finally, the monetized health benefits were divided by the emission reductions to create the benefit-per-ton estimates. Even though all fine particles are assumed to have equivalent health effects, the benefit-per-ton estimates vary between precursors because each ton of precursor reduced has a different propensity to form $PM_{2.5}$. For example, SO_X has a lower benefit-per-ton estimate than direct $PM_{2.5}$ because it does not form as much $PM_{2.5}$, thus the exposure would be lower, and the monetized health benefits would be lower.

This analysis does not include the type of detailed uncertainty assessment found in the 2006 $PM_{2.5}$ NAAQS RIA because we lack the necessary air quality input and monitoring data to run the benefits model. However, the 2006 $PM_{2.5}$ NAAQS benefits analysis provides an indication of the sensitivity of our results to the use of alternative concentration response functions, including those derived from the PM expert elicitation study.

The social costs of this rulemaking are estimated at $694 million (2005$) in the year of full implementation, and the benefits are estimated at $4.4 billion to $11 billion (2005$, 3 percent discount rate) for that same year. The benefits at a 7 percent discount rate are $4.0 billion to $9.7 billion (2005$). Thus, net benefits of this rulemaking are estimated at $3.7 billion to $11 billion (2005$, 3 percent discount rate); using alternate relationships between $PM_{2.5}$ and premature mortality supplied by experts, higher and lower benefits estimates are plausible, but most of the expert-based estimates fall between the two estimates we present above. The net benefits at a 7 percent discount rate are $3.3 billion to $9.0 billion (2005$). EPA believes that the benefits are likely to exceed the costs by a significant margin even when taking into account the uncertainties in the cost and benefit estimates.

It should be noted that the benefits estimates provided above do not include benefits from improved visibility, coarse PM emission reductions, or other hazardous air pollutants such as mercury and hydrochloric acid, additional emission reductions that would occur if cement facilities temporarily idle or reduce capacity utilization as a result of this regulation, or the unquantifiable amount of reductions in condensable PM. We do not have sufficient information or modeling available to provide such estimates for this rulemaking.

For more information, please refer to the RIA for this proposed rule that is available in the docket.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under section 3(f)(1) of Executive Order 12866 (58 FR 51735, October 4, 1993), this action is an ''economically significant regulatory action'' because it is likely to have an annual effect on the economy of $100 million or more.

Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Order 12866, and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document

[56] Pope *et al.,* 2002. ''Lung Cancer, Cardiopulmonary Mortality, and Long-term Exposure to Fine Particulate Air Pollution.'' *Journal of the American Medical Association* 287:1132–1141.

[57] Laden *et al.,* 2006. ''Reduction in Fine Particulate Air Pollution and Mortality.'' *American Journal of Respiratory and Critical Care Medicine.* 173: 667–672.

prepared by EPA has been assigned EPA ICR number 1801.07.

In most cases, new and existing kilns and in-line kiln/raw mills at major and area sources that are not already subject to emission limits for THC, mercury, and PM would become subject to the limits and associated compliance provisions in the current rule. New compliance provisions for mercury would remove the current requirement for an initial performance test coupled with monitoring of the carbon injection rate. Instead, plants would measure mercury emissions by calculating a 30-day average from continuous or integrated monitors. Records of all calculations and data would be required. New compliance procedures would also apply to area sources subject to a PM limit in a format of lbs/ton of clinker. The owner or operator would be required to install and operate a weight measurement system and keep daily records of clinker production instead of the current requirement to install and operate a PM CEMS. The owner or operator would be required to conduct an initial PM performance test and repeat performance tests every 5 years. Cement plants also would be subject to new limits for HCl and associated compliance provisions which include compliance tests using EPA Method 321 and continuous monitoring for HCl for facilities that do not use a wet scrubber for HCl control. These requirements are based on the recordkeeping and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A) which are mandatory for all operators subject to national emission standards. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to EPA policies set forth in 40 CFR part 2, subpart B.

The annual burden for this information collection averaged over the first 3 years of this ICR is estimated to total 44,656 labor-hours per year at a cost of $4.1 million per year. The average annualized capital costs are estimated at $53.7 million per year and average operation and maintenance costs are estimated at $174,000 per year. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9. To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this proposed rule, which includes this ICR, under Docket ID number EPA–HQ–OAR–2002–0051. Submit any comments related to the ICR for this proposed rule to EPA and OMB. *See* **ADDRESSES** section at the beginning of this document for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, *Attention:* Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after May 6, 2009, a comment to OMB is best assured of having its full effect if OMB receives it by June 5, 2009. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impact of this rule on small entities, small entity is defined as: (1) A small business whose parent company has no more than 750 employees (as defined by Small Business Administration (SBA) size standards for the portland cement industry, NAICS 327310); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impact of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. We estimate that up to 4 of the 44 existing portland cement plants are small entities. One of the entities burns hazardous waste in its kiln and is not impacted by this proposed rule.

EPA performed a screening analysis for impacts on the three affected small entities by comparing compliance costs to entity revenues. EPA's analysis found that the ratio of compliance cost to company revenue for two small entities (including a tribal government) would have an annualized cost of between 1 percent and 3 percent of sales. One small business would have an annualized cost of 4.8 percent of sales. All three affected facilities are projected to continue to operate under with-regulation conditions.

EPA also evaluated small business impacts using the ISIS model. There are a total of 7 kilns identified to be associated with small business facilities affected by this proposal. ISIS identified one of these kilns to retire in 2013 as a result of the proposed NESHAP. A second kiln reduces its utilization by 56 percent in 2013 but recovers later in the 2013 to 2018 time frame as the demand increases. All the remaining small business kilns operate at full capacity throughout the 2013 to 2018 time frame.

Although this proposed rule will not impact a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this proposed rule on small entities by setting the proposed emissions limits at the MACT floor, the least stringent level allowed by law. In the case where there are overlapping standards between this NESHAP and the Portland Cement NSPS, we have exempted sources from the least stringent requirement, thereby eliminating the overlapping monitoring, testing and reporting requirements by proposing that the source comply with only the more stringent of the standards. We continue to be interested in the potential impacts of this proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act (UMRA), 2 U.S.C 1531–1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements.

This rule contains a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Accordingly, EPA has prepared under section 202 of the UMRA a written statement which is summarized below.

Consistent with the intergovernmental consultation provisions of section 204 of the UMRA, EPA has already initiated consultations with the governmental entities affected by this rule. In developing this rule, EPA consulted with small governments under a plan developed pursuant to section 203 of UMRA concerning the regulatory requirements in the rule that might significantly or uniquely affect small governments. EPA has determined that this proposed action contains regulatory requirements that might significantly or uniquely affect small governments because one of the facilities affected by the proposed rule is tribally owned. EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. EPA directly contacted the facility in question to insure it was apprised of this rulemaking and potential implications. This facility indicated it was aware of the rulemaking and was participating in meetings with the industry trade association concerning this rulemaking. The facility did not indicate any specific concern, and we are assuming that they have the same concerns as those expressed by the other non-tribally owned facilities during the development of this proposed rule.

Consistent with section 205, EPA has identified and considered a reasonable number of regulatory alternatives. EPA carefully examined regulatory alternatives, and selected the lowest cost/least burdensome alternative that EPA deems adequate to address Congressional concerns and to effectively reduce emissions of mercury, THC and PM. EPA has considered the costs and benefits of the proposed rule, and has concluded that the costs will fall mainly on the private sector (approximately $273 million). EPA estimates that an additional facility owned by a tribal government will incur approximately $2.1 million in costs per year. Furthermore, we think it is unlikely that State, local and Tribal governments would begin operating large industrial facilities, similar to those affected by this rulemaking operated by the private sector.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

This proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. None of the affected facilities are owned or operated by State governments. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action will have tribal implications, because it will impose substantial direct compliance costs on tribal governments, and the Federal government will not provide the funds necessary to pay those costs. One of the facilities affected by this proposed rule is tribally owned. We estimate this facility will incur direct compliance costs that are between 1 to 3 percent of sales. Accordingly, EPA provides the following tribal summary impact statement as required by section 5(b).

EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. EPA directly contacted the facility in question to insure it was apprised of this rulemaking and potential implications. This facility indicated that it was aware of the rulemaking and was participating in meetings with the industry trade association concerning this rulemaking. The facility did not indicate any specific concern, and we are assuming that they have the same concerns as those expressed by the other non-tribally owned facilities during the development of this proposed rule.

EPA specifically solicits additional comments on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Order has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it is based solely on technology performance.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this proposed rule is not likely to have any adverse energy effects. This proposal will result in the addition of control equipment and monitoring systems for existing and new sources. We estimate the additional electrical demand to be 784 million kWhr per year and the natural gas use to be 672 million cubic feet for existing sources. At the end of the fifth year following promulgation, electrical demand from new sources will be 180 million kWhr per year and natural gas use will be 171 million cubic feet.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law

104–113 (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

Consistent with the NTTAA, EPA conducted searches through the Enhanced NSSN Database managed by the American National Standards Institute (ANSI). We also contacted VCS organizations, and accessed and searched their databases.

This proposed rulemaking involves technical standards. EPA proposes to use ASTM D6348–03, ''Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy'', as an acceptable alternative to EPA Method 320 providing the following conditions are met.

(1) The test plan preparation and implementation in the Annexes to ASTM D6348–03, Sections A1 through A8 are mandatory.

(2) In ASTM D6348–03 Annex A5 (Analyte Spiking Technique), the percent (%) R must be determined for each target analyte (Equation A5.5). In order for the test data to be acceptable for a compound, %R must be 70 ≤%R ≤130. If the %R value does not meet this criterion for a target compound, the test data is not acceptable for that compound and the test must be repeated for that analyte (i.e., the sampling and/or analytical procedure should be adjusted before a retest). The %R value for each compound must be reported in the test report, and all field measurements must be corrected with the calculated %R value for that compound by using the following equation: *Reported Result = Measured Concentration in the Stack x 100) ÷ %R*.

While the Agency has identified eight other VCS as being potentially applicable to this rule, we have decided not to use these VCS in this rulemaking. The use of these VCS would have been impractical because they do not meet the objectives of the standards cited in this rule. See the docket for this rule for the reasons for these determinations.

Under 40 CFR 60.13(i) of the NSPS General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule and amendments.

EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially-applicable voluntary consensus standards and to explain why such standards should be used in this regulation.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA has determined that these proposed amendments will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because they would increase the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. These proposed standards would reduce emissions of mercury, THC, HCl, and PM from portland cement plants located at major and area sources, decreasing the amount of such emissions to which all affected populations are exposed.

List of Subjects in 40 CFR Parts 60 and 63

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, and Reporting and recordkeeping requirements.

Dated: April 21, 2009.

Lisa P. Jackson,

Administrator.

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 60—[AMENDED]

1. The authority citation for part 60 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Appendix B—[Amended]

2. Appendix B to 40 CFR Part 60 is amended to read as follows:

a. Revise Performance Specification 12A.

b. Add Performance Specification 12B.

Appendix B to Part 60—Performance Specifications

* * * * *

Performance Specification 12A—Specifications and Test Procedures for Total Vapor Phase Mercury Continuous Emission Monitoring Systems in Stationary Sources

1.0 Scope and Application

1.1 Analyte. The analyte measured by these procedures and specifications is total vapor phase Hg in the flue gas, which represents the sum of elemental Hg (Hg^{0}, CAS Number 7439–97–6) and oxidized forms of gaseous Hg (Hg^{+2}), in mass concentration units of micrograms per dry standard cubic meter (µg/dscm).

1.2 Applicability.

1.2.1 This specification is for evaluating the acceptability of total vapor phase Hg continuous emission monitoring systems (CEMS) installed at stationary sources at the time of or soon after installation and whenever specified in the regulations. The Hg CEMS must be capable of measuring the total mass concentration in µg/dscm (regardless of speciation) of vapor phase Hg, and recording that concentration on a wet or dry basis. Particle bound Hg is not included in the measurements.

1.2.2 This specification is not designed to evaluate an installed CEMS's performance over an extended period of time nor does it identify specific calibration techniques and auxiliary procedures to assess the CEMS's performance. The source owner or operator, however, is responsible to calibrate, maintain, and operate the CEMS properly. The Administrator may require, under Clean Air Act section 114, the operator to conduct CEMS performance evaluations at other times besides the initial test to evaluate the CEMS performance. See § 60.13(c).

2.0 Summary of Performance Specification

Procedures for measuring CEMS relative accuracy, linearity, and calibration errors are outlined. CEMS installation and measurement location specifications, and data reduction procedures are included. Conformance of the CEMS with the Performance Specification is determined.

3.0 Definitions

3.1 *Continuous Emission Monitoring System (CEMS)* means the total equipment required for the determination of a pollutant concentration. The system consists of the following major subsystems:

3.2 *Sample Interface* means that portion of the CEMS used for one or more of the following: sample acquisition, sample transport, sample conditioning, and protection of the monitor from the effects of the stack effluent.

3.3 *Hg Analyzer* means that portion of the Hg CEMS that measures the total vapor phase

Hg mass concentration and generates a proportional output.

3.4 *Data Recorder* means that portion of the CEMS that provides a permanent electronic record of the analyzer output. The data recorder may provide automatic data reduction and CEMS control capabilities.

3.5 *Span Value* means the upper limit of the intended Hg concentration measurement range. The span value is a value equal to two times the emission standard.

3.6 *Linearity* means the absolute value of the difference between the concentration indicated by the Hg analyzer and the known concentration of a reference gas, expressed as a percentage of the span value, when the entire CEMS, including the sampling interface, is challenged. A linearity test procedure is performed to document the linearity of the Hg CEMS at three or more points over the measurement range.

3.7 *Calibration Drift (CD)* means the absolute value of the difference between the CEMS output response and either the upscale Hg reference gas or the zero-level Hg reference gas, expressed as a percentage of the span value, when the entire CEMS, including the sampling interface, is challenged after a stated period of operation during which no unscheduled maintenance, repair, or adjustment took place.

3.8 *Relative Accuracy (RA)* means the absolute mean difference between the pollutant concentration(s) determined by the CEMS and the value determined by the reference method (RM) plus the 2.5 percent error confidence coefficient of a series of tests divided by the mean of the RM tests. Alternatively, for sources with an average RM concentration less than 5.0 µg/dscm, the RA may be expressed as the absolute value of the difference between the mean CEMS and RM values.

4.0 Interferences [Reserved]

5.0 Safety

The procedures required under this performance specification may involve hazardous materials, operations, and equipment. This performance specification may not address all of the safety problems associated with these procedures. It is the responsibility of the user to establish appropriate safety and health practices and determine the applicable regulatory limitations prior to performing these procedures. The CEMS user's manual and materials recommended by the RM should be consulted for specific precautions to be taken.

6.0 Equipment and Supplies

6.1 CEMS Equipment Specifications.

6.1.1 Data Recorder Scale. The Hg CEMS data recorder output range must include zero and a high level value. The high level value must be approximately two times the Hg concentration corresponding to the emission standard level for the stack gas under the circumstances existing as the stack gas is sampled. A lower high level value may be used, provided that the measured values do not exceed 95 percent of the high level value.

6.1.2 The CEMS design should also provide for the determination of CE at a zero value (zero to 20 percent of the span value) and at an upscale value (between 50 and 100 percent of the high-level value).

6.2 Reference Gas Delivery System. The reference gas delivery system must be designed so that the flowrate of reference gas introduced to the CEMS is the same at all three challenge levels specified in Section 7.1, and at all times exceeds the flow requirements of the CEMS.

6.3 Other equipment and supplies, as needed by the applicable reference method used. See Section 8.6.2.

7.0 Reagents and Standards

7.1 Reference Gases. Reference gas standards are required for both elemental and oxidized Hg (Hg and mercuric chloride, $HgCl_2$). The use of National Institute of Standards and Technology (NIST)-certified or NIST-traceable standards and reagents is required. The following gas concentrations are required.

7.1.1 Zero-level. 0 to 20 percent of the span value.

7.1.2 Mid-level. 50 to 60 percent of the span value.

7.1.3 High-level. 80 to 100 percent of the span value.

7.2 Reference gas standards may also be required for the reference methods. See Section 8.6.2.

8.0 Performance Specification Test Procedure

8.1 Installation and Measurement Location Specifications.

8.1.1 CEMS Installation. Install the CEMS at an accessible location downstream of all pollution control equipment. Since the Hg CEMS sample system normally extracts gas from a single point in the stack, use a location that has been shown to be free of stratification for Hg or alternatively, SO_2 and NO_X through concentration measurement traverses for those gases. If the cause of failure to meet the RA test requirement is determined to be the measurement location and a satisfactory correction technique cannot be established, the Administrator may require the CEMS to be relocated. Measurement locations and points or paths that are most likely to provide data that will meet the RA requirements are listed below.

8.1.2 Measurement Location. The measurement location should be (1) at least two equivalent diameters downstream of the nearest control device, point of pollutant generation or other point at which a change of pollutant concentration may occur, and (2) at least half an equivalent diameter upstream from the effluent exhaust. The equivalent duct diameter is calculated as per 40 CFR part 60, appendix A, Method 1.

8.1.3 Hg CEMS Sample Extraction Point. Use a sample extraction point either (1) no less than 1.0 meter from the stack or duct wall, or (2) within the centroidal velocity traverse area of the stack or duct cross section.

8.2 RM Measurement Location and Traverse Points. Refer to Performance Specification 2 (PS 2) of this appendix. The RM and CEMS locations need not be immediately adjacent.

8.3 Linearity Test Procedure. The Hg CEMS must be constructed to permit the introduction of known concentrations of Hg and $HgCl_2$ separately into the sampling system of the CEMS immediately preceding the sample extraction filtration system such that the entire CEMS can be challenged. Sequentially inject each of at least three reference gases (zero, mid-level, and high level) for each Hg species. Record the CEMS response and subtract the reference value from the CEMS value, and express the absolute value of the difference as a percentage of the span value (see example data sheet in Figure 12A–1). For each reference gas, the absolute value of the difference between the CEMS response and the reference value shall not exceed 5 percent of the span value. If this specification is not met, identify and correct the problem before proceeding.

8.4 7-Day CD Test Procedure.

8.4.1 CD Test Period. While the affected facility is operating at more than 50 percent of normal load, or as specified in an applicable regulation, determine the magnitude of the CD once each day (at 24-hour intervals, to the extent practicable) for 7 consecutive unit operating days according to the procedure given in Sections 8.4.2 through 8.4.3. The 7 consecutive unit operating days need not be 7 consecutive calendar days. Use either Hg° or $HgCl_2$ standards for this test.

8.4.2 The purpose of the CD measurement is to verify the ability of the CEMS to conform to the established CEMS response used for determining emission concentrations or emission rates. Therefore, if periodic automatic or manual adjustments are made to the CEMS zero and upscale response settings, conduct the CD test immediately before these adjustments, or conduct it in such a way that the CD can be determined.

8.4.3 Conduct the CD test using the zero gas specified and either the mid-level or high-level point specified in Section 7.1. Introduce the reference gas to the CEMS. Record the CEMS response and subtract the reference value from the CEMS value, and express the absolute value of the difference as a percentage of the span value (see example data sheet in Figure 12A–1). For the reference gas, the absolute value of the difference between the CEMS response and the reference value shall not exceed 5 percent of the span value. If this specification is not met, identify and correct the problem before proceeding.

8.5 RA Test Procedure.

8.5.1 RA Test Period. Conduct the RA test according to the procedure given in Sections 8.5.2 through 8.6.6 while the affected facility is operating at normal full load, or as specified in an applicable subpart. The RA test may be conducted during the CD test period.

8.5.2 RM. Unless otherwise specified in an applicable subpart of the regulations, use Method 29, Method 30A, or Method 30B in appendix A to this part or American Society of Testing and Materials (ASTM) Method D6784–02 (incorporated by reference, see § 60.17) as the RM for Hg concentration. The filterable portion of the sample need not be included when making comparisons to the CEMS results. When Method 29, Method

30B, or ASTM D6784–02 is used, conduct the RM test runs with paired or duplicate sampling systems. When Method 30A is used, paired sampling systems are not required. If the RM and CEMS measure on a different moisture basis, data derived with Method 4 in appendix A to this part shall also be obtained during the RA test.

8.5.3 Sampling Strategy for RM Tests. Conduct the RM tests in such a way that they will yield results representative of the emissions from the source and can be compared to the CEMS data. It is preferable to conduct moisture measurements (if needed) and Hg measurements simultaneously, although moisture measurements that are taken within an hour of the Hg measurements may be used to adjust the Hg concentrations to a consistent moisture basis. In order to correlate the CEMS and RM data properly, note the beginning and end of each RM test period for each paired RM run (including the exact time of day) on the CEMS chart recordings or other permanent record of output.

8.5.4 Number and Length of RM and Tests. Conduct a minimum of nine RM test runs. When Method 29, Method 30B, or ASTM D6784–02 is used, only test runs for which the paired RM trains meet the relative deviation criteria (RD) of this PS shall be used in the RA calculations. In addition, for Method 29 and ASTM D6784–02, use a minimum sample time of 2 hours and for Method 30A use a minimum sample time of 30 minutes.

Note: More than nine sets of RM tests may be performed. If this option is chosen, paired RM test results may be excluded so long as the total number of paired RM test results used to determine the CEMS RA is greater than or equal to nine. However, all data must be reported including the excluded data.

8.5.5 Correlation of RM and CEMS Data. Correlate the CEMS and the RM test data as to the time and duration by first determining from the CEMS final output (the one used for reporting) the integrated average pollutant concentration for each RM test period. Consider system response time, if important, and confirm that the results are on a consistent moisture basis with the RM test. Then, compare each integrated CEMS value against the corresponding RM value. When Method 29, Method 30A, Method 30B, or ASTM D6784–02 is used, compare each CEMS value against the corresponding average of the paired RM values.

8.5.6 Paired RM Outliers.

8.5.6.1 When Method 29, Method 30B, or ASTM D6784–02 is used, outliers are identified through the determination of relative deviation (RD) of the paired RM tests. Data that do not meet the criteria should be flagged as a data quality problem. The primary reason for performing paired RM sampling is to ensure the quality of the RM data. The percent RD of paired data is the parameter used to quantify data quality. Determine RD for two paired data points as follows:

$$RD = \frac{|C_a - C_b|}{C_a + C_b} x\,100 \qquad \text{(Equation 12A-1)}$$

Where: C_a and C_b are concentration values determined from each of the two samples, respectively.

8.5.6.2 A minimum performance criteria for RM Hg data is that RD for any data pair must be ≤10 percent as long as the mean Hg concentration is greater than 1.0 μgm/m³. If the mean Hg concentration is less than or equal to 1.0 μgm/m³, the RD must be ≤20 percent. Pairs of RM data exceeding these RD criteria should be eliminated from the data set used to develop a Hg CEMS correlation or to assess CEMS RA.

8.5.7 Calculate the mean difference between the RM and CEMS values in the units of micrograms per cubic meter (μgm/m³), the standard deviation, the confidence coefficient, and the RA according to the procedures in Section 12.0.

8.6 Reporting. At a minimum (check with the appropriate EPA Regional Office, State or local Agency for additional requirements, if any), summarize in tabular form the results of the RD tests and the RA tests or alternative RA procedure, as appropriate. Include all data sheets, calculations, charts (records of CEMS responses), reference gas concentration certifications, and any other information necessary to confirm that the performance of the CEMS meets the performance criteria.

9.0 Quality Control [Reserved]

10.0 Calibration and Standardization [Reserved]

11.0 Analytical Procedure

Sample collection and analysis are concurrent (see Section 8.0). Refer to the RM employed for specific analytical procedures.

12.0 Calculations and Data Analysis

Summarize the results on a data sheet similar to Figure 2–2 for PS 2.

12.1 Consistent Basis. All data from the RM and CEMS must be compared in units of μgm/m³, on a consistent and identified moisture basis. The values must be standardized to 20 °C, 760 mm Hg.

12.1.1 Moisture Correction (as applicable). If the RM and CEMS measure Hg on a different moisture basis, use Equation 12A–2 to make the appropriate corrections to the Hg concentrations.

$$Concentration_{(dry)} = \frac{Concentration_{(wet)}}{(1 - B_{ws})} \qquad \text{(Equation 12A-2)}$$

Where: B_{ws} is the moisture content of the flue gas from Method 4, expressed as a decimal fraction (e.g., for 8.0 percent H_2O, $B_{ws} = 0.08$).

12.2 Arithmetic Mean. Calculate the arithmetic mean of the difference, d, of a data set as follows:

$$\bar{d} = \frac{1}{n}\sum_{i=1}^{n} d_i \qquad \text{(Equation 12A-3)}$$

Where: n = Number of data points.

12.3 Standard Deviation. Calculate the standard deviation, S_d, as follows:

$$S_d = \left[\frac{\sum_{i=1}^{n} d_i^2 - \frac{\left[\sum_{i=1}^{n} d_i\right]^2}{n}}{n-1} \right]^{\frac{1}{2}} \qquad \text{(Equation 12A-4)}$$

Where:

$\sum_{i=1}^{n} d_i$ = Algebraic sum of the individual differences d_i.

12.3 Confidence Coefficient (CC). Calculate the 2.5 percent error confidence coefficient (one-tailed), CC, as follows:

$$CC = t_{0.975} \frac{S_d}{\sqrt{n}} \qquad \text{(Equation 12A-5)}$$

12.4 RA. Calculate the RA of a set of data as follows:

$$RA = \frac{\left[\left|\bar{d}\right| + \left|CC\right|\right]}{\overline{RM}} x\,100 \qquad \text{(Equation 12A-6)}$$

Where:

$|\bar{d}|$ = Absolute value of the mean differences (from Equation 12A–3).

$|CC|$ = Absolute value of the confidence coefficient (from Equation 12A–5).

$\bar{RM}$ = Average RM value.

13.0 Method Performance

13.1 Linearity. Linearity is assessed at zero-level, mid-level and high-level values as given below using standards for both Hg^0 and $HgCl_2$. The mean difference between the indicated CEMS concentration and the reference concentration value for each standard shall be no greater than 5 percent of the span value.

13.2 CD. The CD shall not exceed 5 percent of the span value on any of the 7 days of the CD test.

13.3 RA. The RA of the CEMS must be no greater than 10 percent of the mean value of the RM test data in terms of units of µg/dscm. Alternatively, (1) if the mean RM is less than 10.0 µg/dscm, then the RA of the CEMS must be no greater than 20 percent, or (2) if the mean RM is less than 5.0 µgm/m^3, the results are acceptable if the absolute value of the difference between the mean RM and CEMS values does not exceed 1.0 µg/dscm.

14.0 Pollution Prevention [Reserved]

15.0 Waste Management [Reserved]

16.0 Alternative Procedures [Reserved]

17.0 Bibliography

17.1 40 CFR part 60, appendix B, ''Performance Specification 2—Specifications and Test Procedures for SO_2 and NO_X Continuous Emission Monitoring Systems in Stationary Sources.''

17.2 40 CFR part 60, appendix A, ''Method 29—Determination of Metals Emissions from Stationary Sources.''

17.3 40 CFR part 60, appendix A, ''Method 30A—Determination of Total Vapor Phase Mercury Emissions From Stationary Sources (Instrumental Analyzer Procedure).

17.4 40 CFR part 60, appendix A, ''Method 30B—Determination of Total Vapor Phase Mercury Emissions From Coal-Fired Combustion Sources Using Carbon Sorbent Traps.''

17.5 ASTM Method D6784–02, ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method).''

18.0 Tables and Figures

TABLE 12A–1—T–VALUES

n[a]	$t_{0.975}$
2	12.706
3	4.303
4	3.182
5	2.776
6	2.571
7	2.447
8	2.365
9	2.306
10	2.262
11	2.228
12	2.201
13	2.179
14	2.160
15	2.145
16	2.131

[a] The values in this table are already corrected for n–1 degrees of freedom. Use n equal to the number of individual values.

FIGURE 12A–1—LINEARITY AND CE DETERMINATION

	Date	Time	Reference Gas value µgm/m^3	CEMS measured value µgm/m^3	Absolute difference	CE (% of span value)
Zero level						
Mid level						

FIGURE 12A–1—LINEARITY AND CE DETERMINATION—Continued

	Date	Time	Reference Gas value µgm/m^3	CEMS measured value µgm/m^3	Absolute difference	CE (% of span value)
High level						

Performance Specification 12B—Specifications and Test Procedures for Monitoring Total Vapor Phase Mercury Emissions From Stationary Sources Using a Sorbent Trap Monitoring System

1.0 Scope and Application

The purpose of Performance Specification 12B (PS 12B) is to evaluate the acceptability of sorbent trap monitoring systems used to monitor total vapor-phase mercury (Hg) emissions in stationary source flue gas streams. These monitoring systems involve continuous repetitive in-stack sampling using paired sorbent media traps with periodic analysis of the time-integrated samples. Persons using PS 12B should have a thorough working knowledge of Methods 1, 2, 3, 4, 5 and 30B in appendices A–1 through A–3 and A–8 to this part.

1.1 Analyte.

The analyte measured by these procedures and specifications is total vapor phase Hg in the flue gas, which represents the sum of elemental Hg (Hg^0, CAS Number 7439–97–6) and gaseous forms of oxidized Hg (Hg^{+2}) in mass concentration units of micrograms per dry standard cubic meter (µg/dscm).

1.2 Applicability.

1.2.1 These procedures are only intended for use under relatively low particulate conditions (e.g., monitoring after all pollution control devices). This specification is for evaluating the acceptability of total vapor phase Hg sorbent trap monitoring systems installed at stationary sources at the time of, or soon after, installation and whenever specified in the regulations. The Hg monitoring system must be capable of measuring the total mass concentration in µg/dscm (regardless of speciation) of vapor phase Hg.

1.2.2 This specification is not designed to evaluate an installed sorbent trap monitoring system's performance over an extended period of time nor does it identify specific techniques and auxiliary procedures to assess the system's performance. The source owner or operator, however, is responsible to calibrate, maintain, and operate the monitoring system properly. The Administrator may require, under Clean Air Act section 114, the operator to conduct performance evaluations at other times besides the initial test to evaluate the CEMS performance. See § 60.13(c).

2.0 Principle

Known volumes of flue gas are continuously extracted from a stack or duct through paired, in-stack, pre-spiked sorbent media traps at appropriate nominal flow rates. The sorbent traps in the sampling system are periodically exchanged with new ones, prepared for analysis as needed, and analyzed by any technique that can meet the performance criteria. For quality-assurance purposes, a section of each sorbent trap is spiked with Hg^0 prior to sampling. Following sampling, this section is analyzed separately and a specified percentage of the spike must be recovered. Paired train sampling is required to determine method precision.

3.0 Definitions

3.1 *Sorbent Trap Monitoring System (STMS)* means the total equipment required for the collection of paired trap gaseous Hg samples using paired three-partition sorbent traps. Refer to Method 30B in this subpart for a complete description of the needed equipment.

3.2 *Relative Accuracy (RA)* means the absolute mean difference between the pollutant concentration(s) determined by the CMS and the value determined by the reference method (RM) plus the 2.5 percent error confidence coefficient of a series of tests divided by the mean of the RM tests. Alternatively, for low concentration sources, the RA may be expressed as the absolute value of the difference between the mean STMS and RM values. It is used to assess the bias of the STMS.

3.3 *Relative Deviation (RD)* means the absolute difference of the analyses of a paired set of traps divided by the sum of those analyses, expressed as a percentage. It is used to assess the precision of the STMS.

3.4 *Spike Recovery* means the amount of Hg mass measured from the spiked trap section as a percentage of the amount spiked. It is used to assess sample matrix interference.

4.0 Interferences [Reserved]

5.0 Safety

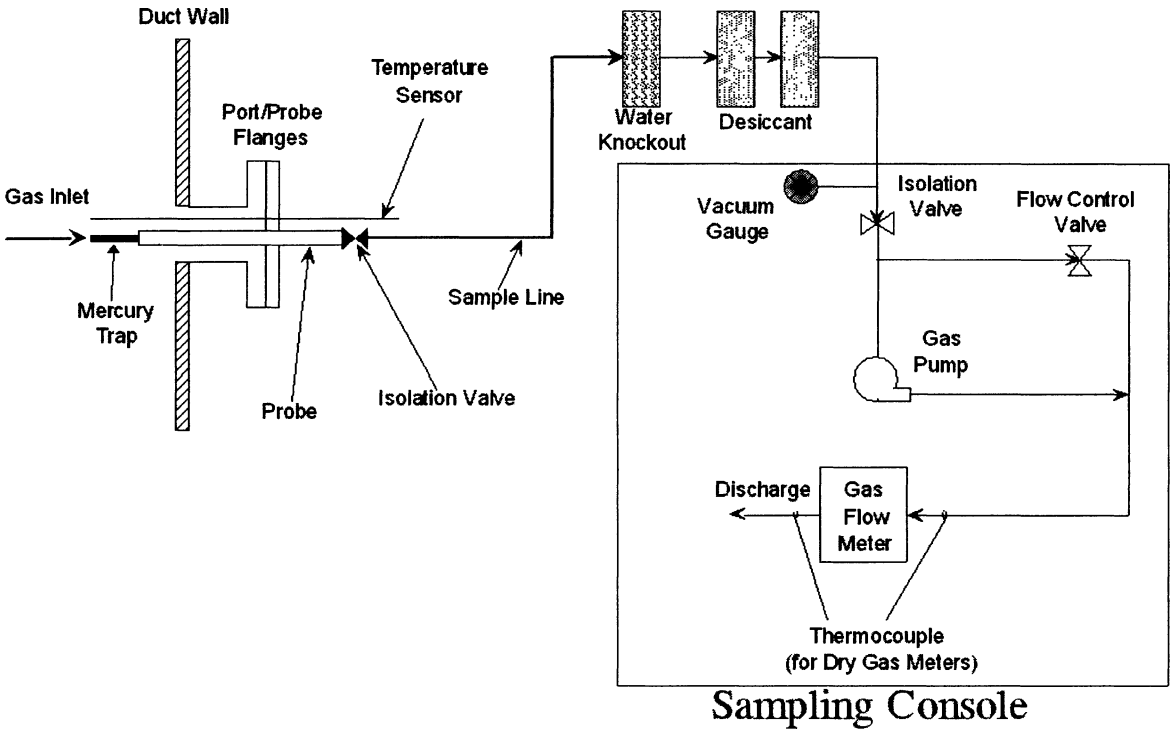
The procedures required under this performance specification may involve hazardous materials, operations, and equipment. This performance specification may not address all of the safety problems associated with these procedures. It is the responsibility of the user to establish appropriate safety and health practices and determine the applicable regulatory limitations prior to performing these procedures.

6.0 Equipment and Supplies

6.1 STMS Equipment Specifications.

6.1.1 Sampling System. The equipment described in Method 30B in appendix A–8 to this subpart shall be used to continuously sample for Hg emissions, with the substitution of three-section traps in place of two-section traps, as described below. A typical sorbent trap sampling system is shown in Figure 12B–1.

6.1.2 Three-Section Sorbent Traps. The sorbent media used to collect Hg must be configured in traps with three distinct and identical segments or sections, connected in series, to be separately analyzed. Section 1 is designated for primary capture of gaseous Hg. Section 2 is designated as a backup section for determination of vapor-phase Hg breakthrough. Section 3 is designated for QA/QC purposes where this section shall be spiked with a known amount of gaseous Hg^0 prior to sampling and later analyzed to determine recovery efficiency.



6.1.3 Gaseous Hg^0 Sorbent Trap Spiking System. A known mass of gaseous Hg^0 must be spiked onto section 3 of each sorbent trap prior to sampling. Any approach capable of quantitatively delivering known masses of Hg^0 onto sorbent traps is acceptable. Several technologies or devices are available to meet this objective. Their practicality is a function of Hg mass spike levels. For low levels, NIST-certified or NIST-traceable gas generators or tanks may be suitable, but will likely require long preparation times. A more practical, alternative system, capable of delivering almost any mass required, makes use of NIST-certified or NIST-traceable Hg salt solutions (e.g., $Hg(NO_3)_2$). With this system, an aliquot of known volume and concentration is added to a reaction vessel containing a reducing agent (e.g., stannous chloride); the Hg salt solution is reduced to Hg^0 and purged onto section 3 of the sorbent trap using an impinger sparging system.

6.1.4 Sample Analysis Equipment. Any analytical system capable of quantitatively recovering and quantifying total gaseous Hg from sorbent media is acceptable provided that the analysis can meet the performance criteria in Table 12B–1 in section 9 of this performance specification. Candidate recovery techniques include leaching, digestion, and thermal desorption. Candidate analytical techniques include ultraviolet atomic fluorescence (UV AF); ultraviolet atomic absorption (UV AA), with and without gold trapping; and in-situ X-ray fluorescence (XRF) analysis.

7.0 Reagents and Standards

Only NIST-certified or NIST-traceable calibration gas standards and reagents shall be used for the tests and procedures required under this performance specification. The sorbent media may be any collection material (e.g., carbon, chemically-treated filter, etc.) capable of quantitatively capturing and recovering for subsequent analysis, all gaseous forms of Hg in the emissions from the intended application. Selection of the sorbent media shall be based on the material's ability to achieve the performance criteria contained in this method as well as the sorbent's vapor phase Hg capture efficiency for the emissions matrix and the expected sampling duration at the test site.

8.0 Performance Specification Test Procedure

8.1 Installation and Measurement Location Specifications.

8.1.1 Selection of Sampling Site. Sampling site information should be obtained in accordance with Method 1 in appendix A–1 to this part. Identify a monitoring location representative of source Hg emissions. Locations shown to be free of stratification through measurement traverses for Hg or other gases such as SO_2 and NO_x may be one such approach. An estimation of the expected stack Hg concentration is required to establish a target sample flow rate, total gas sample volume, and the mass of Hg^0 to be spiked onto section 3 of each sorbent trap.

8.1.2 Pre-sampling Spiking of Sorbent Traps. Based on the estimated Hg concentration in the stack, the target sample rate and the target sampling duration, calculate the expected mass loading for section 1 of each sorbent trap (for an example calculation, see Section 12.1 of this performance specification). The pre-sampling spike to be added to section 3 of each sorbent trap shall be within ± 50 percent of the expected section 1 mass loading. Spike section 3 of each sorbent trap at this level, as described in Section 6.1.3 of this performance specification. For each sorbent trap, keep a record of the mass of Hg^0 added to section 3. This record shall include, at a minimum, the identification number of the trap, the date and time of the spike, the name of the analyst performing the procedure, the method of spiking, the mass of Hg^0 added to section 3 of the trap (µg), and the supporting calculations.

8.1.3 Pre-test Leak Check. Perform a leak check with the sorbent traps in place in the sampling system. Draw a vacuum in each sample train. Adjust the vacuum in each sample train to ~15″ Hg. Use the gas flow meter to determine leak rate. The leakage rate must not exceed 4 percent of the target sampling rate. Once the leak check passes this criterion, carefully release the vacuum in the sample train, then seal the sorbent trap inlet until the probe is ready for insertion into the stack or duct.

8.1.4 Determination of Flue Gas Characteristics. Determine or measure the flue gas measurement environment characteristics (gas temperature, static pressure, gas velocity, stack moisture, etc.) in order to determine ancillary requirements such as probe heating requirements (if any), sampling rate, proportional sampling conditions, moisture management, etc.

8.2 Sample Collection.

8.2.1 Prepare to Sample. Remove the plug from the end of each sorbent trap and store each plug in a clean sorbent trap storage container. Remove the stack or duct port cap and insert the probe(s). Secure the probe(s) and ensure that no leakage occurs between the duct and environment. Record initial data including the sorbent trap ID, start time, starting gas flow meter readings, initial temperatures, set points, and any other appropriate information.

8.2.2 Flow Rate Control. Set the initial sample flow rate at the target value from section 8.1.1 of this performance specification. Then, for every operating hour

during the sampling period, record the date and time, the sample flow rate, the gas flow meter reading, the stack temperature (if needed), the flow meter temperatures (if needed), temperatures of heated equipment such as the vacuum lines and the probes (if heated), and the sampling system vacuum readings. Also, record the stack gas flow rate, as measured by the certified flow monitor, and the ratio of the stack gas flow rate to the sample flow rate. Adjust the sampling flow rate to maintain proportional sampling, i.e., keep the ratio of the stack gas flow rate to sample flow rate within ±25 percent of the reference ratio from the first hour of the data collection period (see section 12.2 of this performance specification). The sample flow rate through a sorbent trap monitoring system during any hour (or portion of an hour) that the unit is not operating shall be zero.

8.2.3 Stack Gas Moisture Determination. If data from the sorbent trap monitoring system will be used to calculate Hg mass emissions, determine the stack gas moisture content using a certified continuous moisture monitoring system.

8.2.4 Essential Operating Data. Obtain and record any essential operating data for the facility during the test period, e.g., the barometric pressure for correcting the sample volume measured by a dry gas meter to standard conditions. At the end of the data collection period, record the final gas flow meter reading and the final values of all other essential parameters.

8.2.5 Post-test Leak Check. When sampling is completed, turn off the sample pump, remove the probe/sorbent trap from the port and carefully re-plug the end of each sorbent trap. Perform a leak check with the sorbent traps in place, at the maximum vacuum reached during the sampling period. Use the same general approach described in section 8.1.3 of this performance specification. Record the leakage rate and vacuum. The leakage rate must not exceed 4 percent of the average sampling rate for the data collection period. Following the leak check, carefully release the vacuum in the sample train.

8.2.6 Sample Recovery. Recover each sampled sorbent trap by removing it from the probe and seal both ends. Wipe any deposited material from the outside of the sorbent trap. Place the sorbent trap into an appropriate sample storage container and store/preserve it in an appropriate manner.

8.2.7 Sample Preservation, Storage, and Transport. While the performance criteria of this approach provide for verification of appropriate sample handling, it is still important that the user consider, determine, and plan for suitable sample preservation, storage, transport, and holding times for these measurements. Therefore, procedures such as those in ASTM D6911B03 ''Standard Guide for Packaging and Shipping Environmental Samples for Laboratory Analysis'' should be followed for all samples.

8.2.8 Sample Custody. Proper procedures and documentation for sample chain of custody are critical to ensuring data integrity. Chain of custody procedures such as in ASTM D4840B99 (reapproved 2004) ''Standard Guide for Sample Chain-of-Custody Procedures'' should be followed for all samples (including field samples and blanks).

8.3 Sorbent Trap Monitoring System RATA Procedures

For the initial certification of a sorbent trap monitoring system, a RATA is required. For ongoing QA purposes, the RATA must be repeated annually. To the extent practicable, the annual RATAs should be performed in the same quarter of the calendar year.

8.3.1 Reference Methods. Acceptable Hg reference methods for the RATA of a sorbent trap system include ASTM D6784–02 (the Ontario Hydro Method), Method 29 in appendix A–8 to this part, Method 30A in appendix A–8 to this part, and Method 30B in appendix A–8 to this part. When the Ontario Hydro Method or Method 29 is used, paired sampling trains are required. To validate an Ontario Hydro or Method 29 test run, the relative deviation (RD), calculated according to Section 11.6 of this performance specification, must not exceed 10 percent, when the average concentration is greater than 1.0 μg/m^3. If the average concentration is ≤# 1.0 μg/m^3, the RD must not exceed 20 percent. The RD results are also acceptable if the absolute difference between the Hg concentrations measured by the paired trains does not exceed 0.03 μg/m^3. If the RD criterion is met, the run is valid. For each valid run, average the Hg concentrations measured by the two trains (vapor phase Hg, only).

8.3.2 Special Considerations. A minimum of 9 valid runs are required for each RATA. If more than 9 runs are performed, a maximum of three runs may be discarded. The time per run must be long enough to collect a sufficient mass of Hg to analyze. The type of sorbent material used by the traps must be the same as for daily operation of the monitoring system; however, the size of the traps used for the RATA may be smaller than the traps used for daily operation of the system. Spike the third section of each sorbent trap with elemental Hg, as described in section 8.1.2 of this performance specification. Install a new pair of sorbent traps prior to each test run. For each run, the sorbent trap data shall be validated according to the quality assurance criteria in Table 12B–1 in section 9.0. Calculate the relative accuracy (RA) of the STMS, on a μg/dscm basis, according to sections 12.2 through 12.5 of Performance Specification 2 in appendix B to this part. The RA of the STMS must be no greater than 10 percent of the mean value of the RM test data in terms of units of μg/dscm. Alternatively, (1) if the mean RM is less than 10.0 μg/dscm, then the RA of the STMS must be no greater than 20 percent, or (2) if the RM is less than 2.0 μg/dscm, then the RA results are acceptable if the absolute difference between the means of the RM and STMS values does not exceed 0.5 μg/dscm.

9.0 Quality Assurance and Quality Control (QA/QC)

Table 12B–1 summarizes the QA/QC performance criteria that are used to validate the Hg emissions data from sorbent trap monitoring systems. Failure to achieve these performance criteria will result in invalidation of Hg emissions data, except where otherwise noted.

TABLE 12B–1—QA/QC CRITERIA FOR SORBENT TRAP MONITORING SYSTEMS

QA/QC test or specification	Acceptance criteria	Frequency	Consequences if not met
Pre-test leak check	≤4% of target sampling rate	Prior to sampling	Sampling shall not commence until the leak check is passed.
Post-test leak check.	≤4% of average sampling rate	After sampling	Invalidate the data from the paired traps or, if certain conditions are met, report adjusted data from a single trap. (*see* Section 12.7.1.3)
Ratio of stack gas flow rate to sample flow rate.	No more than 5% of the hourly ratios or 5 hourly ratios (whichever is less restrictive) may deviate from the reference ratio by more than ± 25%.	Every hour throughout data collection period.	Invalidate the data from the paired traps or, if certain conditions are met, report adjusted data from a single trap. (*see* Section 12.7.1.3)
Sorbent trap section 2 breakthrough.	≤5% of Section 1 Hg mass	Every sample	Invalidate the data from the paired traps or, if certain conditions are met, report adjusted data from a single trap. (*see* Section 12.7.1.3)

TABLE 12B–1—QA/QC CRITERIA FOR SORBENT TRAP MONITORING SYSTEMS—Continued

QA/QC test or specification	Acceptance criteria	Frequency	Consequences if not met
Paired sorbent trap agreement	≤10% Relative Deviation (RD) if the average concentration is > 1.0 μg/m³. ≤20% RD if the average concentration is ≤1.0 μg/m³. Results also acceptable if absolute difference between concentrations from paired traps is ≤0.03 μg/m³.	Every sample	Either invalidate the data from the paired traps or report the results from the trap with the higher Hg concentration.
Spike Recovery Study.	Average recovery between 85% and 115% for each of the 3 spike concentration levels.	Prior to analyzing field samples and prior to use of new sorbent media.	Field samples shall not be analyzed until the percent recovery criteria has been met.
Multipoint analyzer calibration	Each analyzer reading within ±10% of true value and $r^2 \geq 0.99$.	On the day of analysis, before analyzing any samples.	Recalibrate until successful.
Analysis of independent calibration standard.	Within ±10% of true value	Following daily calibration, prior to analyzing field samples.	Recalibrate and repeat independent standard analysis until successful.
Spike recovery from section 3 of sorbent trap.	75–125% of spike amount	Every sample	Invalidate the data from the paired traps or, if certain conditions are met, report adjusted data from a single trap. (*see* Section 12.7.1.3)
RATA	RA ≤10.0% of RM mean value; or (1) RA ≤20.0% if RM mean value ≤10.0 μg/dscm; or (2) if RM mean value ≤2.0 μg/dscm, then absolute difference between RM mean value and STMS ≤0.5 μg/dscm.	For initial certification and annually thereafter.	Data from the system are invalidated until a RATA is passed.
Gas flow meter calibration	Calibration factor (Y) within ±5% of average value from the most recent 3-point calibration.	At three settings prior to initial use and at least quarterly at one setting thereafter. For mass flow meters, initial calibration with stack gas is required.	Recalibrate the meter at three orfice settings to determine a new value of Y.
Temperature sensor calibration	Absolute temperature measured by sensor within ±1.5% of a reference sensor.	Prior to initial use and at least quarterly thereafter.	Recalibrate. Sensor may not be used until specification is met.
Barometer calibration.	Absolute pressure measured by instrument within ±10 mm Hg of reading with a NIST-traceable barometer..	Prior to initial use and at least quarterly thereafter.	Recalibrate. Instrument may not be used until specification is met.

10.0 Calibration and Standardization

10.1 Gaseous and Liquid Standards. Only NIST certified or NIST-traceable calibration standards (i.e., calibration gases, solutions, etc.) shall be used for the spiking and analytical procedures in this performance specification.

10.2 Gas Flow Meter Calibration. The manufacturer or supplier of the gas flow meter should perform all necessary set-up, testing, programming, etc., and should provide the end user with any necessary instructions, to ensure that the meter will give an accurate readout of dry gas volume in standard cubic meters for the particular field application.

10.2.1 Initial Calibration. Prior to its initial use, a calibration of the flow meter shall be performed. The initial calibration may be done by the manufacturer, by the equipment supplier, or by the end user. If the flow meter is volumetric in nature (e.g., a dry gas meter), the manufacturer, equipment supplier, or end user may perform a direct volumetric calibration using any gas. For a mass flow meter, the manufacturer, equipment supplier, or end user may calibrate the meter using a bottled gas mixture containing 12 ±0.5% CO_2, 7 ±0.5% O_2, and balance N_2, or these same gases in proportions more representative of the expected stack gas composition. Mass flow meters may also be initially calibrated on-site, using actual stack gas.

10.2.1.1 Initial Calibration Procedures. Determine an average calibration factor (Y) for the gas flow meter, by calibrating it at three sample flow rate settings covering the range of sample flow rates at which the sorbent trap monitoring system typically operates. You may either follow the procedures in section 10.3.1 of Method 5 in appendix A–3 to this part or the procedures in section 16 of Method 5 in appendix A–3 to this part. If a dry gas meter is being calibrated, use at least five revolutions of the meter at each flow rate.

10.2.1.2 Alternative Initial Calibration Procedures. Alternatively, you may perform the initial calibration of the gas flow meter using a reference gas flow meter (RGFM). The RGFM may be either: (1) A wet test meter calibrated according to section 10.3.1 of Method 5 in appendix A–3 to this part; (2) A gas flow metering device calibrated at multiple flow rates using the procedures in section 16 of Method 5 in appendix A–3 to this part; or (3) A NIST–traceable calibration device capable of measuring volumetric flow to an accuracy of 1 percent. To calibrate the gas flow meter using the RGFM, proceed as follows: While the sorbent trap monitoring system is sampling the actual stack gas or a compressed gas mixture that simulates the stack gas composition (as applicable), connect the RGFM to the discharge of the system. Care should be taken to minimize the dead volume between the sample flow meter being tested and the RGFM. Concurrently measure dry gas volume with the RGFM and the flow meter being calibrated for a minimum of 10 minutes at each of three flow rates covering the typical range of operation of the sorbent trap monitoring system. For each 10-minute (or longer) data collection period, record the total sample volume, in units of dry standard cubic meters (dscm), measured by the RGFM and the gas flow meter being tested.

10.2.1.3 Initial Calibration Factor. Calculate an individual calibration factor Yi at each tested flow rate from section 10.2.1.1 or 10.2.1.2 of this performance specification (as applicable), by taking the ratio of the

reference sample volume to the sample volume recorded by the gas flow meter. Average the three Yi values, to determine Y, the calibration factor for the flow meter. Each of the three individual values of Yi must be within ±0.02 of Y. Except as otherwise provided in sections 10.2.1.4 and 10.2.1.5 of this performance specification, use the average Y value from the three level calibration to adjust all subsequent gas volume measurements made with the gas flow meter.

10.2.1.4 Initial On-Site Calibration Check. For a mass flow meter that was initially calibrated using a compressed gas mixture, an on-site calibration check shall be performed before using the flow meter to provide data for this part. While sampling stack gas, check the calibration of the flow meter at one intermediate flow rate typical of normal operation of the monitoring system. Follow the basic procedures in section 10.2.1.1 or 10.2.1.2 of this performance specification. If the onsite calibration check shows that the value of Yi, the calibration factor at the tested flow rate, differs by more than 5 percent from the value of Y obtained in the initial calibration of the meter, repeat the full 3-level calibration of the meter using stack gas to determine a new value of Y, and apply the new Y value to all subsequent gas volume measurements made with the gas flow meter.

10.2.1.5 Ongoing Quality Assurance. Recalibrate the gas flow meter quarterly at one intermediate flow rate setting representative of normal operation of the monitoring system. Follow the basic procedures in section 10.2.1.1 or 10.2.1.2 of this performance specification. If a quarterly recalibration shows that the value of Yi, the calibration factor at the tested flow rate, differs from the current value of Y by more than 5 percent, repeat the full 3-level calibration of the meter to determine a new value of Y, and apply the new Y value to all subsequent gas volume measurements made with the gas flow meter.

10.3 Thermocouples and Other Temperature Sensors. Use the procedures and criteria in section 10.3 of Method 2 in appendix A–1 to this part to calibrate in-stack temperature sensors and thermocouples. Calibrations must be performed prior to initial use and at least quarterly thereafter. At each calibration point, the absolute temperature measured by the temperature sensor must agree to within ±1.5 percent of the temperature measured with the reference sensor, otherwise the sensor may not continue to be used.

10.4 Barometer. Calibrate against a NIST-traceable barometer. Calibration must be performed prior to initial use and at least quarterly thereafter. At each calibration point, the absolute pressure measured by the barometer must agree to within ±10 mm Hg of the pressure measured by the NIST-traceable barometer, otherwise the barometer may not continue to be used.

10.5 Other Sensors and Gauges. Calibrate all other sensors and gauges according to the procedures specified by the instrument manufacturer(s).

10.6 Analytical System Calibration. See section 11.1 of this performance specification.

11.0 Analytical Procedures

The analysis of the Hg samples may be conducted using any instrument or technology capable of quantifying total Hg from the sorbent media and meeting the performance criteria in section 9 of this performance specification.

11.1 Analyzer System Calibration. Perform a multipoint calibration of the analyzer at three or more upscale points over the desired quantitative range (multiple calibration ranges shall be calibrated, if necessary). The field samples analyzed must fall within a calibrated, quantitative range and meet the necessary performance criteria. For samples that are suitable for aliquotting, a series of dilutions may be needed to ensure that the samples fall within a calibrated range. However, for sorbent media samples that are consumed during analysis (e.g., thermal desorption techniques), extra care must be taken to ensure that the analytical system is appropriately calibrated prior to sample analysis. The calibration curve range(s) should be determined based on the anticipated level of Hg mass on the sorbent media. Knowledge of estimated stack Hg concentrations and total sample volume may be required prior to analysis. The calibration curve for use with the various analytical techniques (e.g., UV AA, UV AF, and XRF) can be generated by directly introducing standard solutions into the analyzer or by spiking the standards onto the sorbent media and then introducing into the analyzer after preparing the sorbent/standard according to the particular analytical technique. For each calibration curve, the value of the square of the linear correlation coefficient, i.e., r^2, must be ≥ 0.99, and the analyzer response must be within ±10 percent of reference value at each upscale calibration point. Calibrations must be performed on the day of the analysis, before analyzing any of the samples. Following calibration, an independently prepared standard (not from same calibration stock solution) shall be analyzed. The measured value of the independently prepared standard must be within ±10 percent of the expected value.

11.2 Sample Preparation. Carefully separate the three sections of each sorbent trap. Combine for analysis all materials associated with each section, i.e., any supporting substrate that the sample gas passes through prior to entering a media section (e.g., glass wool, polyurethane foam, etc.) must be analyzed with that segment.

11.3 Spike Recovery Study. Before analyzing any field samples, the laboratory must demonstrate the ability to recover and quantify Hg from the sorbent media by performing the following spike recovery study for sorbent media traps spiked with elemental mercury. Using the procedures described in sections 6.2 and 12.1 of this performance specification, spike the third section of nine sorbent traps with gaseous Hg^0, i.e., three traps at each of three different mass loadings, representing the range of masses anticipated in the field samples. This will yield a 3 x 3 sample matrix. Prepare and analyze the third section of each spiked trap, using the techniques that will be used to prepare and analyze the field samples. The average recovery for each spike concentration must be between 85 and 115 percent. If multiple types of sorbent media are to be analyzed, a separate spike recovery study is required for each sorbent material. If multiple ranges are calibrated, a separate spike recovery study is required for each range.

11.4 Field Sample Analyses. Analyze the sorbent trap samples following the same procedures that were used for conducting the spike recovery study. The three sections of each sorbent trap must be analyzed separately (i.e., section 1, then section 2, then section 3). Quantify the total mass of Hg for each section based on analytical system response and the calibration curve from section 10.1 of this performance specification. Determine the spike recovery from sorbent trap section 3. The spike recovery must be no less than 75 percent and no greater than 125 percent. To report the final Hg mass for each trap, add together the Hg masses collected in trap sections 1 and 2.

12.0 Calculations, Data Reduction, and Data Analysis

12.1 Calculation of Pre-Sampling Spiking Level. Determine sorbent trap section 3 spiking level using estimates of the stack Hg concentration, the target sample flow rate, and the expected sample duration. First, calculate the expected Hg mass that will be collected in section 1 of the trap. The pre-sampling spike must be within ±50 percent of this mass.

Example calculation: For an estimated stack Hg concentration of 5 μg/m³, a target sample rate of 0.30 L/min, and a sample duration of 5 days:

(0.30 L/min) (1440 min/day) (5 days) (10^{-3} m³/liter) (5 μg/m³) = 10.8 μg

A pre-sampling spike of 10.8 μg ± 50 percent is, therefore, appropriate.

12.2 Calculations for Flow-Proportional Sampling. For the first hour of the data collection period, determine the reference ratio of the stack gas volumetric flow rate to the sample flow rate, as follows:

$$R_{ref} = \frac{KQ_{ref}}{F_{ref}} \qquad \text{(Equation 12B-1)}$$

Where:

R_{ref} = Reference ratio of hourly stack gas flow rate to hourly sample flow rate

Q_{ref} = Average stack gas volumetric flow rate for first hour of collection period (scfh)

F_{ref} = Average sample flow rate for first hour of the collection period, in appropriate units (e.g., liters/min, cc/min, dscm/min)

K = Power of ten multiplier, to keep the value of R_{ref} between 1 and 100. The appropriate K value will depend on the selected units of measure for the sample flow rate.

Then, for each subsequent hour of the data collection period, calculate ratio of the stack gas flow rate to the sample flow rate using Equation 12B–2:

$$R_h = \frac{KQ_h}{F_h} \qquad \text{(Equation 12B-2)}$$

Where:

R_h = Ratio of hourly stack gas flow rate to hourly sample flow rate

Q_h = Average stack gas volumetric flow rate for the hour (scfh)
F_h = Average sample flow rate for the hour, in appropriate units (e.g., liters/min, cc/min, dscm/min)
K = Power of ten multiplier, to keep the value of R_h between 1 and 100. The appropriate K value will depend on the selected units of measure for the sample flow rate and the range of expected stack gas flow rates.

Maintain the value of R_h within ±25 percent of R_{ref} throughout the data collection period.

12.3 Calculation of Spike Recovery. Calculate the percent recovery of each section 3 spike, as follows:

$$\%R = \frac{M_3}{M_s} \times 100 \qquad \text{(Equation 12B-3)}$$

Where:

%R = Percentage recovery of the pre-sampling spike
M_3 = Mass of Hg recovered from section 3 of the sorbent trap, (µg)
M_s = Calculated Hg mass of the pre-sampling spike, from section 8.1.2 of this performance specification, (µg)

12.4 Calculation of Breakthrough. Calculate the percent breakthrough to the second section of the sorbent trap, as follows:

$$\%B = \frac{M_2}{M_1} \times 100 \qquad \text{(Equation 12B-4)}$$

Where:

%B = Percent breakthrough
M_2 = Mass of Hg recovered from section 2 of the sorbent trap, (µg)
M_1 = Mass of Hg recovered from section 1 of the sorbent trap, (µg)

12.5 Calculation of Hg Concentration. Calculate the Hg concentration for each sorbent trap, using the following equation:

$$C = \frac{M^*}{V_t} \qquad \text{(Equation 12B-5)}$$

Where:

C = Concentration of Hg for the collection period, (µg/dscm)
M* = Total mass of Hg recovered from sections 1 and 2 of the sorbent trap, (µg)
V_t = Total volume of dry gas metered during the collection period, (dscm). For the purposes of this performance specification, standard temperature and pressure are defined as 20 °C and 760 mm Hg, respectively.

12.6 Calculation of Paired Trap Agreement. Calculate the relative deviation (RD) between the Hg concentrations measured with the paired sorbent traps:

$$RD = \frac{|C_a - C_b|}{C_a + C_b} x\,100 \qquad \text{(Equation 12B-6)}$$

Where:

RD = Relative deviation between the Hg concentrations from traps ''a'' and ''b'' (percent)
C_a = Concentration of Hg for the collection period, for sorbent trap ''a'' (µg/dscm)
C_b = Concentration of Hg for the collection period, for sorbent trap ''b'' (µg/dscm)

12.7 Data Reduction.

12.7.1 Sorbent Trap Monitoring Systems. Typical data collection periods for normal, day-to-day operation of a sorbent trap monitoring system range from about 24 hours to 168 hours. For the required RATAs of the system, smaller sorbent traps are often used, and the data collection time per run is considerably shorter (e.g., 1 hour or less). Generally speaking, the acceptance criteria for the following five QA specifications in Table 1 above must be met to validate a data collection period: (a) The post-test leak check; (b) the ratio of stack gas flow rate to sample flow rate; (c) section 2 breakthrough; (d) paired trap agreement; and (e) section 3 spike recovery.

12.7.1.1 When both traps meet the acceptance criteria for all five QA specifications, the two measured Hg concentrations shall be averaged arithmetically and the average value shall be applied to each hour of the data collection period.

12.7.1.2 To validate a RATA run, both traps must meet the acceptance criteria for all five QA specifications. However, as discussed in Section 12.7.1.3 below, for normal day-to-day operation of the monitoring system, a data collection period may, in certain instances, be validated based on the results from one trap.

12.7.1.3 For the routine, day-to-day operation of the monitoring system, when one of the traps either: (a) Fails the post-test leak check; or (b) has excessive section 2 breakthrough; or (c) fails to maintain the proper stack flow-to-sample flow ratio; or (d) fails to achieve the required section 3 spike recovery, provided that the other trap meets the acceptance criteria for all four of these QA specifications, the Hg concentration measured by the valid trap may be multiplied by a factor of 1.111 and used for reporting purposes. Further, if both traps meet the acceptance criteria for all four of these QA specifications, but the acceptance criterion for paired trap agreement is not met, the owner or operator may report the higher of the two Hg concentrations measured by the traps, in lieu of invalidating the data from the paired traps.

12.7.1.4 Whenever the data from a pair of sorbent traps must be invalidated and no quality-assured data from a certified backup Hg monitoring system or Hg reference method are available to cover the hours in the data collection period, treat those hours in the manner specified in the applicable regulation (i.e., use missing data substitution or count the hours as monitoring system down time, as appropriate).

13.0 Monitoring System Performance

These monitoring criteria and procedures have been successfully applied to coal-fired utility boilers (including units with post-combustion emission controls), having vapor-phase Hg concentrations ranging from 0.03 µg/dscm to 100 µg/dscm.

14.0 Pollution Prevention [Reserved]

15.0 Waste Management [Reserved]

16.0 Alternative Procedures [Reserved]

17.0 Bibliography

17.1 40 CFR part 60, appendix B, ''Performance Specification 2—Specifications and Test Procedures for SO_2 and NO_X Continuous Emission Monitoring Systems in Stationary Sources.''

17.2 40 CFR part 60, appendix A, ''Method 29—Determination of Metals Emissions from Stationary Sources.''

17.3 40 CFR part 60, appendix A, ''Method 30A—Determination of Total Vapor Phase Mercury Emissions From Stationary Sources (Instrumental Analyzer Procedure).

17.4 40 CFR part 60, appendix A, ''Method 30B—Determination of Total Vapor Phase Mercury Emissions From Coal-Fired Combustion Sources Using Carbon Sorbent Traps.''

17.5 ASTM Method D6784–02, ''Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method).''

Appendix F—[Amended]

2a. Appendix F to 40 CFR part 60 is amended to add Procedure 5 to read as follows:

Appendix F to Part 60—Quality Assurance Procedures

* * * * *

Procedure 5. Quality Assurance Requirements for Vapor Phase Mercury Continuous Emission Monitoring Systems Used for Compliance Determination at Stationary Sources

1.0 Applicability and Principle

1.1 Applicability. The purpose of Procedure 5 is to establish the minimum requirements for evaluating the effectiveness of quality control (QC) and quality assurance (QA) procedures and the quality of data produced by vapor phase mercury (Hg) continuous emission monitoring system (CEMS). Procedure 5 applies to Hg CEMS used for continuously determining compliance with emission standards or operating permit limits as specified in an applicable regulation or permit. Other QC

procedures may apply to diluent (e.g., O_2) monitors and other auxiliary monitoring equipment included with your CEMS to facilitate Hg measurement or determination of Hg concentration in units specified in an applicable regulation (e.g., Procedure 1 of this appendix for O_2 CEMS).

Procedure 5 covers the instrumental measurement of Hg as defined in Performance Specification 12A of appendix B to this part which is total vapor phase Hg representing the sum of elemental Hg (Hg^0, CAS Number 7439B97B6) and oxidized forms of gaseous Hg (Hg^{+2}).

Procedure 5 specifies the minimum requirements for controlling and assessing the quality of Hg CEMS data submitted to EPA or a delegated permitting authority. You must meet these minimum requirements if you are responsible for one or more Hg CEMS used for compliance monitoring. We encourage you to develop and implement a more extensive QA program or to continue such programs where they already exist.

You must comply with the basic requirements of Procedure 5 immediately following successful completion of the initial performance test of PS–12A.

1.2 Principle. The QA procedures consist of two distinct and equally important functions. One function is the assessment of the quality of the CEMS data by estimating accuracy. The other function is the control and improvement of the quality of the CEMS data by implementing QC policies and corrective actions. These two functions form a control loop: When the assessment function indicates that the data quality is inadequate, the quality control effort must be increased until the data quality is acceptable. In order to provide uniformity in the assessment and reporting of data quality, this procedure explicitly specifies the assessment methods for response drift, system integrity, and accuracy. Several of the procedures are based on those of Performance Specification 12A (PS–12A) in appendix B of this part. Procedure 5 also requires the analysis of audit samples concurrent with certain reference method (RM) analyses as specified in the applicable RMs.

Because the control and corrective action function encompasses a variety of policies, specifications, standards, and corrective measures, this procedure treats QC requirements in general terms to allow each source owner or operator to develop a QC system that is most effective and efficient for the circumstances.

2.0 Definitions

2.1 *Continuous Emission Monitoring System (CEMS)* means the total equipment required for the determination of a pollutant concentration.

2.2 *Span Value* means the upper limit of the intended Hg concentration measurement range that is specified for the affected source categories in the applicable monitoring PS and/or regulatory subpart.

2.3 *Zero, Mid-Level, and High Level Values* means the CEMS response values related to the source specific span value. Determination of zero, mid-level, and high level values is defined in the appropriate PS in appendix B to this part (e.g., PS–12A).

2.4 *Calibration Drift (CD)* means the absolute value of the difference between the CEMS output response and either the upscale Hg reference gas or the zero-level Hg reference gas, expressed as a percentage of the span value, when the entire CEMS, including the sampling interface, is challenged after a stated period of operation during which no unscheduled maintenance, repair, or adjustment took place.

2.5 *System Integrity (SI) Check* means the absolute value of the difference between the CEMS output response and the reference value of either a mid-level or high-level mercuric chloride ($HgCl_2$) reference gas, expressed as a percentage of the reference value, when the entire CEMS, including the sampling interface, is challenged.

2.6 *Relative Accuracy (RA)* means the absolute mean difference between the pollutant concentration(s) determined by the CEMS and the value determined by the reference method (RM) plus the 2.5 percent error confidence coefficient of a series of tests divided by the mean of the RM tests. Alternatively, for sources with an average RM concentration less than 5.0 μg/dscm, the RA may be expressed as the absolute value of the difference between the mean CEMS and RM values.

3.0 QC Requirements

Each source owner or operator must develop and implement a QC program. At a minimum, each QC program must include written procedures which should describe in detail, complete, step-by-step procedures and operations for each of the following activities:

1. Calibration of Hg CEMS.
2. CD determination and adjustment of Hg CEMS.
3. SI Check procedures for Hg CEMS.
3. Preventive maintenance of Hg CEMS (including spare parts inventory).
4. Data recording, calculations, and reporting.
5. Accuracy audit procedures including sampling and analysis methods.
6. Program of corrective action for malfunctioning Hg CEMS.

As described in Section 5.2, whenever excessive inaccuracies occur for two consecutive quarters, the source owner or operator must revise the current written procedures or modify or replace the Hg CEMS to correct the deficiency causing the excessive inaccuracies.

These written procedures must be kept on record and available for inspection by the responsible enforcement agency.

4. CD Assessment

4.1 CD Requirement. As described in 40 CFR 60.13(d) and 63.8(c), source owners and operators of CEMS must check, record, and quantify the CD at two concentration values at least once daily (approximately 24 hours) in accordance with the method prescribed by the manufacturer. The CEMS calibration must, at minimum, be adjusted whenever the daily zero (or low-level) CD or the daily high-level CD exceeds two times the limits of the applicable PS in appendix B of this part.

4.2 Recording Requirement for Automatic CD Adjusting Monitors. Monitors that automatically adjust the data to the corrected calibration values (e.g., microprocessor control) must be programmed to record the unadjusted concentration measured in the CD prior to resetting the calibration, if performed, or record the amount of adjustment.

4.3 Criteria for Excessive CD. If either the zero (or low-level) or high-level CD result exceeds twice the applicable drift specification in the applicable PS in appendix B for five consecutive daily periods, the CEMS is out-of-control. If either the zero (or low-level) or high-level CD result exceeds four times the applicable drift specification in the PS in appendix B during any CD check, the CEMS is out-of-control. If the CEMS is out-of-control, take necessary corrective action. Following corrective action, repeat the CD checks.

4.3.1 Out-Of-Control Period Definition. The beginning of the out-of-control period is the time corresponding to the completion of the fifth consecutive daily CD check with a CD in excess of two times the allowable limit, or the time corresponding to the completion of the daily CD check preceding the daily CD check that results in a CD in excess of four times the allowable limit. The end of the out-of-control period is the time corresponding to the completion of the CD check following corrective action that results in the CDs at both the zero (or low-level) and high-level measurement points being within the corresponding allowable CD limit (i.e., either two times or four times the allowable limit in the applicable PS in appendix B).

4.3.2 CEMS Data Status During Out-of-Control Period. During the period the CEMS is out-of-control, the CEMS data may not be used in calculating emission compliance nor be counted towards meeting minimum data availability as required and described in the applicable subpart.

4.4 Data Recording and Reporting. As required in 40 CFR 60.7(d) and 63.10____, all measurements from the CEMS must be retained on file by the source owner for at least 2 years. However, emission data obtained on each successive day while the CEMS is out-of-control may not be included as part of the minimum daily data requirement of the applicable subpart nor be used in the calculation of reported emissions for that period.

5. Data Accuracy Assessment

5.1 Auditing Requirements. Each CEMS must be audited at least once each calendar quarter. Successive quarterly audits shall occur no closer than 2 months. The audits shall be conducted as follows:

5.1.1 Relative Accuracy Test Audit (RATA). The RATA must be conducted at least once every four calendar quarters, except as otherwise noted in section 5.1.4 of this appendix. Conduct the RATA as described for the RA test procedure in the applicable PS in appendix B (e.g., PS 12A). In addition, analyze the appropriate performance audit samples as described in the applicable reference methods.

5.1.2 Gas Audit (GA). If applicable, a GA may be conducted in three of four calendar quarters, but in no more than three quarters in succession.

To conduct a GA: (1) Challenge the CEMS with an audit gas of known concentration at two points within the following ranges:

Audit point	Audit range
1	20 to 30% of span value.
2	50 to 60% of span value.

Challenge the Hg CEMS three times at each audit point, and use the average of the three responses in determining accuracy. If using audit gas cylinders, do not dilute gas from audit cylinder when challenging the Hg CEMS.

The monitor should be challenged at each audit point for a sufficient period of time to assure adsorption-desorption of the Hg CEMS sample transport surfaces has stabilized.

(2) Operate each monitor in its normal sampling mode, i.e., pass the audit gas through all filters, scrubbers, conditioners, and other monitor components used during normal sampling, and as much of the sampling probe as is practical. At a minimum, the audit gas should be introduced at the connection between the probe and the sample line.

(3) Use elemental Hg and oxidized Hg (mercuric chloride, $HgCl_2$) audit gases that are National Institute of Standards and Technology (NIST)-certified or NIST-traceable following an EPA Traceability Protocol.

The difference between the actual concentration of the audit gas and the concentration indicated by the monitor is used to assess the accuracy of the CEMS.

5.1.3 Relative Accuracy Audit (RAA). The RAA may be conducted three of four calendar quarters, but in no more than three quarters in succession. To conduct a RAA, follow the procedure described in the applicable PS in appendix B for the relative accuracy test, except that only three sets of measurement data are required. Analyses of performance audit samples are also required.

The relative difference between the mean of the RM values and the mean of the CEMS responses will be used to assess the accuracy of the CEMS.

5.1.4 Other Alternative Audits. Other alternative audit procedures may be used as approved by the Administrator for three of four calendar quarters. One RATA is required at least every four calendar quarters, except in the case where the affected facility is off-line (does not operate) in the fourth calendar quarter since the quarter of the previous RATA. In that case, the RATA shall be performed in the quarter in which the unit recommences operation. Also, gas audits are not required for calendar quarters in which the affected facility does not operate.

5.2 Excessive Audit Inaccuracy. If the RA, using the RATA, GA, or RAA exceeds the criteria in section 5.2.3, the Hg CEMS is out-of-control. If the Hg CEMS is out-of-control, take necessary corrective action to eliminate the problem. Following corrective action, the source owner or operator must audit the CEMS with a RATA, GA, or RAA to determine if the CEMS is operating within the specifications. A RATA must always be used following an out-of-control period resulting from a RATA. The audit following corrective action does not require analysis of performance audit samples. If audit results show the CEMS to be out-of-control, the CEMS operator shall report both the audit showing the CEMS to be out-of-control and the results of the audit following corrective action showing the CEMS to be operating within specifications.

5.2.1 Out-Of-Control Period Definition. The beginning of the out-of-control period is the time corresponding to the completion of the sampling for the RATA, RAA, or GA. The end of the out-of-control period is the time corresponding to the completion of the sampling of the subsequent successful audit.

5.2.2 CEMS Data Status During Out-Of-Control Period. During the period the monitor is out-of-control, the CEMS data may not be used in calculating emission compliance nor be counted towards meeting minimum data availability as required and described in the applicable subpart.

5.2.3 Criteria for Excessive Audit Inaccuracy. Unless specified otherwise in the applicable subpart, the criteria for excessive inaccuracy are:

(1) For the RATA, the allowable RA in the applicable PS in appendix B.

(2) For the GA, ±15 percent of the average audit value or ±5 ppm, whichever is greater.

(3) For the RAA, ±15 percent of the three run average or ±7.5 percent of the applicable standard, whichever is greater.

5.3 Criteria for Acceptable QC Procedure. Repeated excessive inaccuracies (i.e., out-of-control conditions resulting from the quarterly audits) indicates the QC procedures are inadequate or that the Hg CEMS is incapable of providing quality data. Therefore, whenever excessive inaccuracies occur for two consecutive quarters, the source owner or operator must revise the QC procedures (see Section 3) or modify or replace the Hg CEMS.

6. Calculations for Hg CEMS Data Accuracy

6.1 RATA RA Calculation. Follow the equations described in Section 12 of appendix B, PS 12A to calculate the RA for the RATA. The RATA must be calculated in units of concentration or the applicable emission standard.

6.2 RAA Accuracy Calculation. Use Equation 1–1 to calculate the accuracy for the RAA. The RAA must be calculated in units of concentration or the applicable emission standard.

6.3 GA Accuracy Calculation. Use Equation 1–1 to calculate the accuracy for the GA, which is calculated in units of the appropriate concentration (e.g., $\mu g/m^3$). Each component of the CEMS must meet the acceptable accuracy requirement.

$$A = \frac{C_m - C_a}{C_a} \times 100 \qquad \textit{Eq. 1-1}$$

Where:

A=Accuracy of the CEMS, percent.

C_m=Average CEMS response during audit in units of applicable standard or appropriate concentration.

C_a=Average audit value (GA certified value or three-run average for RAA) in units of applicable standard or appropriate concentration.

6.4 Example Accuracy Calculations. Example calculations for the RATA, RAA, and GA are available in Citation 1.

7. Reporting Requirements

At the reporting interval specified in the applicable regulation, report for each Hg CEMS the accuracy results from Section 6 and the CD assessment results from Section 4. Report the drift and accuracy information as a Data Assessment Report (DAR), and include one copy of this DAR for each quarterly audit with the report of emissions required under the applicable subparts of this part.

As a minimum, the DAR must contain the following information:

1. Source owner or operator name and address.

2. Identification and location of each Hg CEMS.

3. Manufacturer and model number of each Hg CEMS.

4. Assessment of Hg CEMS data accuracy and date of assessment as determined by a RATA, RAA, or GA described in Section 5, including the RA for the RATA, the A for the RAA or GA, the RM results, the audit gas certified values, the CEMS responses, and the calculations results as defined in Section 6. If the accuracy audit results show the CEMS to be out-of-control, the CEMS operator shall report both the audit results showing the CEMS to be out-of-control and the results of the audit following corrective action showing the CEMS to be operating within specifications.

5. Results from performance audit samples described in Section 5 and the applicable RM's.

6. Summary of all corrective actions taken when CEMS was determined out-of-control, as described in Sections 4 and 5.

An example of a DAR format is shown in Figure 1.

8. Bibliography

1. Calculation and Interpretation of Accuracy for Continuous Emission Monitoring Systems (CEMS). Section 3.0.7 of the Quality Assurance Handbook for Air Pollution Measurement Systems, Volume III, Stationary Source Specific Methods. EPA–600/4–77–027b. August 1977. U.S. Environmental Protection Agency. Office of Research and Development Publications, 26 West St. Clair Street, Cincinnati, OH 45268.

Figure 1—Example Format for Data Assessment Report

Period ending date _____

Year _____

Company name _____

Plant name _____

Source unit no. _____

CEMS manufacturer _____

Model no. _____

CEMS serial no. _____

CEMS type (e.g., extractive) _____

CEMS sampling location (e.g., control device outlet) _____

CEMS span values as per the applicable regulation:

I. Accuracy assessment results (complete A, B, or C below for each Hg CEMS). If the

quarterly audit results show the Hg CEMS to be out-of-control, report the results of both the quarterly audit and the audit following corrective action showing the Hg CEMS to be operating properly.

A. Relative accuracy test audit (RATA) for ____ (e.g., Hg in μg/m³).

1. Date of audit ____.

2. Reference methods (RM) used ____ (e.g., Method 30B).

3. Average RM value ____ (e.g., μg/m³).

4. Average CEMS value ____.

5. Absolute value of mean difference [d] ____.

6. Confidence coefficient [CC] ____.

7. Percent relative accuracy (RA) ____ percent.

8. Performance audit sample results:

a. Audit lot number (1) ____ (2) ____.

b. Audit sample number (1) ____ (2) ____.

c. Results (μg/m³) (1) ____ (2) ____.

d. Actual value (μg/m³)* (1) ____ (2) ____.

e. Relative error* (1) ____ (2) ____.

B. Cylinder gas audit (GA) for ____ (e.g., Hg in μg/m³).

	Audit point 1	Audit point 2	
1. Date of audit	.....	.....	
2. Mercury gas generator or cylinder ID number	.....	.....	
3. Date of certification	.....	.....	
4. Type of certification	.....	.....	(e.g., Interim EPA Traceability Protocol for Elemental or Oxidized Mercury Gas Generators).
5. Audit gas value	.....	.....	(e.g., μg/m³).
6. CEMS response value	.....	.....	(e.g., μg/m³).
7. Accuracy	.....	.....	Percent.

C. Relative accuracy audit (RAA) for ____ (e.g., Hg in μg/m³).

1. Date of audit ____.

2. Reference methods (RM) used ____ (e.g., Method 30B).

3. Average RM value ____ (e.g., μg/m³).

4. Average CEMS value ____.

5. Accuracy ____ percent.

6. EPA performance audit results:

a. Audit lot number (1) ____ (2) ____.

b. Audit sample number (1) ____ (2) ____.

c. Results (Hg in μg/m³) (1) ____ (2) ____.

d. Actual value (μg/m³) *(1) ____ (2) ____.

e. Relative error * (1) ____ (2) ____.

* To be completed by the Agency.

D. Corrective action for excessive inaccuracy.

1. Out-of-control periods.

a. Date(s) ____.

b. Number of days ____.

2. Corrective action taken ____.

3. Results of audit following corrective action. (Use format of A, B, or C above, as applicable.)

II. Calibration drift assessment.

A. Out-of-control periods.

1. Date(s) ____.

2. Number of days ____.

B. Corrective action taken ____.

PART 63—[AMENDED]

3. The authority citation for part 63 continues to read as follows:

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

Subpart LLL—[Amended]

4. Section 63.1340 is amended to read as follows:

a. By revising paragraph (a);

b. By revising paragraphs (b)(1) through (b)(8); and

c. By revising paragraph (c).

§ 63.1340 Applicability and designation of affected sources.

(a) The provisions of this subpart apply to each new and existing portland cement plant which is a major source or an area source as defined in § 63.2.

(b) * * *

(1) Each kiln and each in-line kiln/raw mill, including alkali bypasses, except for kilns and in-line kiln/raw mills that burn hazardous waste and are subject to and regulated under subpart EEE of this part;

(2) Each clinker cooler at any portland cement plant;

(3) Each raw mill at any portland cement plant;

(4) Each finish mill at any portland cement plant;

(5) Each raw material dryer at any portland cement plant;

(6) Each raw material, clinker, or finished product storage bin at any portland cement plant;

(7) Each conveying system transfer point including those associated with coal preparation used to convey coal from the mill to the kiln at any portland cement plant; and

(8) Each bagging and bulk loading and unloading system at any portland cement plant.

(c) Crushers are not covered by this subpart regardless of their location.

* * * * *

5. Section 63.1341 is amended by adding definitions for ''Clinker,'' ''Crusher,'' ''New source'' and ''Total organic HAP'' in alphabetic order to read as follows:

§ 63.1341 Definitions.

* * * * *

Clinker means the product of the process in which limestone and other materials are heated in the kiln and is then ground with gypsum and other materials to form cement.

* * * * *

Crusher means a machine designed to reduce large rocks from the quarry into materials approximately the size of gravel.

* * * * *

New source means any source that commences construction after December 2, 2005, for purposes of determining the applicability of the kiln in-line raw mill/kiln, clinker cooler and raw material dryer emissions limits for mercury, THC, and HCl. New source means any source that commences construction after May 6, 2009 for purposes of determining the applicability of the kiln in-line raw mill/kiln AND clinker cooler emissions limits for PM.

* * * * *

Total organic HAP means, for the purposes of this subpart, the sum of the concentrations of compounds of formaldehyde, benzene, toluene, styrene, m-xylene, p-xylene, o-xylene, acetaldehyde, and naphthalene as measured by EPA Test Method 320 of appendix A to this part or ASTM D6348–03. Only the measured concentration of the listed analytes that are present at concentrations exceeding one-half the quantitation limit of the analytical method are to be used in the sum. If any of the analytes are not detected or are detected at concentrations less than one-half the quantitation limit of the analytical method, the concentration of those analytes will be assumed to be zero for the purposes of calculating the total organic HAP for this subpart.

* * * * *

6. Section 63.1343 is amended to read as follows:

a. By revising paragraph (a);

b. By revising paragraph (b) introductory text;

c. By revising paragraph (b)(1);

d. By adding paragraphs (b)(4) through (b)(6);

e. By revising paragraph (c) introductory text;

f. By revising paragraphs (c)(1), (c)(4) and (c)(5);

g. By adding paragraph (c)(6); and

h. By removing paragraphs (d) and (e).

§ 63.1343 Standards for kilns and in-line kiln/raw mills.

(a) *General.* The provisions in this section apply to each kiln, each in-line kiln/raw mill, and any alkali bypass associated with that kiln or in-line kiln/raw mill. All dioxin furan (D/F) and total hydrocarbon (THC) emission limits are on a dry basis, corrected to 7 percent oxygen. The owner/operator shall ensure appropriate corrections for moisture are made when measuring flowrates used to calculate D/F and THC emissions. All (THC) emission limits are measured as propane. Standards for mercury and THC are based on a 30-day rolling average. If using a CEM to determine compliance with the HCl standard, this standard is based on a 30-day rolling average.

(b) *Existing kilns located at major or area sources.* No owner or operator of an existing kiln or an existing in-line kiln/raw mill located at a facility that is subject to the provisions of this subpart shall cause to be discharged into the atmosphere from these affected sources, any gases which:

(1) Contain particulate matter (PM) in excess of 0.085 pounds per ton of clinker. When there is an alkali bypass associated with a kiln or in-line kiln/raw mill, the combined PM emissions from the kiln or in-line kiln/raw mill and the alkali bypass stack are subject to this emission limit. Kiln, or in-line kiln/raw mills that combine the clinker cooler exhaust with the kiln exhaust for energy efficiency purposes and send the combined exhaust to the PM control device as a single stream may meet an alternative PM emissions limit. This limit is calculated using the following equation:

$$PM_{alt} = 0.0067 \times 1.65 \times (Q_k + Q_c) / 7000 \qquad \text{(Eq. 1)}$$

Where: 0.0067 is the PM exhaust concentration equivalent to 0.085 lb per ton clinker where clinker cooler and kiln exhaust gas are not combined.

Q_k is the exhaust flow of the kiln (dscf/ton raw feed)

Q_c is the exhaust flow of the clinker cooler (dscf/ton raw feed)

* * * * *

(4) Contain THC in excess of 7 ppmv or total organic HAP in excess of 2 ppmv from the main exhaust of the kiln or in-line kiln/raw mill. If a source elects to demonstrate compliance with the total organic HAP limit in lieu of the THC limit, then they may meet a site specific THC limit based on a 30-day average and on the level of THC measured during the performance test demonstrating compliance with the organic HAP limit.

(5) Contain mercury (Hg) in excess of 43 lb per million tons of clinker. When there is an alkali bypass associated with a kiln or in-line kiln/raw mill, the combined Hg emissions from the kiln or in-line kiln/raw mill and the alkali bypass are subject to this emission limit.

(6) Contain hydrogen chloride (HCl) in excess of 2 ppmv from the main exhaust of the kiln or in-line kiln/raw mill if the kiln or in-line kiln/raw mill is located at a major source of HAP emissions.

(c) *New or reconstructed kilns located at major or area sources.* No owner or operator of a new or reconstructed kiln or new or reconstructed inline kiln/raw mill located at a facility subject to the provisions of this subpart shall cause to be discharged into the atmosphere from these affected sources any gases which:

(1) Contain PM in excess of 0.080 pounds per ton of clinker. When there is an alkali bypass associated with a kiln or in-line kiln/raw mill, the combined PM emissions from the kiln or in-line kiln/raw mill and the alkali bypass stack are subject to this emission limit. Kiln, or in-line kiln/raw mills that combine the clinker cooler exhaust with the kiln exhaust for energy efficiency purposes and send the combined exhaust to the PM control device as a single stream may meet an alternative PM emissions limit. This limit is calculated using the following equation:

$$PM_{alt} = 0.0063 \times 1.65 \times (Q_k + Q_c) / 7000 \qquad \text{(Eq. 2)}$$

Where: 0.0063 is the PM exhaust concentration equivalent to 0.080 lb per ton clinker where clinker cooler and kiln exhaust gas are not combined.

Q_k is the exhaust flow of the kiln (dscf/ton raw feed)

Q_c is the exhaust flow of the clinker cooler (dscf/ton raw feed)

* * * * *

(4) Contain THC in excess of 6 ppmv, or total organic HAP in excess of 1 ppmv, from the main exhaust of the kiln, or main exhaust of the in-line kiln/raw mill. If a source elects to demonstrate compliance with the total organic HAP limit in lieu of the THC limit, then they may meet a site specific THC limit based a 30-day average and the on the level of THC measured during the performance test demonstrating compliance with the organic HAP limit.

(5) Contain Hg from the main exhaust of the kiln, or main exhaust of the in-line kiln/raw mill, in excess of 14 lb/million tons of clinker. When there is an alkali bypass associated with a kiln, or in-line kiln/raw mill, the combined Hg emissions from the kiln or in-line kiln/raw mill and the alkali bypass are subject to this emission limit.

(6) Contain HCl in excess of 0.1 ppmv from the main exhaust of the kiln, or main exhaust of the in-line kiln/raw mill if the kiln or in-line kiln/raw mill is located at a major source of HAP emissions.

7. Section 63.1344 is amended to read as follows:

a. By revising paragraph (c) introductory text,

b. By revising paragraphs (d) and (e); and

c. By removing paragraphs (f), (g), (h) and (i).

§ 63.1344 Operating limits for kilns and in-line kiln/raw mills.

* * * * *

(c) The owner or operator of an affected source subject to a D/F emission limitation under § 63.1343 that employs carbon injection as an emission control technique must operate the carbon injection system in accordance with paragraphs (c)(1) and (c)(2) of this section.

* * * * *

(d) Except as provided in paragraph (e) of this section, the owner or operator of an affected source subject to a D/F emission limitation under § 63.1343 that employs carbon injection as an emission control technique must specify and use

the brand and type of activated carbon used during the performance test until a subsequent performance test is conducted, unless the site-specific performance test plan contains documentation of key parameters that affect adsorption and the owner or operator establishes limits based on those parameters, and the limits on these parameters are maintained.

(e) The owner or operator of an affected source subject to a D/F emission limitation under § 63.1343 that employs carbon injection as an emission control technique may substitute, at any time, a different brand or type of activated carbon provided that the replacement has equivalent or improved properties compared to the activated carbon specified in the site-specific performance test plan and used in the performance test. The owner or operator must maintain documentation that the substitute activated carbon will provide the same or better level of control as the original activated carbon.

8. Section 63.1345 is amended by revising paragraph (a) introductory text and paragraph (a)(1) to read as follows:

§ 63.1345 Standards for clinker coolers.

(a) No owner or operator of a new or existing clinker cooler at a facility which is a major source or an area source subject to the provision of this subpart shall cause to be discharged into the atmosphere from the clinker cooler any gases which:

(1) Contain PM in excess of 0.085 lb per ton of clinker for existing sources or 0.080 lb per ton of clinker for new sources.

* * * * *

9. Section 63.1346 is revised to read as follows:

§ 63.1346 Standards for raw material dryers.

(a) Raw material dryers that are located at facilities that are major sources can not discharge to the atmosphere any gases which:

(1) Exhibit opacity greater then 10 percent; or

(2) Contain THC in excess of 7 ppmv (existing sources) or 6 ppmv (new sources), on a dry basis as propane corrected to 7 percent oxygen based on a 30-day rolling average

(b) Raw Material dryers located at a facility that is an area source must not discharge to the atmosphere any gases which contain THC in excess of 7 ppmv (existing sources) or 6 ppmv (new sources), on a dry basis as propane corrected to 7 percent oxygen based on a 30-day rolling average. If a source elects to demonstrate compliance with the total organic HAP limit in lieu of the THC limit, then they may meet a site specific THC limit based on a 30-day average and on the level of THC measured during the performance test demonstrating compliance with the organic HAP limit.

10. Section 63.1349 is amended to read as follows:

a. By revising paragraph (b) introductory text;

b. By revising paragraphs (b)(1) introductory text, (b)(1)(ii), (iii), (iv) and (vi);

c. By revising paragraphs (b)(3)(iii) and (v), (b)(4) and (b)(5);

d. By adding paragraph (b)(6);

e. By revising paragraph (c); and

f. By adding paragraphs (f) and (g).

§ 63.1349 Performance testing requirements.

* * * * *

(b) Performance tests to demonstrate initial compliance with this subpart shall be conducted as specified in paragraphs (b)(1) through (b)(6) of this section.

(1) The owner or operator of a kiln subject to limitations on PM emissions that is not equipped with a PM CEMS shall demonstrate initial compliance by conducting a performance test as specified in paragraphs (b)(1)(i) through (b)(1)(iv) of this section. The owner or operator of an in-line kiln/raw mill subject to limitations on PM emissions that is not equipped with a PM CEMS shall demonstrate initial compliance by conducting separate performance tests as specified in paragraphs (b)(1)(i) through (b)(1)(iv) of this section while the raw mill of the in-line kiln/raw mill is under normal operating conditions and while the raw mill of the in-line kiln/raw mill is not operating. The owner or operator of a clinker cooler subject to limitations on PM emissions shall demonstrate initial compliance by conducting a performance test as specified in paragraphs (b)(1)(i) through (b)(1)(iii) of this section. The owner or operator shall determine the opacity of PM emissions exhibited during the period of the Method 5 (40 CFR part 60, appendix A–3) performance tests required by paragraph (b)(1)(i) of this section as required in paragraphs (b)(1)(v) through (vi) of this section. The owner or operator of a kiln or in-line kiln/raw mill subject to limitations on PM emissions that is equipped with a PM CEMS shall demonstrate initial compliance by conducting a performance test as specified in paragraph (b)(1)(vi) of this section.

* * * * *

(ii) The owner or operator must install, calibrate, maintain and operate a permanent weigh scale system, or use another method approved by the Administrator, to measure and record weight rates in tons-mass per hour of the amount of clinker produced. The system of measuring hourly clinker production must be maintained within ±5 percent accuracy. The owner or operator shall determine, record, and maintain a record of the accuracy of the system of measuring hourly clinker production before initial use (for new sources) or within 30 days of the effective date of this rule (for existing sources). During each quarter of source operation, the owner or operator shall determine, record, and maintain a record of the ongoing accuracy of the system of measuring hourly clinker production. The use of a system that directly measures kiln feed rate and uses a conversion factor to determine the clinker production rate is an acceptable method.

(iii) The emission rate, E, of PM (lb/ton of clinker) shall be computed for each run using equation 3 of this section:

$$E = \left(C_s Q_{sd}\right) \Big/ \left(PK\right) \qquad \text{(Eq. 3)}$$

Where:

E = emission rate of particulate matter, kg/metric ton (lb/ton) of clinker production;

C_s = concentration of particulate matter, g/dscm (gr/dscf);

Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr);

P = total kiln clinker production rate, metric ton/hr (ton/hr); and

K = conversion factor, 1000 g/kg (7000 gr/lb).

(iv) Where there is an alkali bypass associated with a kiln or in-line kiln/raw mill, the main exhaust and alkali bypass of the kiln or in-line kiln/raw mill shall be tested simultaneously and the combined emission rate of particulate matter from the kiln or in-line raw mill and alkali bypass shall be computed for each run using equation 4 of this section:

$$E_c = \left(C_{sk} Q_{sdk} + C_{sb} Q_{sdb}\right) \Big/ \left(PK\right) \qquad \text{(Eq. 4)}$$

Where:

E_c = combined emission rate of particulate matter from the kiln or in-line kiln/raw mill and bypass stack, kg/metric ton (lb/ton) of kiln clinker production;

C_{sk} = concentration of particulate matter in the kiln or in-line kiln/raw mill effluent gas, g/dscm (gr/dscf);

Q_{sdk} = volumetric flow rate of kiln or in-line kiln/raw mill effluent gas, dscm/hr (dscf/hr);

C_{sb} = concentration of particulate matter in the alkali bypass gas, g/dscm (gr/dscf);

Q_{sdb} = volumetric flow rate of alkali bypass effluent gas, dscm/hr (dscf/hr);

P = total kiln clinker production rate, metric ton/hr (ton/hr); and

K = conversion factor, 1000 g/kg (7000 gr/lb).

* * * * *

(vi) The owner or operator of a kiln or in-line kiln/raw mill subject to limitations on emissions of PM that is equipped with a PM CEMS shall install, operate, calibrate, and maintain the PM CEMS in accordance with Performance Specification 11 (40 CFR part 60, appendix B). Compliance with the PM emissions standard shall be determined by calculating the average of 3 hourly average PM emission rates in lb/ton of clinker using Equation 3 or 4 of this section. The owner or operator of an in-line kiln/raw mill shall conduct separate performance tests while the raw mill of the in-line kiln/raw mill is under normal operating conditions and while the raw mill of the in-line kiln/raw mill is not operating. The owner or operator shall continuously measure kiln feed rate, volumetric flow rate, and clinker production during the period of the test. The owner or operator shall determine, record, and maintain a record of the accuracy of the volumetric flow rate monitoring system according to the procedures in appendix A to part 75 of this chapter.

* * * * *

(3) * * *

(iii) Hourly average temperatures must be calculated for each run of the test.

* * * * *

(v) If activated carbon injection is used for D/F control, the rate of activated carbon injection to the kiln or in-line kiln/raw mill exhaust, and where applicable, the rate of activated carbon injection to the alkali bypass exhaust, must be continuously recorded during the period of the Method 23 test, and the continuous injection rate record(s) must be included in the performance test report. In addition, the performance test report must include the brand and type of activated carbon used during the performance test and a continuous record of either the carrier gas flow rate or the carrier gas pressure drop for the duration of the test. The system of measuring carrier gas flow rate or carrier gas pressure drop must be maintained within +/- 5 percent accuracy. If the carrier gas flow rate is used, the owner or operator shall determine, record, and maintain a record of the accuracy of the carrier gas flow rate monitoring system according to the procedures in appendix A to part 75 of this chapter. If the carrier gas pressure drop is used, the owner or operator shall determine, record, and maintain a record of the accuracy of the carrier gas pressure drop monitoring system according to the procedures in appendix A to part 75 of this chapter. Activated carbon injection rate parameters must be determined in accordance with paragraphs (b)(3)(vi) of this section.

* * * * *

(4)(i) The owner or operator of an affected source subject to limitations on emissions of THC shall demonstrate initial compliance with the THC limit by operating a continuous emission monitor in accordance with Performance Specification 8A (40 CFR part 60, appendix B). The duration of the performance test shall be 24 hours. The owner or operator shall calculate the daily average THC concentration (as calculated from the hourly averages obtained during the performance test). The owner or operator of an in-line kiln/raw mill shall demonstrate initial compliance by conducting separate performance tests while the raw mill of the in-line kiln/raw mill is under normal operating conditions and while the raw mill of the in-line kiln/raw mill is not operating.

(ii) As an alternative to complying with the THC limit, the owner or operator may comply with the limits for total organic HAP, as defined in § 63.1341, by following the procedures in (b)(4)(ii) through (b)(4)(vi) of this section.

(iii) The owner or operator of a kiln complying with the alternative emissions limits for total organic HAP in § 63.1343 shall demonstrate initial compliance by conducting a performance test as specified in paragraphs (b)(4)(ii) through (b)(4)(vi) of this section. The owner or operator of an in-line kiln/raw mill complying with the emissions limits for total organic HAP in § 63.1343 shall demonstrate initial compliance by conducting separate performance tests as specified in paragraphs (b)(4)(ii) through (b)(4)(vi) of this section while the raw mill of the in-line kiln/raw mill is under normal operating conditions and while the raw mill of the in-line kiln/raw mill is not operating.

(iv) Method 320 of appendix A to this part or ASTM D6348–03 shall be used to determine emissions of total organic HAP. Each performance test shall consist of three separate runs under the conditions that exist when the affected source is operating at the representative performance conditions in accordance with § 63.7(e). Each run shall be conducted for at least 1 hour. The average of the three runs shall be used to determine initial compliance. The owner or operator shall determine, record, and maintain a record of the accuracy of the volumetric flow rate monitoring system according to the procedures in appendix A to part 75 of this chapter.

(v) At the same time that the owner or operator is determining compliance with the emissions limits for total organic HAP, the owner or operator shall also determine THC emissions by operating a continuous emission monitor in accordance with Performance Specification 8A of appendix B to part 60 of this chapter. The duration of the test shall be 3 hours, and the average THC concentration (as calculated from the 1-minute averages) during the 3-hour test shall be calculated. The THC concentration measured during the initial performance test for total organic HAP will be used to monitor compliance subsequent to the initial performance test.

(vi) Emissions tests to determine compliance with total inorganic HAP limits shall be repeated annually, beginning 1 year from the date of the initial performance tests.

(5) The owner or operator of a kiln or in-line kiln/raw mill subject to an emission limitation for mercury in § 63.1343 shall demonstrate initial compliance with the mercury limit by complying with the requirements of (b)(5)(i) through (b)(5)(vi) of this section.

(i) Operate a continuous emission monitor in accordance with Performance Specification 12A of 40 CFR part 60, appendix B or a sorbent trap based integrated monitor in accordance with Performance Specification 12B of 40 CFR part 60, appendix B. The duration of the performance test shall be a calendar month. For each calendar month in which the kiln or in-line kiln/raw mill operates, hourly mercury concentration data, stack gas volumetric flow rate data shall be obtained. The owner or operator shall determine, record, and maintain a record of the accuracy of the volumetric flow rate monitoring system according to the procedures in appendix A to part 75 of this chapter. The owner or operator of an in-line kiln/raw mill shall demonstrate initial compliance by

operating a continuous emission monitor while the raw mill of the in-line kiln/raw mill is under normal operating conditions and while the raw mill of the in-line kiln/raw mill is not operating.

(ii) Owners or operators using a mercury CEMS must install, operate, calibrate, and maintain an instrument for continuously measuring and recording the exhaust gas flow rate to the atmosphere according to the requirements in § 60.63(m) of this chapter.

(iii) The owner or operator shall determine compliance with the mercury limitations by dividing the average mercury concentration by the clinker production rate during the same calendar month using the Equation 3 of this section:

$$E = \frac{(C_s Q_{sd})}{(PK)} \qquad \text{(Eq. 5)}$$

Where:

E = emission rate of mercury, kg/metric ton (lb/million tons) of clinker production;
C_s = concentration of mercury, g/dscm (g/dscf);
Q_{sd} = volumetric flow rate of effluent gas, dscm/hr (dscf/hr);
P = total kiln clinker production rate, metric ton/hr (million ton/hr); and
K = conversion factor, 1000 g/kg (454 g/lb).

(6) The owner or operator of an affected source subject to limitations on emissions of HCl shall demonstrate initial compliance with the HCl limit by one of the following methods:

(i) If your source is equipped with a wet scrubber such as a spray tower, packed bed, or tray tower, use Method 321 of appendix A to this part. A repeat test must be performed every 5 years to demonstrate continued compliance.

(ii) If your source is not controlled by a wet scrubber, you must operate a continuous emission monitor in accordance with Performance Specification 15 of appendix B of part 60. The duration of the performance test shall be 24 hours. The owner or operator shall calculate the daily average HCl concentration (as calculated from the hourly averages obtained during the performance test). The owner or operator of an in-line kiln/raw mill shall demonstrate initial compliance by conducting separate performance tests while the raw mill of the in-line kiln/raw mill is under normal operating conditions and while the raw mill of the in-line kiln/raw mill is not operating.

(c) Except as provided in paragraph (e) of this section, performance tests are required for existing kilns or in-line kiln/raw mills that are subject to a PM, THC, HCl or mercury emissions limit and must be repeated every 5 years except for pollutants where that specific pollutant is monitored using a CEMS.

* * * * *

(f) The owner or operator of an affected facility shall submit the information specified in paragraphs (c)(1) through (c)(4) of this section no later than 60 days following the initial performance test. All reports shall be signed by the facilities manager.

(1) The initial performance test data as recorded under § 60.56c(b)(1) through (b)(14), as applicable.

(2) The values for the site-specific operating parameters established pursuant to § 60.56c(d), (h), or (j), as applicable, and a description, including sample calculations, of how the operating parameters were established during the initial performance test.

(3) For each affected facility as defined in § 60.50c(a)(3).

(4) That uses a bag leak detection system, analysis and supporting documentation demonstrating conformance with EPA guidance and specifications for bag leak detection systems in § 60.57c(h).

(g) For affected facilities, as defined in § 60.50c(a)(3) and (4), that choose to submit an electronic copy of stack test reports to EPA's WebFIRE data base, as of December 31, 2011, the owner or operator of an affected facility shall enter the test data into EPA's data base using the Electronic Reporting Tool located at *http://www.epa.gov/ttn/chief/ert/ert_tool.html.*

11. Section 63.1350 is amended to read as follows:

a. By revising paragraph (a)(4)(i), (a)(4)(iv), (a)(4)(vi) and (vii);

b. By revising paragraph (c)(1) and (2) introductory text;

c. By revising paragraph (d)(1) and (2) introductory text;

d. By revising paragraph (e) introductory text;

e. By revising paragraph (g) introductory text;

f. By revising paragraph (h) introductory text;

g. By revising paragraph (h)(2) through (h)(4);

h. By revising paragraph (k);

i. By revising paragraphs (m) introductory text;

j. By revising paragraphs (n),(o) and (p); and

k. By adding paragraphs (q) and (r).

§ 63.1350 Monitoring requirements.

(a) * * *

(4) * * *

(i) The owner or operator must conduct a monthly 20-minute visible emissions test of each affected source in accordance with Method 22 of appendix A–7 to part 60 of this chapter. The test must be conducted while the affected source is in operation.

* * * * *

(iv) If visible emissions are observed during any Method 22 test, of appendix A–7 to part 60, the owner or operator must conduct five 6-minute averages of opacity in accordance with Method 9 of appendix A–4 to part 60 of this chapter. The Method 9 test, of appendix A–4 to part 60, must begin within 1 hour of any observation of visible emissions.

* * * * *

(vi) If any partially enclosed or unenclosed conveying system transfer point is located in a building, the owner or operator of the portland cement plant shall have the option to conduct a Method 22 test, of appendix A–7 to part 60, according to the requirements of paragraphs (a)(4)(i) through (iv) of this section for each such conveying system transfer point located within the building, or for the building itself, according to paragraph (a)(4)(vii) of this section.

(vii) If visible emissions from a building are monitored, the requirements of paragraphs (a)(4)(i) through (iv) of this section apply to the monitoring of the building, and you must also test visible emissions from each side, roof and vent of the building for at least 20 minutes. The test must be conducted under normal operating conditions.

* * * * *

(c) * * *

(1) Except as provided in paragraph (c)(2) of this section, the owner or operator shall install, calibrate, maintain, and continuously operate a continuous opacity monitoring system (COMS) located at the outlet of the PM control device to continuously monitor the opacity. The COMS shall be installed, maintained, calibrated, and operated as required by subpart A, general provisions of this part, and according to PS–1 of appendix B to part 60 of this chapter.

(2) The owner or operator of a kiln or in-line kiln/raw mill subject to the provisions of this subpart using a fabric filter with multiple stacks or an electrostatic precipitator with multiple stacks may, in lieu of installing the continuous opacity monitoring system required by paragraph (c)(1) of this section, monitor opacity in accordance with paragraphs (c)(2)(i) through (ii) of this section. If the control device exhausts through a monovent, or if the use of a COMS in accordance with the installation specifications of PS–1 of appendix B to part 60 of this chapter is not feasible, the owner or operator must monitor opacity in accordance with paragraphs (c)(2)(i) through (ii) of this section.

* * * * *

(d)(1) Except as provided in paragraph (d)(2) of this section, the owner or operator shall install, calibrate, maintain, and continuously operate a COMS located at the outlet of the clinker cooler PM control device to continuously monitor the opacity. The COMS shall be installed, maintained, calibrated, and operated as required by subpart A, general provisions of this part, and according to PS–1 of appendix B to part 60 of this chapter.

(2) The owner or operator of a clinker cooler subject to the provisions of this subpart using a fabric filter with multiple stacks or an electrostatic precipitator with multiple stacks may, in lieu of installing the continuous opacity monitoring system required by paragraph (d)(1) of this section, monitor opacity in accordance with paragraphs (d)(2)(i) through (ii) of this section. If the control device exhausts through a monovent, or if the use of a COMS in accordance with the installation specifications of PS–1 of appendix B to part 60 of this chapter is not feasible, the owner or operator must monitor opacity in accordance with paragraphs (d)(2)(i) through (ii) of this section.

* * * * *

(e) The owner or operator of a raw mill or finish mill shall monitor opacity by conducting daily visual emissions observations of the mill sweep and air separator PMCD of these affected sources in accordance with the procedures of Method 22 of appendix A–7 to part 60 of this chapter. The Method 22 test, of appendix A–7 to part 60, shall be conducted while the affected source is operating at the representative performance conditions. The duration of the Method 22 test, of appendix A–7 to part 60, shall be 6 minutes. If visible emissions are observed during any Method 22 test, of appendix A–7 to part 60, the owner or operator must:

* * * * *

(g) The owner or operator of an affected source subject to an emissions limitation on D/F emissions that employs carbon injection as an emission control technique shall comply with the monitoring requirements of paragraphs (f)(1) through (f)(6) and (g)(1) through (g)(6) of this section to demonstrate continuous compliance with the D/F emissions standard.

* * * * *

(h) The owner or operator of an affected source subject to a limitation on THC emissions under this subpart shall comply with the monitoring requirements of paragraphs (h)(1) through (h)(3) of this section to demonstrate continuous compliance with the THC emission standard:

* * * * *

(2) For existing facilities complying with the THC emissions limits of § 63.1343, the 30-day average THC concentration in any gas discharged from the main exhaust of a kiln, or in-line kiln/raw mill, must not exceed their THC emissions limit, reported as propane, corrected to seven percent oxygen.

(3) For new or reconstructed facilities complying with the THC emission limits of § 63.1343, the 30-day average THC concentration in any gas discharged from the main exhaust of a kiln or in-line kiln/raw mill must not exceed their THC emission limit, reported as propane, corrected to 7 percent oxygen.

(4) For new or reconstructed facilities complying with the THC emission limits of § 63.1346, any daily average THC concentration in any gas discharged from a raw material dryer must not exceed their THC emission limit, reported as propane, corrected to 7 percent oxygen.

* * * * *

(k) The owner or operator of an affected source subject to a particulate matter standard under § 63.1343 using a fabric filter for PM control must install, operate, and maintain a bag leak detection system according to paragraphs (k)(1) through (k)(3) of this section.

(1) Each bag leak detection system must meet the specifications and requirements in paragraphs (k)(1)(i) through (k)(1)(viii) of this section.

(i) The bag leak detection system must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 1 milligram per dry standard cubic meter (0.00044 grains per actual cubic foot) or less.

(ii) The bag leak detection system sensor must provide output of relative PM loadings. The owner or operator shall continuously record the output from the bag leak detection system using electronic or other means (e.g., using a strip chart recorder or a data logger).

(iii) The bag leak detection system must be equipped with an alarm system that will sound when the system detects an increase in relative particulate loading over the alarm set point established according to paragraph (k)(1)(iv) of this section, and the alarm must be located such that it can be heard by the appropriate plant personnel.

(iv) In the initial adjustment of the bag leak detection system, you must establish, at a minimum, the baseline output by adjusting the sensitivity (range) and the averaging period of the device, the alarm set points, and the alarm delay time.

(v) Following initial adjustment, you shall not adjust the averaging period, alarm set point, or alarm delay time without approval from the Administrator or delegated authority except as provided in paragraph (k)(1)(vi) of this section.

(vi) Once per quarter, you may adjust the sensitivity of the bag leak detection system to account for seasonal effects, including temperature and humidity, according to the procedures identified in the site-specific monitoring plan required by paragraph (k)(2) of this section.

(vii) You must install the bag leak detection sensor downstream of the fabric filter.

(viii) Where multiple detectors are required, the system's instrumentation and alarm may be shared among detectors.

(2) You must develop and submit to the Administrator or delegated authority for approval a site-specific monitoring plan for each bag leak detection system. You must operate and maintain the bag leak detection system according to the site-specific monitoring plan at all times. Each monitoring plan must describe the items in paragraphs (k)(2)(i) through (k)(2)(vi) of this section. At a minimum you must retain records related to the site-specific monitoring plan and information discussed in paragraphs (k)(2)(i) through (k)(2)(vi) of this section for a period of 2 years on-site and 3 years off-site;

(i) Installation of the bag leak detection system;

(ii) Initial and periodic adjustment of the bag leak detection system, including how the alarm set-point will be established;

(iii) Operation of the bag leak detection system, including quality assurance procedures;

(iv) How the bag leak detection system will be maintained, including a routine maintenance schedule and spare parts inventory list;

(v) How the bag leak detection system output will be recorded and stored; and

(vi) Corrective action procedures as specified in paragraph (k)(3) of this section. In approving the site-specific monitoring plan, the Administrator or delegated authority may allow owners and operators more than 3 hours to alleviate a specific condition that causes an alarm if the owner or operator identifies in the monitoring plan this specific condition as one that could lead to an alarm, adequately explains why it is not feasible to alleviate this condition within 3 hours of the time the alarm occurs, and demonstrates that the requested time will ensure alleviation of this condition as expeditiously as practicable.

(3) For each bag leak detection system, you must initiate procedures to determine the cause of every alarm within 1 hour of the alarm. Except as provided in paragraph (k)(2)(vi) of this section, you must alleviate the cause of the alarm within 3 hours of the alarm by taking whatever corrective action(s) are necessary. Corrective actions may include, but are not limited to the following:

(i) Inspecting the fabric filter for air leaks, torn or broken bags or filter media, or any other condition that may cause an increase in PM emissions;

(ii) Sealing off defective bags or filter media;

(iii) Replacing defective bags or filter media or otherwise repairing the control device;

(iv) Sealing off a defective fabric filter compartment;

(v) Cleaning the bag leak detection system probe or otherwise repairing the bag leak detection system; or

(vi) Shutting down the process producing the PM emissions.

(4) The owner or operator of a kiln or clinker cooler using a PM continuous emission monitoring system (CEMS) to demonstrate compliance with the particulate matter emission limit in § 63.1343 must install, certify, operate, and maintain the CEMS as specified in paragraphs (p)(1) through (p)(3) of this section.

* * * * *

(m) The requirements under paragraph (e) of this section to conduct daily Method 22 testing shall not apply to any specific raw mill or finish mill equipped with a continuous opacity monitoring system (COMS) or bag leak detection system (BLDS). If the owner or operator chooses to install a COMS in lieu of conducting the daily visual emissions testing required under paragraph (e) of this section, then the COMS must be installed at the outlet of the PM control device of the raw mill or finish mill, and the COMS must be installed, maintained, calibrated, and operated as required by the general provisions in subpart A of this part and according to PS–1 of appendix B to part 60 of this chapter. The 6-minute average opacity for any 6-minute block period must not exceed 10 percent. If the owner or operator chooses to install a BLDS in lieu of conducting the daily visual emissions testing required under paragraph (e) of this section, the requirements in paragraphs (k)(1) through (k)(3) of this section apply to each BLDS.

* * * * *

(n) The owner or operator of a kiln or in-line kiln raw mill shall install and operate a continuous emissions monitor in accordance with Performance Specification 12A of 40 CFR part 60, appendix B or a sorbent trap-based integrated monitor in accordance with Performance Specification 12B of 40 CFR part 60, appendix B. The owner or operator shall operate and maintain each CEMS according to the quality assurance requirements in Procedure 4 of 40 CFR part 60, appendix F.

(o) The owner or operator of any portland cement plant subject to the PM limit (lb/ton of clinker) for new or existing sources in § 63.1343(b) or (c) shall:

(1) Install, calibrate, maintain and operate a permanent weigh scale system, or use another method approved by the Administrator, to measure and record weight rates in tons–mass per hour of the amount of clinker produced. The system of measuring hourly clinker production must be maintained within ±5 percent accuracy. The owner or operator shall determine, record, and maintain a record of the accuracy of the system of measuring hourly clinker production before initial use (for new sources) or within 30 days of the effective date of this rule (for existing sources). During each quarter of source operation, the owner or operator shall determine, record, and maintain a record of the ongoing accuracy of the system of measuring hourly clinker production. The use of a system that directly measures kiln feed rate and uses a conversion factor to determine the clinker production rate is an acceptable method.

(2) Record the daily clinker production rates and kiln feed rates.

(p) The owner or operator of a kiln or clinker cooler using a PM continuous emission monitoring system (CEMS) to demonstrate compliance with the particulate matter emission limit in § 63.1343 or § 63.1345 must install, certify, operate, and maintain the CEMS as specified in paragraphs (p)(1) through (p)(3) of this section.

(1) The owner or operator must conduct a performance evaluation of the PM CEMS according to the applicable requirements of § 60.13, Performance Specification 11 of appendix B of part 60, and Procedure 2 of appendix F to part 60.

(2) During each relative accuracy test run of the CEMS required by Performance Specification 11 of appendix B to part 60, PM and oxygen (or carbon dioxide) data must be collected concurrently (or within a 30- to 60-minute period) during operation of the CEMS and when conducting performance tests using the following test methods:

(i) For PM, Method 5 or 5B of appendix A–5 to part 60 or Method 17 of appendix A–6 to part 60.

(ii) For oxygen (or carbon dioxide), Method 3, 3A, or 3B of appendix A–2 to part 60, as applicable.

(3) Procedure 2 of appendix F to part 60 for quarterly accuracy determinations and daily calibration drift tests. The owner or operator must perform Relative Response Audits annually and Response Correlation Audits every 3 years.

(q) The owner or operator of an affected source subject to limitations on emissions of HCl shall:

(1) Continuously monitor compliance with the HCl limit by operating a continuous emission monitor in accordance with Performance Specification 15 of part 60, appendix B. The owner or operator shall operate and maintain each CEMS according to the quality assurance requirements in Procedure 1 of 40 CFR part 60, appendix F, or

(2) Monitor your wet scrubber parameters as specified in 40 CFR part 63, subpart SS.

(r) The owner or operator complying with the total organic HAP emissions limits of § 63.1343 shall continuously monitor THC according to paragraphs (r)(1) through (r)(2) of this section to demonstrate continuous compliance with the emission limits for total organic HAP.

(1) Install, operate and maintain a THC continuous emission monitoring system in accordance with Performance Specification 8A, of appendix B to part

60 of this chapter and comply with all of the requirements for continuous monitoring found in the general provisions, subpart A of the part. The owner or operator shall operate and maintain each CEMS according to the quality assurance requirements in Procedure 1 of 40 CFR part 60, appendix F.

(2) Calculate the 3-hour average THC concentration as the average of three successive 1-hour average THC readings. The 3-hour average THC concentration shall not exceed the average THC concentration established during the initial performance tests for total organic HAP.

12. Section 63.1351 is amended by revising paragraph (d) and adding paragraphs (e) and (f) to read as follows:

§ 63.1351 Compliance dates.

* * * * *

(d) The compliance date for a new source which commenced construction after December 2, 2005, and before December 20, 2006 to meet the THC emission limit of 6 ppmvd or the mercury standard of 14 lb/MM tons clinker will be December 21, 2009, or the effective date of these amendments, whichever is later.

(e) The compliance data for existing sources with the revised PM, mercury, THC, and HCl emissions limits will be 3 years from the effective data of these amendments.

(f) The compliance date for new sources not subject to paragraph (d) of this section will be the effective date of the final rule or startup, whichever is later.

13. Section 63.1354 is amended by adding paragraph (b)(9)(vi) to read as follows:

§ 63.1354 Reporting requirements.

* * * * *

(b)(9) * * *

(vi) Monthly rolling average mercury concentration for each kiln and in-line kiln/raw mill.

* * * * *

14. Section 63.1355 is amended by revising paragraph (e) to read as follows:

§ 63.1355 Recordkeeping requirements.

* * * * *

(e) You must keep records of the daily clinker production rates and kiln feed rates for area sources.

* * * * *

15. Section 63.1356 is revised to read as follows:

§ 63.1356 Sources with multiple emission limits or monitoring requirements.

If an affected facility subject to this subpart has a different emission limit or requirement for the same pollutant under another regulation in title 40 of this chapter, the owner or operator of the affected facility must comply with the most stringent emission limit or requirement and is exempt from the less stringent requirement.

16. Table 1 to Subpart LLL of Part 63 is revised to read as follows:

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS

Citation	Requirement	Applies to subpart LLL	Explanation
63.1(a)(1)–(4)	Applicability	Yes.	
63.1(a)(5)		No	[Reserved].
63.1(a)(6)–(8)	Applicability	Yes.	
63.1(a)(9)		No	[Reserved].
63.1(a)(10)–(14)	Applicability	Yes.	
63.1(b)(1)	Initial Applicability Determination	No	§ 63.1340 specifies applicability.
63.1(b)(2)–(3)	Initial Applicability Determination	Yes.	
63.1(c)(1)	Applicability After Standard Established.	Yes.	
63.1(c)(2)	Permit Requirements	Yes	Area sources must obtain Title V permits.
63.1(c)(3)		No	[Reserved].
63.1(c)(4)–(5)	Extensions, Notifications	Yes.	
63.1(d)		No	[Reserved].
63.1(e)	Applicability of Permit Program	Yes.	
63.2	Definitions	Yes	Additional definitions in § 63.1341.
63.3(a)–(c)	Units and Abbreviations	Yes.	
63.4(a)(1)–(3)	Prohibited Activities	Yes.	
63.4(a)(4)		No	[Reserved].
63.4(a)(5)	Compliance date	Yes.	
63.4(b)–(c)	Circumvention, Severability	Yes.	
63.5(a)(1)–(2)	Construction/Reconstruction	Yes.	
63.5(b)(1)	Compliance Dates	Yes.	
63.5(b)(2)		No	[Reserved].
63.5(b)(3)–(6)	Construction Approval, Applicability	Yes.	
63.5(c)		No	[Reserved].
63.5(d)(1)–(4)	Approval of Construction/Reconstruction.	Yes.	
63.5(e)	Approval of Construction/Reconstruction.	Yes.	
63.5(f)(1)–(2)	Approval of Construction/Reconstruction.	Yes.	
63.6(a)	Compliance for Standards and Maintenance.	Yes.	
63.6(b)(1)–(5)	Compliance Dates	Yes.	
63.6(b)(6)		No	[Reserved].
63.6(b)(7)	Compliance Dates	Yes.	
63.6(c)(1)–(2)	Compliance Dates	Yes.	
63.6(c)(3)–(4)		No	[Reserved].
63.6(c)(5)	Compliance Dates	Yes.	
63.6(d)		No	[Reserved].

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Requirement	Applies to subpart LLL	Explanation
63.6(e)(1)–(2)	Operation & Maintenance	Yes.	
63.6(e)(3)	Startup, Shutdown Malfunction Plan	Yes.	
63.6(f)(1)	Compliance with Emission Standards	No.	
63.6(f)(2)–(3)	Compliance with Emission Standards	Yes.	
63.6(g)(1)–(3)	Alternative Standard	Yes.	
63.6(h)(1)	Opacity/VE Standards	No.	
63.6(h)(2)	Opacity/VE Standards	Yes.	
63.6(h)(3)		No	[Reserved].
63.6(h)(4)–(h)(5)(i)	Opacity/VE Standards	Yes.	
63.6(h)(5)(ii)–(iv)	Opacity/VE Standards	No	Test duration specified in subpart LLL.
63.6(h)(6)	Opacity/VE Standards	Yes.	
63.6(h)(7)	Opacity/VE Standards	Yes.	
63.6(i)(1)–(14)	Extension of Compliance	Yes.	
63.6(i)(15)		No	[Reserved].
63.6(i)(16)	Extension of Compliance	Yes.	
63.6(j)	Exemption from Compliance	Yes.	
63.7(a)(1)–(3)	Performance Testing Requirements	Yes	§ 63.1349 has specific requirements.
63.7(b)	Notification	Yes.	
63.7(c)	Quality Assurance/Test Plan	Yes.	
63.7(d)	Testing Facilities	Yes.	
63.7(e)(1)–(4)	Conduct of Tests	Yes.	
63.7(f)	Alternative Test Method	Yes.	
63.7(g)	Data Analysis	Yes.	
63.7(h)	Waiver of Tests	Yes.	
63.8(a)(1)	Monitoring Requirements	Yes.	
63.8(a)(2)	Monitoring	No	§ 63.1350 includes CEMS requirements.
63.8(a)(3)		No	[Reserved].
63.8(a)(4)	Monitoring	No	Flares not applicable.
63.8(b)(1)–(3)	Conduct of Monitoring	Yes.	
63.8(c)(1)–(8)	CMS Operation/Maintenance	Yes	Temperature and activated carbon injection monitoring data reduction requirements given in subpart LLL.
63.8(d)	Quality Control	Yes.	
63.8(e)	Performance Evaluation for CMS	Yes.	
63.8(f)(1)–(5)	Alternative Monitoring Method	Yes	Additional requirements in § 63.1350(l).
63.8(f)(6)	Alternative to RATA Test	Yes.	
63.8(g)	Data Reduction	Yes.	
63.9(a)	Notification Requirements	Yes.	
63.9(b)(1)–(5)	Initial Notifications	Yes.	
63.9(c)	Request for Compliance Extension	Yes.	
63.9(d)	New Source Notification for Special Compliance Requirements.	Yes.	
63.9(e)	Notification of Performance Test	Yes.	
63.9(f)	Notification of VE/Opacity Test	Yes	Notification not required for VE/opacity test under § 63.1350(e) and (j).
63.9(g)	Additional CMS Notifications	Yes.	
63.9(h)(1)–(3)	Notification of Compliance Status	Yes.	
63.9(h)(4)		No	[Reserved].
63.9(h)(5)–(6)	Notification of Compliance Status	Yes.	
63.9(i)	Adjustment of Deadlines	Yes.	
63.9(j)	Change in Previous Information	Yes.	
63.10(a)	Recordkeeping/Reporting	Yes.	
63.10(b)	General Requirements	Yes.	
63.10(c)(1)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(c)(2)–(4)		No	[Reserved].
63.10(c)(5)–(8)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(c)(9)		No	[Reserved].
63.10(c)(10)–(15)	Additional CMS Recordkeeping	Yes	PS–8A supersedes requirements for THC CEMS.
63.10(d)(1)	General Reporting Requirements	Yes.	
63.10(d)(2)	Performance Test Results	Yes.	
63.10(d)(3)	Opacity or VE Observations	Yes.	
63.10(d)(4)	Progress Reports	Yes.	
63.10(d)(5)	Startup, Shutdown, Malfunction Reports.	Yes.	
63.10(e)(1)–(2)	Additional CMS Reports	Yes.	

TABLE 1 TO SUBPART LLL OF PART 63—APPLICABILITY OF GENERAL PROVISIONS—Continued

Citation	Requirement	Applies to subpart LLL	Explanation
63.10(e)(3)	Excess Emissions and CMS Performance Reports.	Yes	Exceedances are defined in subpart LLL.
63.10(f)	Waiver for Recordkeeping/Reporting	Yes.	
63.11(a)–(b)	Control Device Requirements	No	Flares not applicable.
63.12(a)–(c)	State Authority and Delegations	Yes.	
63.13(a)–(c)	State/Regional Addresses	Yes.	
63.14(a)–(b)	Incorporation by Reference	Yes.	
63.15(a)–(b)	Availability of Information	Yes.	

Appendix to Part 63—[Amended]

17. Section 1.3.2 of Method 321 of Appendix A to Part 63—Test Methods is revised to read as follows:

Appendix A to Part 63—Test Methods

* * * * *

Test Method 321—Measurement of Gaseous Hydrogen Chloride Emissions at Portland Cement Kilns by Fourier Transform Infrared (FTIR) Spectroscopy

* * * * *

1.3.2 The practical lower quantification range is usually higher than that indicated by the instrument performance in the laboratory, and is dependent upon (1) the presence of interfering species in the exhaust gas (notably H_2O), (2) the optical alignment of the gas cell and transfer optics, and (3) the quality of the reflective surfaces in the cell (cell throughput). Under typical test conditions (moisture content of up to 30 percent, 10 meter absorption pathlength, liquid nitrogen-cooled IR detector, 0.5 cm^{-1} resolution, and an interferometer sampling time of 60 seconds) a typical lower quantification range for HCl is 0.1 to 1.0 ppm.

* * * * *

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May 6, 2009

Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 300

Pacific Halibut Fisheries; Guided Sport Charter Vessel Fishery for Halibut; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 0808061071–9666–02]

RIN 0648–AX17

Pacific Halibut Fisheries; Guided Sport Charter Vessel Fishery for Halibut

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

ACTION: Final rule.

SUMMARY: NMFS implements regulations to limit the harvest of Pacific halibut by guided sport charter vessel anglers in International Pacific Halibut Commission (IPHC) Regulatory Area 2C (Area 2C) of Southeast Alaska to one halibut per day. This action is necessary to reduce the halibut harvest in the guided sport charter vessel (guided) sector. The intended effect of this action is to manage the harvest of halibut in Area 2C consistent with an allocation strategy recommended by the North Pacific Fishery Management Council for the guided fishery and the commercial fishery. This final rule implements three restrictions for the guided fishery for halibut in Area 2C: a one-fish daily bag limit, no harvest by the charter vessel guide and crew, and a line limit equal to the number of charter vessel anglers onboard, not to exceed six lines.

DATES: Effective June 5, 2009.

ADDRESSES: Copies of the Environmental Assessment (EA), Regulatory Impact Review (RIR), and Final Regulatory Flexibility Analysis (FRFA) prepared for this action may be obtained from NMFS Alaska Region, P.O. Box 21668, Juneau, Alaska 99802, Attn: Ellen Sebastian, and on the NMFS Alaska Region Web site at *http://www.alaskafisheries.noaa.gov.*

Written comments regarding the burden-hour estimates or other aspects of the collection of information requirements contained in this rule may be submitted to NMFS at the above address, and by e-mail to *David_Rostker@omb.eop.gov* or by fax to 202–395–7285.

FOR FURTHER INFORMATION CONTACT: Sue Salveson or Jay Ginter, 907–586–7228.

SUPPLEMENTARY INFORMATION: The IPHC and NMFS manage fishing for Pacific halibut (*Hippoglossus stenolepis*) through regulations established under the authority of the Northern Pacific Halibut Act of 1982 (Halibut Act). The IPHC promulgates regulations governing the halibut fishery under the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention). The IPHC's regulations are subject to acceptance by the Secretary of State with concurrence by the Secretary of Commerce (Secretary). After acceptance by the Secretaries of State and Commerce, the IPHC regulations are published in the **Federal Register** as annual management measures pursuant to 50 CFR 300.62. The annual management measures for 2009 were published on March 19, 2009 (74 FR 11681).

The Halibut Act also provides the North Pacific Fishery Management Council (Council) with authority to recommend regulations to the Secretary to allocate harvesting privileges among U.S. fishermen. The Council, under 16 U.S.C. 773c(c), may develop regulations applicable to U.S. nationals or vessels, which are in addition to, and not in conflict with, regulations adopted by the IPHC. Regulations developed by the Council shall be implemented only with the approval of the Secretary, and must meet criteria outlined in section 773c(c).

The Secretary, under 16 U.S.C. 773c(a) and (b) has general responsibility to carry out the Convention and Halibut Act. According to section 773c(b),

> In fulfilling this responsibility, the Secretary shall, in consultation with the Secretary of the department in which the Coast Guard is operating, adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and [the Halibut Act].

The Secretary's authority to take action under the Halibut Act has been delegated to NMFS. NMFS takes this action under section 773c(b) to adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention and the Halibut Act. This action implements, among other measures, a one-halibut daily bag limit on charter vessel anglers in IPHC Area 2C. This bag limit originally was recommended by the Council in June 2007 and implemented by NMFS by final rule on May 28, 2008, with an effective date of June 1, 2008 (73 FR 30504). The June 1, 2008 rule was withdrawn following a legal challenge as described in the preamble to the proposed rule for this action published on December 22, 2008 (73 FR 78276).

Background and Need for Action

The respective roles of the IPHC and the Council in managing the commercial, sport and subsistence fisheries for halibut are described in the preamble to the proposed rule for this action (73 FR 78276, December 22, 2008).

Each year, the IPHC establishes an annual total Constant Exploitation Yield (Total CEY) for Pacific halibut based on the most recent estimates of the overall halibut biomass. The IPHC then subtracts estimates of all noncommercial removals (sport, subsistence, bycatch, and wastage) from the Total CEY. The remainder, after the noncommercial removals are subtracted, is the Fishery CEY for an area's directed commercial fishery. Any increases in non-commercial removals of halibut will necessarily decrease the portion of the Total CEY available as Fishery CEY for use by the commercial sector. The IPHC annually sets a catch limit for the commercial longline fishery in each regulatory area in and off Alaska that is based on the Fishery CEY but not necessarily limited to the Fishery CEY.

In 2003, NMFS approved and established (at 50 CFR 300.65(c)(1)) the Council's recommended guideline harvest level (GHL) policy to serve as a benchmark for monitoring the charter vessel fishery's harvests of Pacific halibut. The GHL does not limit harvests by charter vessel anglers, however. Subsequent regulatory action, such as this action, is necessary to control the charter vessel fishery's harvests to the GHL. Harvests by charter vessel anglers exceeded the GHL in Area 2C each year from 2004 to 2007, and the best available estimates indicate that the 2008 GHL also was exceeded (Table 1 and Figure 1 of this preamble). Harvests of halibut by the charter sector above its GHL reduce the Fishery CEY. By reducing the amount of fish available to the commercial sector, the charter harvests create an allocation concern. Charter removals should be close to the GHL or the methodology used by the IPHC to determine the Fishery CEY is undermined and results in a *de facto* reallocation from the commercial sector in subsequent years.

Charter vessel harvests in excess of the GHL also create a conservation concern by compromising the overall harvest strategy developed by the IPHC to conserve the halibut resource. The Total CEY and the Fishery CEY have decreased each year since 2004 reflecting declines in the estimated halibut biomass. As the Total CEY decreases, harvests of halibut should decrease to help conserve the resource. Hence, the GHL is linked to the Total CEY so that the GHL decreases in a stepwise fashion as the Total CEY decreases. Despite a decrease in Total CEY and the GHL in recent years,

charter vessel harvests have remained high and in excess of the GHL. As conservation of the halibut resource is the overarching goal of the IPHC, the magnitude of charter vessel harvests over the GHL in Area 2C has raised concern that such overharvesting by the charter sector poses a conservation risk, with the potential to undermine the IPHC's conservation and management goals for the overall halibut stock. Therefore, restraining charter sector harvests to approximately the GHL would contribute to the conservation of the halibut resource.

Objective of This Action

As indicated in the proposed rule for this action (73 FR 78276, December 22, 2008), NMFS is implementing a one-halibut daily bag limit in Area 2C to give effect to the Council's intent to keep the harvest of charter vessel anglers to approximately the GHL. In the years 2003 through 2007, the GHL was 1,432,000 lbs (649.5 mt). In 2008, the GHL was reduced to 931,000 lbs (422.3 mt), and in 2009, the GHL was further reduced to 788,000 lbs (357.4 mt). Harvests by charter vessel anglers were below the GHL in 2003 and above the GHL in 2004 through 2008. Table 1 provides the GHL for each year, the specific amounts of charter vessel angler harvest, and the percentages of those amounts compared to the GHL. Figure 1 provides a graphical representation of the GHL and the specific amounts harvested. Table 7 in the analysis (see **ADDRESSES**) shows that implementation of a one-halibut daily bag limit would reduce charter vessel angler catch to a range of 1,495,000 lbs (678.1 mt) to 602,000 lbs (310.7 mt), depending on various average weight scenarios and assumptions about reductions in demand. NMFS determined that the one-halibut daily bag limit was the best alternative to bring charter vessel angler harvest close to the 931,000 lb (422.3 mt) level, after comparing it with other options and reviewing the range of potential harvests under the one-halibut daily bag limit based on various weight scenarios and demand reduction assumptions. Taking this action is consistent with the action proposed at 73 FR 78276. Also, it will bring the harvest of halibut by charter vessel anglers in Area 2C closer to the 788,000 lb (357.4 mt) level than will the *status quo,* consistent with the Council's intent.

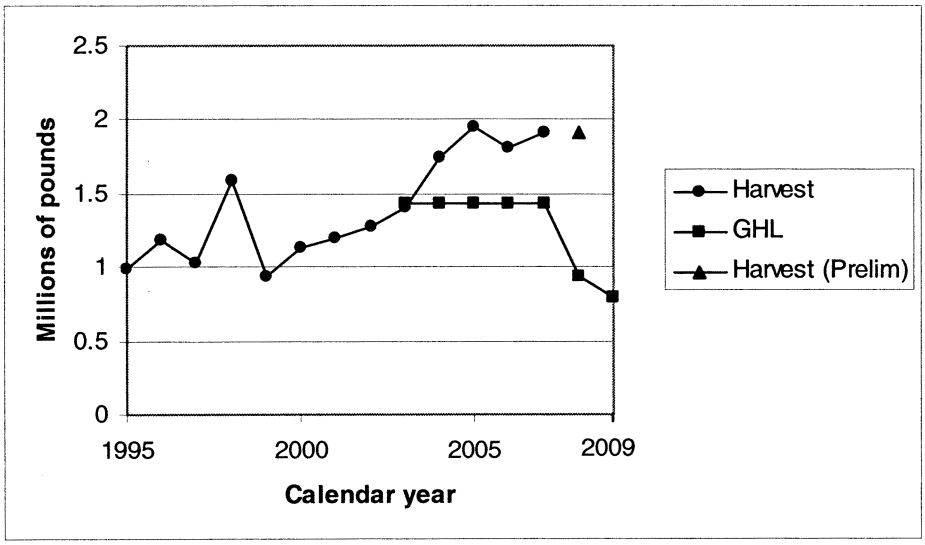
From 2003 to 2007, the GHL for Area 2C was 1,432,000 lbs (649.6 mt). In 2008, the IPHC reduced the Total CEY to 6,500,000 lbs (2,948.4 mt) from the 2007 Total CEY of 10,800,000 lbs (4,899.0 mt). This was a reduction of 4,300,000 lbs (1,950.5 mt) from the 2007 Total CEY. The reduction in the Total CEY triggered a reduction of the GHL for Area 2C from 1,432,000 lbs (649.6 mt) to 931,000 lbs (422.3 mt) for 2008. In 2009, the IPHC again reduced the Total CEY to 5,570,000 lbs (2,526.5 mt), which again triggered a reduction of the Area 2C GHL from 931,000 lbs (422.3 mt) to 788,000 lbs (357.4 mt) for 2009. As shown in Table 1 and Figure 1, the average charter vessel angler harvest in Area 2C for the four years 2004 through 2007 was 1,856,000 lbs (841.9 mt).

TABLE 1—GUIDED AND UNGUIDED SPORT HARVEST BY YEAR IN AREA 2C

Year	GHL (million pounds)	Unguided sport harvest (million pounds)	Charter harvest (million pounds)	Total sport harvest (million pounds)	Charter harvest as percentage of GHL	Charter harvest as percentage of total sport harvest
2002	n/a	0.814	1.275	2.089	n/a	61.0
2003	1.432	0.846	1.412	2.258	98.6	62.5
2004	1.432	1.187	1.750	2.937	122.2	59.6
2005	1.432	0.845	1.952	2.797	136.3	69.8
2006	1.432	0.723	1.804	2.527	126.0	71.4
2007	1.432	1.131	1.918	3.049	133.9	62.9
2008	0.931	n/a	*1.914	n/a	*205.6	n/a
2009	0.788	n/a	n/a	n/a	n/a	n/a

n/a = not available.
* Harvest estimates are the best available.

Figure 1. Area 2C Charter vessel angler harvest and the GHL from 1995 to 2009



NMFS proposed this action on December 22, 2008 (73 FR 78276). Public comments were invited on the proposed rule for a period of 30 days ending on January 21, 2009. NMFS received 179 public submissions containing 141 unique comments. These comments are grouped into topical areas, summarized, and responded to below.

Comments and Responses

Conservation Concerns

Comment 1: The proposed rule is an allocation measure and does not have a conservation objective.

Response: This action addresses conservation of the halibut resource by constraining overall harvest to meet yield. In the presence of multiple user groups, conservation and allocation cannot be separated. Instead conservation objectives are advanced by conservation-sensitive allocation procedures. By reducing harvest in the Area 2C charter vessel fishery more than it would be without this rule, the fleet can contribute to achievement of the overall target exploitation rate for halibut in Area 2C and bring the charter vessel fishery closer to its GHL in this area.

In recent years, the Total CEY for Area 2C halibut has been declining. In response, it is important that the harvests of the principal user groups also decline to control the yield from the fisheries for conservation purposes. In the evaluation of these fisheries, different mechanisms have been created to limit the harvests of different user groups. Some user groups, such as subsistence and unguided sport users, are not currently subject to measures designed to control aggregate harvests. A major user group, the commercial setline fishery, has a strictly managed annual catch limit, however. This catch limit is set by the IPHC based on the Fishery CEY and distributed to the commercial harvesters through the individual fishing quota (IFQ) system. The commercial catch limit has been cut by just over 50 percent between 2005 and 2009.

Harvest controls also have been created for the guided component of the sport fishery. This operates through the Council and Secretarial GHL system and regulatory measures implemented to limit guided harvests to the GHL. The guided sport fishery has exceeded its GHL since 2004 and the best available harvest estimates in 2008 indicate that the fishery exceeded its GHL 100 percent. A size limit on one of the two halibut in the bag limit in 2007 did not substantially constrain the charter vessel angler harvest in 2007. To control harvest to approximately the GHL in 2009, NMFS is implementing a one-halibut daily bag limit.

Comment 2: IPHC statements demonstrate there is no conservation concern. In 2008, the IPHC said the halibut stocks in Area 2C are ''well above a level of concern'' and there is no cause for ''undue alarm.'' The IPHC has projected increases in the available harvestable biomass over the next 10 years. The IPHC has stated the proposed alternatives are not expected to have a significant impact on the halibut stocks or affect the overall harvest determined by the IPHC.

Response: The statements attributed to the IPHC in the first sentence are not presented in context. The comment concerning ''well above a level of concern'' was made on page 83 of the IPHC 2008 Annual Meeting Bluebook and referred to the ''coastwide'' biomass of halibut, not the biomass of halibut in Area 2C. The complete statement was: ''The coastwide assessment indicates a declining spawning biomass but one that is still well above a level of concern or anything close to a historic minimum.''

The second statement concerning no cause for ''undue alarm'' is also taken out of context. The complete statement is on page 84 of the IPHC 2008 Annual Meeting Bluebook and states, ''Taken together, the decline in exploitable biomass in Area 2 is understandable and is not cause for undue alarm. However, under a constant exploitation harvest strategy, removals by the fishery must come down as the biomass declines. Our present view of Area 2 is that harvest rates have been much higher than the target harvest rate of 0.20 over the past decade.''

The coastwide biomass of halibut is projected to increase, as the comment notes, but only if harvests are restrained within the target harvest rates of 0.20 for Areas 2 and 3, and 0.15 for Area 4. Such projections do not incorporate the much higher harvests taken in Area 2 over the past decade.

The statement that the proposed alternatives are not expected to have a significant impact on the halibut stocks or affect the overall harvest determined by the IPHC was not made by the IPHC. That comment appears to be based on language in the executive summary of the analysis (see **ADDRESSES**) supporting the proposed rule. The commenter's

statement about a lack of significant impact on halibut stocks correctly characterizes the conclusions of the analysis. However, the statement about not affecting the overall harvest does not. The analysis indicated that harvest rates might be exceeded in the short run, but that the IPHC had the ability to offset these by reduced catch limits in the longer term. See response to Comment 7 for further discussion of this issue. The executive summary of the analysis has been revised to more accurately reflect the conclusions of the analysis.

Comment 3: The IPHC's action in basing the 2008 and 2009 commercial catch limits on the GHL, rather than on a scientific projection of guided harvests in the coming year is evidence that there is no conservation concern. In 2008 and 2009, the IPHC deviated from its past approach to estimating guided sport harvests for the coming year, and based its estimates on the GHL. Because the GHL is likely to be smaller than actual harvests, this tends to increase the IPHC's Fishery Constant Exploitation Yield (Fishery CEY), on which the longline fishery's catch limit is based. The IPHC essentially gave Area 2C longline IFQ holders millions of additional pounds of halibut through its manipulation of the Fishery CEY formula by using the much lower charter halibut GHL number rather than the best available estimate of charter catch.

Response: Through 2007, the IPHC made its allocation decisions using a formula that deducted estimated non-commercial user harvests for the year, including the guided sport sector harvests, from an overall Total CEY. The residual (the Fishery CEY) then formed the basis for determining the amount of halibut to allocate to the commercial longline fishermen as a catch limit. The catch limit could be greater than or less than the residual, depending on whether the stock was increasing or decreasing and on the speed with which the IPHC proposed to adjust the catch limit to this residual. In 2008, the IPHC used the GHL to project charter vessel angler harvests, following a commitment by NMFS to implement a one-fish bag limit for the 2008 Area 2C charter fishery. NMFS issued a final rule implementing the one-fish bag limit, but that rule was enjoined by a court order and was subsequently withdrawn. In 2009, the IPHC, assuming that NMFS would implement management measures to limit harvest to approximately the GHL, again used the GHL to project the guided sport harvest.

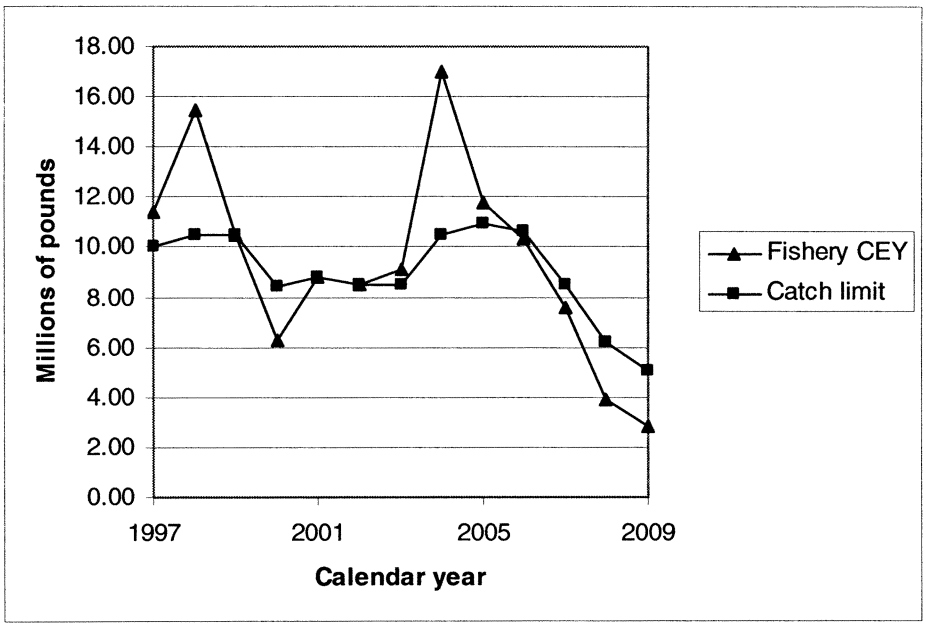
At its 2009 Annual Meeting, the IPHC stated ''* * *national parties are cautioned that any departure from these assumed levels of removal by the recreational sector will compromise achievement of IPHC harvest targets for 2009'' (IPHC 2009 Annual Meeting Bluebook page 138). The IPHC use of the GHL as the assumed level of removal for the guided fishery reflects the Council's and NMFS' intent to limit the guided sport fishery harvest of halibut to a level consistent with GHL trends.

The concept that using the GHL rather than actual halibut harvests increases the amount of fish available to commercial fishermen is misleading. The correct context of this result is that when charter vessel harvests are close to the GHL, the commercial fishery is not penalized through a reduction caused by charter vessel harvests in excess of the GHL. This issue is further discussed in the response to Comment 9.

Comment 4: The IPHC's use of its ''Slow Up/Fast Down'' (SUFD) policy is evidence that there is no conservation concern. One commenter notes that in the last four years through its SUFD policy the IPHC has intentionally exceeded the Fishery CEY to the direct benefit of the longline fleet by 300,000 lbs in 2006, 900,000 lbs in 2007, and 2,300,000 lbs in 2008; and has approved another 2,210,000 lbs in 2009. The total excess over the Fishery CEY over this period exceeds 5,680,000 lbs. How can the IPHC and NMFS express a conservation concern with a charter vessel catch exceeding a non-binding GHL by 500,000 lbs, while at the same time promote harvest by the longline fleet in excess of its Fishery CEY by more than 2,000,000 lbs? If this level of overage is not considered a conservation issue, how can the 1,400,000 lbs allocated to the recreational fishery be considered a conservation issue?

Response: The SUFD policy is an integral part of the IPHC's management regime. If the Fishery CEY is bigger than the previous year's catch limit, then the IPHC staff's recommended catch limit increases by only 33 percent of the difference. If the Fishery CEY is less than the previous year's catch limit, the recommended catch limit reduction is limited to 50 percent of the difference, as illustrated in Figure 2. The commercial catch limit increases and decreases with changes in biomass, even with a static GHL, whereas changes to the charter sector's GHL occur in a stepwise manner only when specific Fishery CEY levels are established by the IPHC (see 50 CFR 300.65(c)(1)).

Figure 2. Area 2C Fishery CEY and Catch Limit from 1997 to 2009



The SUFD component of the IPHC's management regime was not designed to advantage the commercial sector. It is designed to ameliorate the impacts of large changes in biomass.

The IPHC's management decisions on annual catch limits are based on the underlying stock assessment and the application of its harvest management policies to the identified biomass levels in that assessment. Accordingly, the Fishery CEY levels of the assessment are only one component of the process to determine catch limits and conservation targets. The Fishery CEY levels are further modified by harvest policy considerations (e.g., the SUFD harvest control rule) in deciding on final catch limits. For regulatory areas with Catch Sharing Plans, all directed fisheries are affected by these additional policy considerations, but this is not the case for GHL-governed fisheries in the absence of a Catch Sharing Plan. Notably, the Council's proposed Catch Sharing Plan for Areas 2C and 3A charter vessel fisheries could bring the charter fisheries under such policy adjustments. Also see responses to Comments 10 and 111.

The Fishery CEY is only one component of the IPHC's harvest strategy. The overall harvest rate and the harvest control rules, such as SUFD, also are part of the harvest strategy. The IPHC establishes its annual conservation targets by considering the underlying stock assessment, the harvest rate, and the harvest control rules. The IPHC staff has evaluated the impacts of the harvest control rules and the application of these rules to establish annual conservation limits to ensure that the stock is not compromised by their application. This approach has been endorsed by the IPHC. The important part of this approach is that it is based on the achievement of the identified conservation targets. If these targets are exceeded, the length of time that the stock is projected to be below threshold reference points increases. This creates a conservation concern and requires reductions in the harvest rate. In the case of regulatory areas with Catch Sharing Plans, such concerns have not existed because the conservation targets for those directed fisheries have not been exceeded.

The IPHC's mandate under the Convention requires that it enact measures to conserve halibut stocks. The IPHC therefore has taken strong actions to decrease the catch limits for Area 2C in order to lower the realized harvest rate on the exploitable biomass. Catch limits adopted by the IPHC for Area 2C over the 2005 to 2009 period have decreased by 54 percent. Despite the establishment of the GHL for Area 2C guided sport fishery, the benefits of protecting the stock biomass have not been realized by the lack of sufficient restrictions on the guided sport fishery.

The 2009 commercial catch limit exceeds the Fishery CEY by about 2,300,000 lbs, while the best available harvest information indicates the charter vessel fishery exceeded the 2008 GHL by almost one million pounds. Overages of this magnitude raise conservation concerns. The IPHC, the Council, and NMFS, have been attempting to address each fishery within the regulatory structure created for it. The Fishery CEY and the GHL are different concepts, and different mechanisms are available for setting them and for reducing catches to them. The IPHC reduced the catch limit by 54 percent between 2005 and 2009. If the Fishery CEY remains low, the catch limit would continue to decrease in coming years until it became equal to the Fishery CEY. The Council and NMFS tried, with the 32-inch size limit in 2007, and with a one-fish daily bag limit in 2008, to reduce charter vessel harvests to approximately the GHL. The present action imposing a one-fish daily bag limit is one part of the effort to reduce overall harvests.

NMFS notes that the measured response to changing stock conditions incorporated in the SUFD policy is similar to the way the charter vessel fishery has been managed in practice. The GHL allows for moderate reductions in Total CEY without triggering harvest reductions for the charter vessel fishery.

Comment 5: The IPHC Commissioners increased the allocation to the commercial sector beyond the amount recommended by IPHC staff by reducing the recommended commercial allocations for other regulatory areas to increase the allocations for all of Area 2, including Area 2C. This is evidence that there is no conservation concern.

Response: Biological issues in different management areas are related since there is a single coastwide stock of halibut. However, IPHC determinations about Area 2C commercial catch limits were made independently of determinations about commercial catch limits in other areas.

The IPHC staff recommended commercial catch limit for Area 2C for 2009 was 4,540,000 lbs (2,059.3 mt) and the IPHC adopted a catch limit of 5,020,000 lbs (2,277.0 mt) a difference of 480,000 lbs (217.7 mt). The staff recommendation was based on the assessment and application of harvest control rules as described in the response to Comment 4. The IPHC's adoption of the 5,020,000 lbs (2,277.0 mt) commercial catch limit was a reduction of 1,190,000 lbs (539.8 mt or 19 percent) from the 2008 commercial catch limit for Area 2C. By adopting a catch limit that is higher than its staff's recommendation but lower than last year's catch limit, the IPHC was choosing a more gradual reduction than that proposed by the staff.

Comment 6: The IPHC decision to shift from a closed area assessment model to the coastwide model is responsible for a decrease in the amount of halibut available for harvest in Area 2C. This decision moved 12 percent of traditional harvest from coastal areas to western Alaska where it will be harvested primarily by boats from Seattle. The shift in models did not fare well in peer review and is contrary to 76 years of halibut management experience. It causes hardship to fishing operations in Southeast Alaska, while benefitting large vessel owners based far from the resource. Do not adopt a one-fish bag limit at this time, and request the IPHC to reinstate the closed area assessment model. Doing so would allow continuation of the two-fish daily bag limit, and the proposed limited entry and current economic reality would reduce charter vessel effort to bring down guided sport halibut harvest numbers.

Response: IPHC shifted from a closed-area to a coastwide approach for area-specific biomass determination beginning with the assessment for 2007. This has resulted in lower estimates of biomass for Area 2C. Growing concerns about net migration from the western to the eastern Gulf of Alaska led the IPHC to doubt the accuracy of the closed-area biomass assessments that had been done for many years. In 2006, the IPHC staff changed the orientation of its stock assessment because new scientific information conflicted with previous model assumptions about migration between regulatory areas. The new assessment approach considered tagging data and mortality rates that suggested that a larger fraction of halibut beyond eight years of age continue to migrate eastward than previously assumed. The IPHC staff submitted its revised stock assessment to independent scientific peer review and the IPHC Commissioners were satisfied with the results of the peer review.

Comment 7: The analysis (see **ADDRESSES**) for this action says that there is no conservation concern. One commenter quoted from sections of the analysis at pages xiv, 29, 56, and 57, that state the action will not have significant impacts, that the objective of the action is distributive, and that no adverse impacts are expected because the IPHC takes account all significant resource removals.

Response: The analysis finds that the action would not have significant environmental impacts. The purpose of an analysis is to determine whether an action of the federal government will have a significant impact on the human environment, and whether an environmental impact statement is necessary. The draft analysis for this action evaluated the environmental impacts of the action and found that it would not have a significant environmental impact. This conclusion is not the same as a statement that an action does not have a management or conservation purpose.

As noted in the response to Comment 1, when multiple user groups must operate within a shared overall harvest, distribution and conservation questions are inseparable. Any conservation mandated increase or decrease in the shared overall harvest must be shared among the different user groups. If one group exceeds its allocation, either the conservation limit will be exceeded, or another user group must find its share of the harvest reduced.

No adverse impacts are expected because the IPHC takes account of resource removals, but as the analysis goes on to state, there is a potential for exploitation rates to be exceeded in the short run under the status quo, and that the IPHC can address this in the longer run with offsetting policy measures. This consideration reflects the issues raised when multiple user groups fish against a common overall harvest objective that were discussed in the second paragraph of this response.

Finally, NMFS has new information at this time that was not available at the time the analysis was completed. This new information includes the best available logbook-based information on the 2008 guided angler harvest from ADF&G in November 2008, the Area 2C Total CEY, Fishery CEY, and catch limit determinations made by the IPHC in January 2009, and the new GHL published February 24, 2009 (74 FR 8232). The best available 2008 harvest information indicating that the GHL was exceeded again in 2008 and that the 32-inch maximum size limit on one fish was not effective in 2008, and the continued declines of the Total CEY, Fishery CEY, and GHL in 2009, heighten management and conservation concerns.

Comment 8: The proposed rule does not identify a conservation objective.

Response: The preamble to the proposed rule clearly identified the following conservation objective:

> This action addresses conservation of the resource, by restricting catch to approximately the GHL, so that the IPHC's projected harvest of halibut by guided anglers, which is assumed by the IPHC to equal the GHL, adequately reflects actual catches for purposes of managing sustainable removals of the halibut resource. This action also addresses an allocation of halibut fishing privileges among various U.S. fishermen, by giving effect to a Council recommendation on how to assign such privileges consistent with the criteria found in section 773c(c) of the Halibut Act.

These criteria include expectations for harvest limits that are reasonably calculated to promote conservation.

Comment 9: The rule would not leave any more fish in the water as a result of the one-fish limit. Any charter vessel reduction simply increases the longline harvest.

Response: The objective of this action is explained above under the heading ''objective of this action.'' This action should reduce the overall harvest rate from all fisheries in Area 2C to a level closer to the 20 percent harvest rate target set by the IPHC for conservation of the resource. If successful, a reduction in the charter vessel harvest should leave more halibut in the water to the benefit of all fisheries now and in future years, as well as benefit the health and reproductive potential of the resource.

Comment 10: If this is a conservation issue, why is it going to be all right for the charter business to buy guided angler fish from the longline sector for that second fish?

Response: The term ''guided angler fish'' refers to part of a Catch Sharing Plan proposed by the Council in October 2008, for resolving halibut resource allocation issues between the commercial and charter vessel fisheries. The proposed Catch Sharing Plan has not been submitted to NMFS for review and is outside the scope of this final rule. Once the Catch Sharing Plan is submitted, NMFS will publish a

proposed rule in the **Federal Register** for public review and comment.

Comment 11: In an editorial in the *Juneau Empire* dated September 21, 2008, the Deputy Director of the Council stated that no stock of groundfish off Alaska is overfished or subject to overfishing.

Response: NMFS notes that the reference to groundfish is to the species managed under the Council's two groundfish fishery management plans. Pacific halibut is not a ''groundfish'' as that term is defined in those plans or in their implementing regulations.

Comment 12: Because the 32-inch rule in 2008 applied to charter boats only, the implication is that the action was not designed to protect resources, but rather to target charter boats.

Response: The 32-inch rule in 2008 applicable to charter vessel anglers in Area 2C was first implemented in 2007 (72 FR 30714, June 4, 2007). That rule allowed a daily bag limit of two halibut but required at least one of the two fish to be no more than 32 inches (81.3 cm) in length. This rule was applied to charter vessel anglers in Area 2C because the number of guided vessels participating in the charter fishery was increasing rapidly and the charter vessel sector (about 67 percent of the combined charter and non-charter sport harvest), had exceeded its GHL in Area 2C in 2004, 2005, and 2006.

The 32-inch rule was designed to maintain a two-halibut bag limit and reduce the halibut harvest by the charter vessel sector in Area 2C to a level comparable to the seasonal one-halibut bag limit proposed that year by the IPHC. The 32-inch rule did not appear to have its intended effect. The charter vessel harvest in 2007 actually increased about six percent compared to the charter vessel harvest in 2006. Because the 32-inch rule proved ineffective at reducing the Area 2C charter vessel harvest to a level consistent with GHL trends while maintaining a two-halibut daily bag limit, more restrictive measures are warranted.

Comment 13: In the responses to several comments in the final rule that implemented a one-fish halibut bag limit in 2008 (73 FR 30504, May 28, 2008), NMFS asserted that there was no conservation rationale in its defense of the 2008 one-fish limit. In the response to Comment 79, NMFS agreed that the rule dealt with a pure allocation issue and did not present any resource conservation questions. NMFS went on to say, ''* * * the healthy status of the halibut resource is evidence that IPHC policies are conservative and successful.'' In the response to Comment 81, NMFS said, ''The best available evidence indicates that the Area 2C stock is not over fished and the IPHC has not made that determination.'' In the response to Comment 82, NMFS said, ''* * * the environmental analysis prepared for this rule did not find that failure to limit the guided sport charter vessel halibut harvest to the GHL would cause significant environmental impacts on the resource.'' Thus, there is no conservation concern.

Response: As noted in the response to Comment 1, conservation issues are inherent when the harvests of multiple user groups are being constrained to stay within an overall aggregate harvest limit.

The essence of last year's Comment 79 was that conservation of the halibut resource is an objective of the IPHC's policies and the need for restrictions on the charter vessel sector is primarily one of allocation. NMFS acknowledged the long history of the IPHC in maintaining a relatively healthy halibut resource coastwide. This final rule thus supports the appropriateness of the IPHC's caution that departures from assumed levels of harvest, such as the GHL, will compromise the IPHC's ability to achieve its overall harvest strategy. NMFS would modify that response now in light of recent information indicating the effects of several previous years of excessively high harvest rates in Area 2C. Hence, this action has a conservation effect of helping to reduce the overall harvest rate in Area 2C while also serving an allocation purpose.

Comment 81 did not say that the rule does not have a conservation objective. It says that the fishery was not over fished at the time of the publication of the final rule (May 2008). An action may have a conservation objective under those circumstances. Both Comment 81 and Comment 82 discuss the role of the one-fish bag limit in helping the IPHC achieve its exploitation yield objectives for the fishery.

Comment 82 referred to the significance determination made in the environmental assessment for the 2008 action. A NEPA analysis is meant to determine whether or not the action would have a significant impact on the human environment in order to determine whether or not an EIS would be necessary, but does not preclude an action from having a conservation objective. The analysis concluded that the action would not have a significant impact on the human environment. This is not the same thing as determining that the action would have no impact on the halibut resource or on resource management.

Comment 14: The final rule should provide a clearer explanation of the conservation rationale. The proposed rule does not fully explain the conservation imperative for holding the charter harvest to the 2009 GHL. The rule must be corrected to explain the conservation basis, including area-wide and local depletion issues, and the imperative conservation mandate to restrict charter harvest to the GHL given the status of the Area 2C halibut resource.

Response: The response to Comment 1 describes the conservation rationale for this action. As explained in the response to Comment 65, NMFS does not have scientific information to characterize localized depletion or attribute it to a particular gear group. This action was not intended to address localized depletion of the halibut resource.

Comment 15: According to the 2008 IPHC Annual Report, North Pacific halibut stocks have declined fishery wide by 10 percent from 2007 levels. The Area 2C exploitable biomass of halibut has declined by an estimated 58 percent over the past three years and is near historic low levels. Halibut catch rates, or the amount of fish caught per hook set or hours fished, have declined in all Area 2C sectors including the catch rates of charter halibut anglers. This drop in catch rates is evidence that all fishermen are working harder to catch halibut because there are less halibut to catch. The IPHC now understands that assessment models used before 2008 overestimated abundance in Area 2 (which includes the Pacific Northwest (2A), British Columbia (2B), and Southeast Alaska (2C)). In a summary of the 2007 stock assessment, IPHC staff said that a disproportionate share of the halibut catch has been coming from Area 2. Other resource considerations, such as slowed growth rates and the overharvest of older, more fecund fish from the population also indicate the need for caution and reduced harvest.

Response: NMFS agrees with the comment that the overall harvest rate from all sources of fishing mortality in Area 2 should be reduced. This action will contribute to that goal by reducing the harvest of charter vessel anglers in Area 2C and will work in concert with actions taken by the IPHC to reduce the overall exploitation rate in Area 2C.

Comment 16: The IPHC has expressed concern about the Area 2C halibut stocks and has emphasized the need to reduce Area 2C exploitation rates for conservation reasons. The IPHC has stated that failure to control the charter sector harvests in Area 2C exacerbates

conservation concerns for halibut in that area.

Response: Reducing charter vessel angler harvests in Area 2C likely would have conservation benefits by reducing the overall harvest rate in this area. This action is intended to have this effect. Also see response to Comment 14.

Comment 17: The IPHC has taken action to address conservation in Area 2C by reducing the commercial fishery catch limits. Area 2C longline catch limits have been reduced by an unprecedented amount, totaling 53 percent over the past three years.

Response: NMFS agrees that the commercial halibut fishery in Area 2C has faced large reductions in its catch limits in recent years.

Comment 18: Catch limits must be adhered to for protection of the resource. In the absence of a one-halibut daily limit, the Area 2C charter industry can be reasonably expected to once again double its GHL because status quo management resulted in a 2008 charter vessel harvest of 1,900,000 lbs in Area 2C. This 2008 harvest marked the fifth consecutive year in which the Area 2C harvest of halibut by the charter sector exceeded the conservation target established for the sector by the IPHC. Quoting again from an IPHC statement in May, 2008, ''Exceeding the GHL specified for 2008 in Area 2C will mean that the combined removals by all sectors in 2008 will exceed the IPHC's conservation targets, which have been accepted by the U.S. government, to the detriment of the halibut stock in this area.''

Response: The premise of this comment is that the overall harvest rate target that the IPHC has for Area 2C can not be achieved without all sources of fishing mortality staying at about the level that the IPHC uses as the best available estimate of harvest. The best available estimate of 2008 charter vessel harvest for Area 2C is based on ADF&G logbook and creel survey information. The ADF&G estimated a charter vessel harvest of 1,914,000 lbs for 2008. The Council, the public, and NMFS will likely receive the final 2008 charter vessel harvest estimate, based on the statewide postal survey, in November or December 2009.

However, the best available estimates indicate that the 2008 GHL of 931,000 lbs was exceeded. The GHL is not a conservation target established by the IPHC. The Council developed the GHL as a level of harvest to target for the guided sector, and NMFS implemented it as such. Nevertheless, exceeding the GHL likely would contribute to exceeding the overall harvest rate target estimated by the IPHC for Area 2C for conservation purposes.

The overall target harvest rate set by the IPHC for Area 2C would be undermined in the absence of controls on fisheries that take significant amounts of halibut. Without knowledge of the economic demand for charter vessel fishing trips in Area 2C and other factors that are difficult or impossible to forecast, NMFS can not estimate what the charter vessel fishery would harvest in the absence of this action. NMFS can say, however, that without this action, the Area 2C charter vessel fishery would likely substantially exceed its GHL. Further, harvest controls implemented in 2007 (two-halibut daily bag limit if one is no more than 32 inches) did not appear to reduce the guided harvest as intended. In fact, guided harvest increased from 2006 to 2007. This experience indicates a need for the more restrictive controls implemented by this action.

Comment 19: Until 2007, increased charter harvest resulted in a direct reallocation of halibut from the longline to the charter sector. This occurred as a result of the IPHC quota setting process, which subtracts from the total area CEY the estimated sport, subsistence, charter, bycatch and wastage removals of halibut, then establishes the remainder as the Fishery CEY, or longline catch limit. Longline fishermen expected the reallocation to end when the GHL was established. However, because charter harvest control measures were not in place in 2005 and 2006, the IPHC used projected catch, instead of the GHL, to estimate charter harvest, and charter GHL overages were deducted from the longline quota in an effort to constrain total harvest to the area CEY. In other words, the charter sector's overages, totaling over one million pounds, continued to be deducted from the IFQs of longline fishermen even after the GHL was implemented, despite the substantial investments longline fishermen have made in those quota shares under the IFQ program, and the adherence of longline fishermen to IPHC catch limits. It is unfair and inequitable to punish fishermen who are living within restrictive catch limits for the excess harvest of a sector that ignores resource constraints and consistently overfishes.

Response: The GHL for Area 2C was established in 2003 (August 8, 2003, 68 FR 47256). As stated in that action, the GHL is an acceptable amount of halibut harvest by charter vessel anglers during a year in an area. By itself, it does not impose any restriction on the charter vessel fleet. Hence, an expectation by longline fishermen that the GHL would automatically limit the charter vessel fishery to the GHL was mistaken.

The Council has the authority to develop regulations that would restrict the charter vessel fishery to the GHL if that is determined by the Council to be necessary. In June 2007, the Council took final action to limit guided harvest to approximately the GHL. It was that June 2007 final action that led to this final rule.

Policy making, including data collection, analysis, and rulemaking, is a time-consuming process. NMFS will act as promptly as it can with the best information available to give effect to Council action. NMFS understands the frustration of IFQ fishermen who have seen their shares eroded by increasing harvests above the GHL by the guided sector. This action is designed in part to remedy this situation.

Comment 20: The IPHC recommended a one-halibut daily limit for charter vessel anglers in Area 2C and, assuming the management measure would be implemented, did not subtract charter halibut overages from the longline catch limit for 2007. In 2008, the IPHC again assumed the one-halibut daily limit would be in place to prevent GHL overages, and established the longline catch limit accordingly. For this reason, the lawsuit filed by Southeast charter operators that stayed implementation of the one-halibut daily limit resulted in an unaccounted-for overage of the Southeast Total CEY in 2008.

Response: NMFS acknowledges the comment. If the IPHC bases its estimate of the Fishery CEY and the catch limit on the assumption that charter vessel anglers will harvest the GHL, the Total CEY will be exceeded if charter vessel anglers exceed the GHL, the commercial fishery harvests its catch limit, and other user groups take the harvests the IPHC expected they would.

Comment 21: Because NMFS published the one-halibut daily limit proposed rule on December 22, 2008, the IPHC assumed that the 2009 charter harvest would be restricted to the Area 2C GHL and recommended longline catch limits accordingly. Failure to implement the rule will, in the short-term, result in overharvest of the Area 2C resource.

Response: NMFS acknowledges the IPHC's assumption of timely implementation of the one-fish bag limit rule for the 2009 guided fishery season. Although this final rule will contribute to the conservation of halibut in Area 2C, by itself, a one-fish bag limit may not prevent the total halibut harvest in Area 2C from exceeding the harvest rate target set for this area by the IPHC.

Comment 22: In the absence of this action, the cuts to the longline fleet will have no effect on helping the halibut stocks recover. Continuing to allow the charter vessel sector to exceed its GHL compromises the halibut resource and undermines the IPHC's effort to rebuild the stocks.

Response: NMFS disagrees. Even in the absence of this action, cuts to commercial catch limits would help constrain harvest in Area 2C and contribute to the achievement of exploitation yield targets. Also see responses to Comments 1 and 19.

Comment 23: The commercial halibut fishery is under stress because of overfishing by charter and sports sectors. The charter sector has exceeded GHL for several years.

Response: NMFS agrees that guided harvest in excess of the GHL for several years in Area 2C is a contributing factor to harvests in this area exceeding harvest targets set by the IPHC.

Comment 24: It is important to the IPHC goal of lowering the historical harvest rate in Area 2C that the schedule of annual catch limits and harvest rates adopted by the IPHC be met. Uncontrolled harvest by the charter vessel fishery or harvests in excess of established GHL levels that formed part of the IPHC's decision on commercial annual catch limits will result in negative impacts on the IPHC's ability to achieve its stock management goal. Not implementing a one-halibut daily limit for the charter vessel fishery in 2009 could result in a harvest rate approximately 15 percent higher than that assumed for the IPHC's commercial catch limit. The impact of a consistent overage of this level puts at risk various stock metrics of production, including potentially falling below the threshold reference point for this stock at which the harvest rate must be decreased linearly with biomass. Ultimately, the associated harvest rate could fall to zero (no directed fishery) if the spawning biomass falls to the limit reference point.

Response: NMFS agrees that the target exploitation rate of 20 percent set by the IPHC for Area 2C would be undermined to the extent that the amount of halibut harvested by charter vessel anglers exceeds the GHL for Area 2C.

Comment 25: The halibut harvests by charter vessel anglers are overestimated. The charter vessels are not even close to taking the GHL on a yearly basis.

Response: The best scientific information available on the harvests of halibut in Area 2C comes from the ADF&G's postal survey, logbook, and creel survey programs. This information indicates a steady increase in halibut harvest by charter vessel anglers starting from 1999 to 2005. In 1999, the guided harvest in Area 2C was estimated at 939,000 lbs (425.9 mt). The guided harvest increased annually to a peak in 2005 of 1,952,000 lbs (885.4 mt). In 2006 the charter harvest declined slightly to 1,804,000 lbs (818.3 mt) but increased again in 2007 to 1,918,000 lbs (870.0 mt). The charter harvest in 2004 through 2007 was consistently above the GHL as indicated in Table 1 of this preamble. The final estimate of guided harvest in 2008 has not been developed by ADF&G, but the best available estimates indicate that the harvest exceeded the GHL.

Comment 26: The halibut harvests by charter vessel anglers are underestimated. One commenter has seen suspiciously large volumes of halibut being shipped out of Wrangell. One charter operator shipped 428 lbs of halibut for one client and said that there were no weight limits on charter halibut. Once, two fishermen left Wrangell with 28 boxes of fish or about 1,900 lbs. Overfishing is not rare. Therefore, the commenter supports the one-fish daily bag limit.

Response: NMFS appreciates the commenter's notes and regards potential retention violations as an enforcement issue. Halibut can grow quite large. It is possible that charter vessel anglers could harvest hundreds of pounds of halibut and other fish in full compliance with existing daily bag limits. The charter operator is correct in that there are no poundage limits on sport charter halibut catch. Limits on the sport harvest of halibut are on the number of fish caught and retained, not on the total pounds of halibut harvested as the commercial fishery is regulated. Nevertheless, information regarding illegal halibut harvests should be reported to the NOAA Office of Law Enforcement.

Comment 27: Because the charter vessel fleet's catching capacity has outgrown monitoring and accounting systems, impacts of charter catch on the halibut resource likely are underestimated. A 2008 report prepared by ADF&G states that existing catch accounting systems for the charter harvest of halibut in Southeast Alaska may underestimate that harvest by 20 percent. Hence, the actual GHL overages in recent years may be far greater than reported and are a significant cause of the rapid decline of the Area 2C halibut stocks.

Response: The comment refers to a study of logbook and Statewide Harvest Survey data prepared by ADF&G in 2008. The study reported that estimates of numbers of charter halibut derived from logbook information and creel census information were 23 percent greater than similar estimates derived from the Statewide Harvest Survey, and that estimates of halibut weight were 16 percent greater. The report, however, did not say that catch accounting systems may underestimate harvest. ADF&G is scheduled to present an expanded report to the Council in late 2009 that compares additional years of data to better assess the comparison between logbook and Statewide Harvest Survey estimates of halibut harvest by anglers on board charter vessels. Until this study is completed, ADF&G has indicated that it will continue to rely on the estimates of harvest derived from the survey as best representing charter vessel fishery harvests.

Guideline Harvest Level

Comment 28: The GHL is a guideline, advisory in nature, and was not meant to constrain overall guided sport harvests. It is not a hard cap, either in the sense that the fishery would be closed within a year if it were reached, or in the sense that the guided fishing must be more heavily regulated so as to keep overall guided harvests within it if it has been or is likely to be exceeded. It represents a non-binding random political reference number. According to the December 31, 2007 proposed rule to limit charter vessel anglers to one halibut per day (72 FR 74258), the GHL is not supposed to restrict or limit in any way angler harvests from charter vessels.

Response: The Area 2C GHL was established in 2003 as a benchmark for a level of guided harvest (August 8, 2003, 68 FR 47256). By itself, the GHL does not restrict or limit charter vessel anglers, as demonstrated by the fact that charter vessel harvest exceeded the Area 2C GHL in four consecutive years, 2004 through 2007.

The GHL is not a limit above which further fishing is prohibited, which is often referred to as a ''hard cap.'' NMFS normally manages commercial fisheries for groundfish off Alaska in this manner, closing a fishery when it reaches its specified catch limit regardless of whether time remains in the fishing season. In recommending the GHL, however, the Council's intent was that guided harvests would not lead to a mid-season closure of the fishery because of the nature of guided businesses. Hence, the GHL is a benchmark and not a limit like a hard cap.

The GHL was developed by the Council and approved by NMFS as an allowable level of harvest for the charter vessel fishery that is linked to halibut

abundance. Hence, this allowable level of harvest decreases in stepwise increments as the abundance of halibut decreases. Further, the Council and NMFS have the authority to take subsequent regulatory action to control the harvest of the charter vessel fishery as necessary to stay within its GHL. Thus, this regulatory action to reduce the harvest of halibut by charter vessel anglers in Area 2C is completely within the authority of NMFS, and is being implemented to meet the policy of the Council when it recommended the GHL.

The citation from 72 FR 74258 does not provide the full context of the remark, which reads,

> The GHLs serve as benchmarks for monitoring the charter vessel fishery relative to the commercial fishery and other sources of fishing mortality. The GHLs do not limit the charter vessel fisheries. Although it is the Council's policy that the charter vessel fisheries should not exceed the GHLs, no constraints have been imposed on the charter vessel fisheries for GHLs that have been exceeded in the past.

The text states that the GHLs themselves do not constrain harvest, but that the Council policy is that the guided sector should not exceed the GHLs. More details on the Council's policy response to GHL overages may be found in the responses to Comments 19 and 29.

Comment 29: The final rule implementing the GHL states that the GHL is the ''level of allowable harvest by the charter vessel fishery'' (68 FR 47256, 47257). The GHL is not a benchmark but is meant to be a maximum harvest amount. The Council intended that the GHLs would not close the fishery in season but would instead trigger other management measures in years following attainment of the GHL (68 FR 47259). In October 2008, the Council stated its intent to maintain the GHL and manage halibut charter vessel harvest to their allocation limits. Each year since the GHL was implemented the charter fleet has exceeded their allowable harvest. The charter fleet is still growing with an increased number of anglers served, fishing trips, and active vessels. NMFS should not use the words ''benchmark'' or ''approximately to the GHL'' in the final rule.

Response: No changes from the proposed rule are made in the final rule. As noted in our response to Comment 28 above, the Area 2C GHL was established in 2003 as a benchmark for a level of guided harvest, and the approved GHL policy contemplates that the Council and NMFS would take subsequent regulatory action to control the harvest of the charter vessel fishery as necessary to stay within its GHL. NMFS uses the term ''approximately to the GHL'' because it does not have tools to manage guided harvest to precisely the GHL.

Comment 30: There is no analysis of the interaction between removals in excess of the Total CEY and the GHL, and this is not covered in the proposed rule.

Response: The IPHC takes all sources of halibut fishing mortality into account when setting the Total CEY. Hence, to the extent that harvests of halibut by charter vessel anglers in Area 2C can be reduced, any removals in excess of the Total CEY for this area also should be reduced.

Comment 31: The IPHC substituted the GHL for the best estimate of guided recreational harvest in its calculation of Area 2C and 3A directed fisheries and set a GHL of 931,000 lbs instead of a more realistic harvest estimate of 1,900,000 lbs. This policy resulted in the Fishery CEY being inflated by approximately one million pounds and the subsequent overharvest of the total CEY by the same amount. It is obvious that an allocation scheme, which allocates millions of pounds of fish in excess of the Fishery CEY to commercial fishermen at the expense of the GHL in following years, is neither fair nor equitable.

Response: NMFS disagrees. The IPHC's use of the GHL in the calculation of catch limits reflects the stated intent of NMFS and the Council to manage charter fisheries to stay within its GHL (see the response to Comment 28). The statement that the policy would result in an ''* * * overharvest of the total CEY by the same amount [one million pounds]'' is based on a conclusion that the charter fishery will not be managed to its GHL in 2009. This is counter to the Council's intent and the NMFS's management goals for 2009.

Comment 32: NMFS and the Secretary have failed to validate the need for the arbitrary and capricious GHL allocation. The charter fishery has only grown one percent a year since 1993 and only accounts for seven percent of the removals in Alaska, while the commercial industry removes 90 percent. Although GHL policy recognized a 25 percent growth in the charter fishery from the 1995 to 1999 catch, it did not provide for a fair and equitable allowance considering the 100 percent free increase in commercial quota shares during 1997 and 1998. Moreover, it is not fair and equitable to impose the one-fish bag limit on the guided halibut anglers when the longline fishermen already enjoy a disproportionate share of the resource. Some commenters characterized the large longline share as an excessive share.

Response: The GHL for Area 2C was determined to be consistent with the Halibut Act and other applicable federal law when it was implemented in 2003 (August 8, 2003, 68 FR 47256).

Growth in the halibut harvests by the charter vessel fishery may be slight on an Alaska-wide basis; however, this action is focused on reducing harvests only in Area 2C. In this area, charter vessel fishery harvests increased from 939,000 lbs (425.9 mt) in 1999 to 1,952,000 lbs (885.4 mt) in 2005. This is an increase of 1,013,000 lbs (459.5 mt) or 107 percent over six years. In 2006 and 2007, charter vessel anglers in Area 2C did not increase their halibut harvest above the record high harvest in 2005; however, the harvest in 2007 (the most recent year for which final sport harvest estimates are available) remained slightly more than 100 percent above the harvest in 1999. The percentage of the sport harvest generally and charter vessel harvest in particular also is much higher in Area 2C than in other areas of Alaska. In 2007, total removals of halibut from Area 2C are estimated to be 12,210,000 lbs (5,538.4 mt). Of this total amount the commercial fishery harvested 68.3 percent and the combined sport fisheries (charter and non-charter) harvested 24.7 percent. The charter vessel fishery harvested 15.7 percent and the non-charter sport fishery harvested 9.3 percent of the total removals from Area 2C in 2007. Hence, charter vessel anglers in Area 2C have demonstrated rapid growth in their Area 2C halibut harvests since 1999, and their contribution to the total harvest in Area 2C, the area this action affects, is greater than the statewide percentages stated in the comment.

Comment 33: The GHL allocation is fair and equitable. The initial allocation was established as 125 percent of the historically highest catch levels of the charter sector, thus allowing new and existing businesses in the charter fishery some amount of growth. In contrast, when NMFS implemented the halibut IFQ program in 1995, the average commercial QS holder received only about 80 percent of his historical catch levels. Many of these participants had to purchase additional IFQ to maintain a viable fishing business, and new commercial entrants are required to buy IFQ to participate in the fishery. The Council process to set the allocation was based on the testimony and the historical resource dependence of all user groups and included detailed debate and analysis. The current allocation balances the needs of all

halibut sectors, including subsistence, recreational and commercial.

The Halibut Act indicates that if it becomes necessary to allocate or assign halibut fishing privileges among U.S. fishermen, such allocation shall be ''carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges.'' (16 U.S.C. 773c(c)) This requirement refers to individual entities rather than the sectoral allocation made in this rule. Under the terms of the IFQ program, no person may hold or control more than one percent of the Southeast Alaska quota. Only one quota share holder is currently at this cap, and most are significantly below it. Moreover, the harvest supports thousands of fishermen and crew, others involved in downstream processing and distribution, and millions of consumers.

Response: NMFS notes support for the GHL.

Comment 34: The GHL was set using incorrect, inconsistent or dated information, and therefore is not fair and equitable. Section 1853(b)(6)(A) of the Halibut Act clearly states that the Secretary must take into account present participation in the fishery. The GHL was built upon angler harvest and trend data generated more than a decade ago for a recreational industry that at the time was in its infancy in Southeast Alaska. Under the Halibut Act, no GHL allocation can be fair and equitable until the Secretary evaluates current participation by each sector.

The GHL is nothing more than a historical snapshot of the Area 2C guided angler catch and stock status for a certain period of time. The historical catch data upon which the GHL is based is 1995 to 1999, while the step-down mechanism is based on halibut stock distribution in 1999 and 2000. Thus, the data used to create the GHL is between nine and fifteen years old. Since the GHL was established the number of guided anglers has increased nearly 79 percent. Meanwhile, there has been a decline of 16 percent in the number of commercial quota shareholders. In order for present participation to be properly considered, the Secretary would have to look at more recent catch data for guided anglers and commercial harvesters, numbers that are readily available and are set forth in the analysis, as well as the current distribution of the halibut stock.

Response: NMFS disagrees that incorrect, inconsistent, or dated information was used for the GHL or this action. The Council and NMFS have used the best information available at each step of the process, beginning with the GHL, and continuing through this final rule. The Council and NMFS analyzed and considered data that relate to the criteria found at 16 U.S.C. 1853(b)(6) (Magnuson-Stevens Act), and referenced at 16 U.S.C. 773c(c) (Halibut Act), when it developed and implemented the GHL. These data included past and present participation, historical dependence of various sectors on the halibut resource, economic impacts of the action on various sectors, cultural and social framework of the various sectors, impacts on other fisheries, and other relevant considerations. Data that relate to the criteria at 16 U.S.C. 1853(b)(6) were also analyzed and considered in issuing this final rule, including past and present participation levels, economic impacts of the action on various sectors and fishing communities, impacts on other fisheries, etc. The commenter is referred to the GHL analysis and the analysis that accompanies this action for further details on the data considered in developing these actions. The GHL analysis is available on the Council Web site at *http://www.fakr.noaa.gov/npfmc/current_issues/halibut_issues/halibut.htm* and the analysis for this action is available on the NMFS Alaska Region Web site at *http://www.alaskafisheries.noaa.gov/sustainablefisheries/halibut/charters.htm.*

Comment 35: The GHL was implemented as a reference measure to evaluate guided angler catches under the IPHC ''closed area assessment'' model. The GHL did not take into account exclusive, post-CEY overage allowances to the longline sector through implementation of the SUFD policy. The GHL also did not account for changes in IPHC methodology, such as the switch to coastwide assessment modeling.

Response: The GHL is responsive to the IPHC's switch to a coastwide assessment model for developing its estimate of the halibut biomass. Regulations at 50 CFR 300.65(c)(1) establish that the annual GHLs will be based on the Total CEY established for the year by the IPHC. Regulations at 50 CFR 300.65(c)(2) require that GHLs for IPHC regulatory Areas 2C and 3A be specified by NMFS and announced by publication in the **Federal Register** no later than 30 days after receiving information from the IPHC on the annual Total CEY for halibut in regulatory Areas 2C and 3A, and regulations. To the extent that the IPHC develops the Total CEY from a coastwide assessment model, the GHL will be based on and reflect that method of estimating the halibut biomass. The SUFD process is described in the response to Comment 4.

Comment 36: The Secretary is obligated to issue regulations implementing the GHL for the charter fishery, under 16 U.S.C. 773c(a) and (b). The Halibut Act states that the Secretary ''shall'' issue regulations necessary to carry out the purposes and objectives of the Halibut Act. The GHL became one of those purposes and objectives, upon its establishment and approval. Failure to manage to the GHL results in a reallocation in violation of the Halibut Act and of the Council's policy and intent in establishing the GHL.

Response: NMFS implemented the GHL in 2003 (August 8, 2003; 68 FR 47256) with regulations that appear at 50 CFR 300.65(c), as revised by this final rule. These regulations provided the responsibilities of NMFS in regard to the GHL. However, NMFS agrees that implementing the one-fish bag limit is necessary to carry out those purposes and objectives of the Council in recommending the GHL and, hence, is consistent with the Halibut Act.

Comment 37: The Council has stated its intent to manage the charter halibut fishery to the GHL until a long-term plan is adopted. This includes a limited entry program for halibut charter businesses and new regulations for the allocation of halibut between the commercial and charter fisheries.

Response: NMFS agrees. In March 2007, the Council adopted a recommendation to implement a limited access program for the guided charter vessel fishery in Areas 2C and 3A. A proposed rule and solicitation for public comment on the recommended limited access proposal was published on April 21, 2009 (74 FR 18178).

Comment 38: Rescind the GHL.

Response: Rescinding the GHL is outside the scope of this action.

Comment 39: The final rule should clearly explain the conservation and fairness elements used as the basis for the initial allocation incorporated into the GHL regime. The GHL for the charter fishery was based on 125 percent of the historic catch and should not be changed due to the lack of other management measures to stabilize the fishery.

Response: This final rule does not change the GHL. Instead, this rule is expected to reduce the harvest of halibut by charter anglers in Area 2C to better meet the objectives for the GHL and to contribute to reaching the overall harvest rate target set for this area by the IPHC. This action is a rational response to charter harvests in excess of the GHL and was developed with public

participation at the Council and Secretarial levels.

Comment 40: This proposed rule circumvents the proper rule making procedures for changing the definition of GHL. This action inappropriately changes the definition of the GHL (50 CFR 300.61) and allocates resources between charter and commercial users. Therefore, this rule is required to follow additional rulemaking procedures such as proper notification to the public, public comment periods in both Areas 2C and 3A, adequate analysis, and a reasonable explanation for the change.

Response: This action complies fully with Administrative Procedure Act (APA) rulemaking procedures. All comments received on the proposed rule were considered and changes were made where they were deemed appropriate. This action was proposed in a **Federal Register** notice published on December 22, 2008 (73 FR 78276). The proposed rule proposed changing the GHL definition by substituting the word ''the'' for the word ''a'' at 50 CFR 300.61. This change is designed to more precisely define the GHL as it relates to the GHL table at 50 CFR 300.65(c)(1). The phrase ''a level'' in the former definition could be misinterpreted to mean any level in the table whereas ''the level'' more clearly indicates the level in the GHL table that is annually announced pursuant to 50 CFR 300.65(c)(2). As discussed in the proposed rule preamble under the heading ''other proposed changes,'' these changes were proposed to clarify NMFS's authority to limit charter angler harvest to the GHL.

Comment 41: The Secretary has failed to explain his change in the GHL regulations. Specifically, the agency has failed to explain why it has abandoned the position the court found in *Van Valin* that it had adopted when it promulgated the GHL in 2003. That is, that the schedule for adopting management measures would be backward looking. Specifically, the Secretary hasn't explained why he no longer intends that GHL-based management measures lag behind a GHL reduction by a year or two. There is nothing in the record to explain the reason for this change. If the Secretary does not correct that failure in the final rule (after first publishing those reasons for comment in a supplemental proposed rule), then the proposed rule will be subject to reversal on review on that ground as well.

Response: The proposed rule for this action (73 FR 78276, December 22, 2008) indicated that NMFS was proposing language changes to clarify its ''authority to take action at any time to limit the charter angler catch to the GHL.'' (page 78279, column 3). Despite interpretations to the contrary, NMFS never intended that GHL-based management measures lag behind a GHL reduction by a year or two and this clarification is not a change in policy. According to the preamble to the GHL final rule (68 FR 47256, August 8, 2003), ''[i]f end-of-season harvest data indicated that the guided recreational sector likely would reach or exceed its area-specific GHL in the following season, NMFS would implement management measures to reduce guided recreational halibut harvest.'' (page 47257, column 3). This clearly indicates that NMFS can take prospective action based on past information, behavior that is not uncommon in NMFS's management of other fisheries under its purview. However, the following sentence in the GHL final rule preamble could have caused confusion, and is why NMFS chose to clarify its authority at 50 CFR 300.65. At page 47257, column 3, the preamble continues, ''[g]iven the one-year lag between the end of the fishing season and the availability of that year's harvest data, *management measures in response to the guided recreational fleet's meeting or exceeding the GHL would take up to two years to become effective.''* (emphasis added) This statement was meant as an explanation to why management measures might not be imposed immediately, not as a restriction on NMFS that it had to wait a period of time before it could implement management measures. Even if this sentence could be read as a restriction, as opposed to an explanation regarding the timing of data availability (that changes over time, as data source change) and the rulemaking process (that has certain time determinative requirements that can be waived with good cause), the sentence states ''up to two years.'' This phrase is generally interpreted as a range—any time between now and two years from now, and not usually interpreted as a guarantee of any amount of time. However, to be very clear about its intent, NMFS proposed a change to its regulations to clarify that it did not have to wait for a time period before taking action. This was not a change in policy. The proposed regulatory language for 50 CFR 300.65 is a clarification of NMFS's authority and this response is an explanation of NMFS's intent for language used in the preamble of the GHL final rule, which has been misinterpreted in the past.

There are several other places in the preamble to the GHL final rule where statements could be taken out of context and be misconstrued as restrictions as opposed to examples. For instance, on page 47258, column 3, NMFS explains that under the GHL final rule, ''if the GHL were exceeded, subsequent harvest restrictions *could* be implemented as needed under normal APA rulemaking with accompanying analyses,'' and ''this final rule would establish the GHL policy and *require* NMFS to notify the Council when a GHL is exceeded, which *could* serve as a trigger for subsequent rulemaking.'' (emphasis added) Emphasis was added to show that NMFS was aware of the difference between the mandatory portions of the GHL policy, i.e., NMFS is *required* to ''notify the Council,'' and the example of actions that could occur, i.e., ''subsequent harvest restrictions *could* be implemented as needed,'' and notification to the Council ''*could* serve as a trigger for subsequent rulemaking.''

Perhaps the best way to illustrate that NMFS has not changed its intent or policy, but only clarified its authority, is the found in the preamble to the GHL final rule. On page 47257, column 2, NMFS states:

> This final rule establishes a GHL policy which specifies the level of harvest for the guided sport recreational fishery. If the GHL is exceeded, then NMFS will notify the Council within 30 days of receiving information that the GHL has been exceeded. At that time the Council may initiate analysis of possible harvest restrictions and NMFS may initiate subsequent rulemaking to reduce guided recreational harvests. This final rule does not establish specific harvest restrictions for the guided recreational fishery. This final rule does not prevent the Council from recommending management measures before the guided recreational fishery exceeds the GHL, nor does it obligate the Council to take specific action if the GHL is exceeded.

In other words, the final rule preamble indicated that the Council could take action after it is informed that the guided sport fishery exceeded its GHL, but it was not obligated to do so. More importantly, however, in response to this comment about changes in policy, the final rule preamble indicates that the final rule does not prevent the Council from taking action before the guided sport fishery exceeds the GHL. Any action by the Council would require NMFS's approval, and would need to be promulgated pursuant to the APA, whether it occurred before or after the guided recreational fishery exceeded the GHL. The changes in regulatory text proposed in 73 FR 78276, and made final by this rule, are consistent with the final rule for the GHL, do not represent a change in policy, and clarify the authority of

NMFS to act consistent with Council recommendations and the purposes and objectives of the Halibut Act.

Comment 42: There are troubling similarities between the situation in *Hawaii Longline* v. *NMFS,* 281 F.Supp.2d 1 (D.D.C. 2003) and the current instance. That case dealt with a situation in which a court had struck down a NMFS rule because of an inadequate Endangered Species Act biological opinion. NMFS represented to the court that it would issue a new rule based on a new biological opinion. In fact, the new rule was ultimately based on the old, invalidated, biological opinion. The court struck down the new rule because the Secretary had not provided a new record and new rationale for it. In this instance, NMFS convinced the court to dismiss *Van Valin* saying that any new rule would be accompanied by a new rationale and new record. In this instance, the new rationale is simply a stated desire for a different outcome this time, unaccompanied by an explanation of the policy considerations that led to the outcome last time. The analysis for this action is in all material respects identical to the analysis that supported the rule enjoined in *Van Valin.* Specifically, this analysis re-confirms that: (1) This is an allocation action without significance for the health of the halibut stock; (2) lodge-based guide operations are likely to be forced out of business; (3) no consideration has been given to whether the allocation levels are fair and equitable; (4) guided angler catch levels are down from their peaks and are likely to remain stable for at least long enough to put a long-term solution in place in 2011.

Response: On December 22, 2008, NMFS published a proposed rule to ''reduce the halibut harvest in the charter vessel sector to approximately the guideline harvest for Area 2C'' (73 FR 78276, December 22, 2008). NMFS indicated that its intent for the rule ''is to manage the harvest of halibut consistent with an allocation strategy recommended by the North Pacific Fishery Management Council for the guided sport charter vessel fishery and the commercial fishery.'' NMFS published the proposed rule, and this final rule, under its authority found at 16 U.S.C. 773c(a) and (b) (Halibut Act), which unlike the example biological opinion provided in the comment, has not been invalidated by a court. Sections 773c(a) and (b) provide that NMFS has the general authority to carry out the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and the Bering Sea (the Convention) and the Halibut Act and the authority to adopt regulations consistent with its general authority. The allocation strategy recommended by the Council was the GHL, as explained in response to Comment 41. The Council had the authority to make the recommendation to NMFS under the Halibut Act sec. 773c(c), and NMFS published those recommendations as regulations at 50 CFR 300.61 and 300.65.

These regulations defined the GHL, provided a table with various levels of the GHL based on the annual Total CEY, and requirements for NMFS to publish a notice in the **Federal Register** establishing the GHL on an annual basis and to notify the Council when the GHL has been exceeded. As explained in the response to Comment 41, examples of how future harvest restrictions could be implemented should not be read as how future harvest restrictions must be implemented. NMFS is not aware of any legal reason preventing the Council from recommending management measures to limit the guided fishery under the Halibut Act sec. 773c(c), whether or not the guided fishery exceeded the GHL. Further, NMFS has the authority to approve such recommendations and implement them as regulations.

Comment 43: The intended effect of this action is to manage the harvest of halibut consistent with an allocation strategy recommended by the North Pacific Management Council for the guided sport charter vessel fishery and the commercial fishery. Has NMFS taken upon itself to follow Council recommendations before the Secretary has approved them?

Response: No. This question appears to be based on a misunderstanding. NMFS is acting on behalf of the Secretary, and appropriately so under a delegation of authority. The one-fish bag limit will not become effective without delegated Secretarial approval.

Comment 44: The Magnuson-Stevens Act National Standard 1: Annual Catch Limits (ACL) guidelines reinforce the importance of restricting charter harvest to the GHL cap. The ACL guidelines are clear that accountability measures are to be used ''to prevent ACLs, including sector-ACLs, from being exceeded, and to correct or mitigate overages of the ACL if they occur'' (74 FR 3178–3213). It would be inconsistent and legally suspect for NMFS to manage halibut stocks by a different standard.

Response: Section 301(a) of the Magnuson-Stevens Act requires any fishery management plan and regulations implementing such plan to be consistent with the ten national standards. This requirement does not apply to this action because it is implemented under the authority of the Halibut Act and not the Magnuson-Stevens Act. Hence, the National Standard 1 guidelines published January 16, 2009 (74 FR 3178) do not apply to this action or to the GHL.

Comment 45: The final rule should be clear that the GHL is a cap, not a benchmark. The proposed rule describes the GHL as a benchmark, which conflicts with the definition of GHL, ''Mean[ing] the level of allowable harvest by the charter vessel fishery.'' NMFS should correct all references to a benchmark found in the proposed rule prior to the issuance of the final rule. For example, the preamble to the proposed rule states that the guided industry will be managed ''near'' their GHL. This section needs to be corrected to state that the intent of this rule is to follow Council action and manage the guided fleet so it does not exceed the GHL.

Response: No changes from the proposed rule are made in the final rule. The rule refers to the GHL as a benchmark (at § 300.65(c)(3)) because that is the purpose the GHL was designed to serve. Essentially, the GHL serves as a standard or reference point against which the harvest of halibut by the charter vessel fishery is measured or judged. Also see responses to Comments 28 and 29.

If the Council or NMFS finds it necessary to limit harvest by the guided sector, the approach recommended by the Council and approved by NMFS is to use various restrictive rules to reduce the charter vessel sector harvest to approximately the GHL. Such restrictions are often imprecise in their effect. Therefore, NMFS can not be certain that these restrictions will prevent the charter vessel fishery from harvesting no more halibut than the GHL amount. As such, the GHL is a harvest level target to which NMFS can try to get close but likely will never exactly hit.

Comment 46: IPHC allocation procedures setting the GHL violate the fair and equitable clause of the Halibut Act. This proposed rule halves the charter bag limit while commercial catch is allowed to exceed catch limits. The IPHC GHL management serves a few commercial fishermen at the cost of the many sport fishermen. For 15 years, the Council and NMFS have pursued an unfair and inequitable ''allocation'' policy solely for the benefit of the halibut longline sector. It is irresponsible of NMFS to continue to circumvent analysis and implementation of a legally binding, fair

and equitable allocation between user groups. This proposed rule is based on outdated ''GHL Policy'' that seeks only to financially benefit the commercial sector.

Response: The IPHC does not set the GHL, although the GHL in any particular year is linked to the Total CEY, which is set by the IPHC. Any resource allocation policy likely will result in some resource users feeling unfairly burdened with the costs of reducing their use of the resource.

As the halibut resource has declined in abundance in Area 2C in recent years, the commercial longline fishery's catch limits have been substantially reduced from 10,930,000 lbs (4,957.8 mt) in 2005 to 5,020,000 lbs (2,277.0 mt) in 2009. This represents a 54 percent reduction over four years.

During part of this period (2005 through 2007) charter vessel anglers in Area 2C have had record high levels of harvest. If there is a policy to benefit the commercial longline fishery at the expense of the charter vessel fishery, it is not apparent under the facts described above. Regarding the claim of violating the fairness and equity provision of the Halibut Act, see the response to Comment 74.

Comment 47: The final rule should be based on the 2009 Area 2C GHL, instead of the 2008 GHL, as the proposed rule is. For 2009 the IPHC has adopted catch limits based on the Area 2C CEY of 5,570,000 lbs. The GHL rule published August 8, 2003 (68 FR 47256; corrected on May 28, 2008, 73 FR 30504) describes the procedure to identify the Area 2C GHL on the basis of the IPHC's approved CEY for Area 2C. The GHL in Area 2C was 931,000 lbs in 2008. The final rule should clearly state that the GHL in place for the 2009 season is 788,000 lbs.

Response: NMFS agrees that the GHL for Area 2C in 2009 is 788,000 lbs (357.4 mt) and not 931,000 lbs (422.3 mt). This change is based on new Total CEY information from the IPHC meeting in January 2009, shortly after the proposed rule was published. The notice of the 2009 GHL for Area 2C was published in a **Federal Register** notice on February 24, 2009 (74 FR 8232). NMFS is not changing the proposed management measures, however, because the one-halibut daily bag limit and accompanying measures have the best chance of achieving the objectives of this action of all the alternatives analyzed. Requiring a new analysis of other, possibly more restrictive management measures would mean that those measures would not be in effect for the 2009 summer fishing season.

Comment 48: This action will not constrain the guided industry to stay within the GHL. NMFS has relied on 2007 data because final 2008 harvest numbers are not yet available. The proposed rule indicates that a one-halibut daily limit will not reduce the guided harvest to the GHL unless demand reduction further reduces harvest. The rule also states that in 2008 the guided sport harvest may have been near double the GHL of 931,000 lbs under the status quo management option (73 FR 78278), which translates to an estimated harvest of 1,862,000 lbs. The Council's 2007 Area 2C GHL analysis indicated that a one-fish bag limit for the entire 2008 season would have resulted in a harvest reduction of 808,000 lbs of halibut in Area 2C (Table 4 in analysis). Given that the correct 2009 GHL in Area 2C is 788,000 lbs, the one-halibut daily limit can be expected to allow a GHL overage of 200,000 to 700,000 lbs. Clearly an overage of this magnitude does not meet the Council's intent to limit harvest to the GHL. Therefore, NMFS should adopt measures in addition to those identified in the proposed rule to achieve the goal of limiting guided harvest in Area 2C to the 2009 GHL. Establishing a maximum size limit on the retained halibut is the management measure identified to control guided harvest at times of low abundance in the recently adopted Council Catch Sharing Plan (October 2008). This measure was identified by the Council as less onerous to the guided industry than a season closure, but reasonably calculated to achieve the necessary reductions based on existing analysis.

Response: The analysis indicates that it would take a 30 percent to 40 percent reduction in the demand for guided trips to bring the guided harvest down to approximately the GHL level along with the one-fish bag limit. NMFS does not have information to project the precise impact of this action on demand for guided trips. Guides commenting on this action and a similar action in 2008 have indicated that a demand decrease of this magnitude may take place. Moreover, the current financial crisis and recession may reduce demand independently of this action. NMFS believes that the combination of the one-fish limit and the reduction in demand may reduce harvest to approximately the GHL. NMFS also notes that the GHL itself is not meant to be a hard cap. See also the responses to Comments 28 and 47.

Comment 49: The one-fish limit alone will not constrain guided harvest to the GHL. The proposal must be supplemented by a maximum size limit or a non-retention period. A maximum size limit may be less onerous to the charter industry than a non-retention period. Retain carcass retention, as it has considerably improved data quality and is necessary for maximum size limit enforcement.

Response: The ability of the one-fish limit to control guided harvests to the GHL is discussed in responses to Comments 29 and 48. The response to Comment 110 addresses the proposal for a maximum size limit, and the responses to Comments 105 and 114 deals with carcass retention comments.

Comment 50: Annual guided catch limits are less conservative than the commercial catch limits. The annual commercial fishing management target is set by a precautionary method. The IPHC SUFD policy fluctuates catch limits with stock abundance, leaving more fish in the water than a policy of managing catch limits to CEY. The guided industry requested and received a GHL ''stair step'' policy to implement catch limits that is similar to the commercial sector's SUFD approach. The SUFD approach increases catch limits slowly as halibut biomass increases and decreases catch limits quickly as biomass decreases, while the guided sector uses the same rates to modify catch limits regardless of halibut abundance trends. The stair-step down provisions allow the biomass to change by 15 percent before dropping to the next level. This was implemented at the guided sector's request to provide a more stable fishery before management measures were changed.

Response: As noted in the response to Comment 4, the SUFD policy has a measured response to changing stock conditions. The GHL is not a catch limit in the same sense as the commercial catch limit set by the IPHC. However, the GHL also is linked to halibut abundance through the Total CEY.

Comment 51: The GHL should include step up as well as step down provisions. The method used to set the GHL does not allow for increases in annual catch limits regardless of halibut abundance trends. This method is incompatible with the SUFD approach that allows the commercial sector IFQ allocations to exceed the Fishery CEY by 300,000 lbs in 2006, 900,000 lbs in 2007, 3,070,000 lbs in 2008, and up to 3,290,000 lbs this year, at a time of decreasing abundance. The IPHC has applied its SUFD policy solely to the commercial fleet and there is no analog for the charter fleet. The IPHC policy ignores conservation by awarding charter ''underages'' to the commercial fleet with a SUFD policy to benefit the seafood industry.

Response: Revising the GHL is outside the scope of this action. NMFS notes that while the GHL does not increase beyond the maximum GHL established by the Council regardless of halibut abundance trends, it does increase above current GHL levels if there is an increase in the Total CEY, up to the maximum GHL of 1,400,000 lbs. The stair-step down provision of the GHL (see the response to Comment 50) provides the guided sector with a lagged GHL decrease in response to declining halibut biomass levels. The SUFD component of the IPHC's management regime is not necessarily advantageous to the commercial sector, as discussed in the response to Comment 4.

Comment 52: The proposed rule assumes all guided anglers catch their limit. Guided anglers are seeking a fair opportunity to catch two halibut per day. This does not mean each angler catches two halibut per day.

Response: NMFS acknowledges the comment. Based 2007 data, the analysis of the harvest impacts of the proposed rule assumed that approximately 60 percent of charter vessel anglers in Area 2C would catch two halibut.

Economics

Comment 53: This action will reduce tourist demand for Southeast guided trips. A one-fish limit will make halibut fishing less attractive to charter vessel anglers, and will increase the cost per pound of halibut harvested with the assistance of guides. Quality differences mean that fish purchased in a store are an imperfect substitute for fish harvested in a recreational fishery. Evidence from declining bookings in 2008, questions about bag limits from guided clients and potential clients, cancellations in 2009, and statements made by potential clients, indicate that the one-fish limit will lead to large reductions in visits. Typical comments noted that many operations had reported a decline in bookings, for example, of about 15 percent because of the published one-fish rule in 2008; reduced 2009 bookings; a 20 percent to 30 percent estimate of reduced visits is not unreasonable. One fish per day is too few to justify the high expense of a trip to Area 2C for many potential clients. Many customers will go elsewhere, for example, to other parts of Alaska, British Columbia, or Mexico. It may not be easy for the guided industry demand to recover; the business depends on repeat customers and many of these will now go elsewhere. Uncertainty interferes with willingness of customers to make bookings. The impacts of surprise regulatory changes outlast the regulation by many years. It takes years to build up a client base.

Response: NMFS acknowledges that the reduced bag limit is likely to reduce the demand for guided fishing in Southeast Alaska. Other than acknowledging the potential for lost business, as was done in the analysis, NMFS cannot predict the number of charter vessel anglers that will choose to not take a guided sport fishing trip in Area 2C as a direct result of this final rule. NMFS notes that the current financial climate may be affecting bookings at this time, so that the entire decline in 2009 bookings may not be solely attributable to the pending one-fish bag limit.

Comment 54: Guided charter operations will be badly hurt by the demand decrease associated with this action. Many comments from within the guided industry pointed to concrete instances of the adverse business impacts because of the proposed 2008 one-fish bag limit, and to adverse word of mouth and bookings impacts already observed from the proposed 2009 limit. For example, one lodge operation with 1,000 clients a year is only successful and profitable when booked to 85 percent of capacity. At the time the comment was submitted, bookings were 60 percent, down from 80 percent at the same time the previous year. The business has a very thin margin. A sustained loss of 20 percent of customers means the lodge will no longer be viable. Ultimately the statement in the analysis that some businesses will fail is a gross underestimate. Reductions in demand on the scale necessary to bring harvest within the GHL means bankruptcy for all but a few guided operations. Halibut charter businesses will be devastated and many forced out of business.

Response: NMFS agrees that this action is likely to have adverse impacts on charter business profitability in 2009 and that some charter operators may fail or leave the business, however, NMFS does not agree that all but a few guided operations will go bankrupt. NMFS agrees that an action taken in one year may have impacts on marketing and bookings in subsequent years.

Comment 55: This action will have severe adverse impacts on the businesses, jobs, and communities that depend on guided charter operations. The businesses include firms that supply food, fuel, material and capital equipment to the charter operations, and businesses that supply transportation, food, lodging, fish processing, gifts, and other tourist services to clients. Jobs include jobs provided by the charter operations and these other firms. Communities also suffer from lost income spent by people who would have worked in the guided charter business. Communities suffer from the direct losses of jobs and businesses, indirect impacts, and loss of tax revenue. These jobs and businesses are important to small local Alaskan communities. National Standard 8, which requires NMFS to ''take into account the importance of fishery resources to fishing communities to provide for the sustained participation of, and minimize adverse impacts to, such communities (consistent with conservation requirements) requires a consideration of these issues.

Response: NMFS agrees that the guided sport charter vessel industry is an important industry for many communities, generating jobs and revenue for the communities involved as well as direct employment for the guides and crew. A reduction in the daily bag limit for charter vessel anglers will affect those communities and their efforts to develop guided businesses.

The potential impact on bookings and demands for tourist activities is discussed in the analysis supporting this final rule, but quantitative estimates of how such impacts will influence demand for these services and commensurate impacts on local communities are unavailable. The response to Comment 72 describes recent studies on the relationship between sport and commercial fishing and regional economies, but notes that these analyses do not provide enough information to evaluate the impacts of this action on individual communities.

Finally, NMFS and the Council considered impacts to communities, as is evident in sections 2.3.5 and 2.5.5 of the analysis for this action. However, National Standard 8 does not directly apply to this action as it is taken under the Halibut Act and not the Magnuson-Stevens Act.

Comment 56: The one-fish bag limit proposal in Area 2C has adverse impacts in Area 3A, because potential Area 3A out-of-state clients do not understand the geographical differences between areas. Area 3A guides report adverse impacts on business and cancellations and adverse word of mouth at trade shows for this reason. Commenters noted that the Area 2C rule would provide an incentive for charter vessel anglers to substitute fishing trips to Area 3A for trips to Area 2C. Commenters noted that this could increase guided harvests in Area 3A, potentially causing Area 3A fishermen to exceed the 3A GHL and become subject to new regulatory restriction, causing economic harm to guides in 3A. One commenter

recommended that the one-fish bag limit be adopted throughout Alaska and the Pacific Northwest. This would limit shifts out of Area 2C, protecting Area 2C guides, and would protect the resource in other areas from excessive harvest as fishermen substitute out of Area 2C. One commenter noted that the proposed action is necessary because the conservation and management problem in Area 2C will likely come to Area 3A soon and it should be addressed and corrected now to prepare NMFS and the guided charter vessel fleet for its later implementation in Area 3A.

Response: NMFS agrees that the one-fish bag limit could adversely affect bookings in Area 3A if charter vessel anglers outside of Alaska are unable to discriminate between geographic areas within Alaska. NMFS has no data that would allow it to estimate the potential impact on 3A guided operations because of this confusion.

NMFS notes that this could be offset to an unknown extent, if anglers substitute guided charters in Area 3A for guided charters in Area 2C because of a difference in bag limits. NMFS agrees that a shift of charter vessel anglers from Area 2C to Area 3A could lead to increases in Area 3A harvest that cause harvests to rise above the 3A GHL. It is not known whether or not increased guided fishing activity in Area 3A will increase harvest sufficiently to require additional fishing restrictions within Area 3A.

NMFS is taking the current action to address GHL overages in Area 2C and must evaluate events in Area 3A independently. The action taken for Area 2C is not being taken because of speculation regarding future events in Area 3A.

Comment 57: Captains, guides, and crew would like to consume halibut, and it is more cost-effective for them to catch it when they are already on the water guiding than if they have to make a separate independent trip to catch halibut. They can economize on fuel, and other costs, if they take their recreational harvest incidental to their work as guides and not make special trips. It is recommended that guide and crew personal use fishing be allowed, consistent with regulations, prior to May 16 and after August 15, or some other agreed upon dates outside of the busy tourist season. This would allow taking fish for summer use, then taking fish for winter use. Total restriction of fishing by guides and crew does not achieve the goal of ''minimizing the adverse impacts on the charter fishery'' which was a NMFS goal in its 2008 proposed rule, or of optimizing benefit to the Nation. Minimization of the adverse impacts will be achieved by allowing personal use fishing by guides and crew to eliminate the expenditure for fuel and other resources that they will unnecessarily incur while trying to put food on their tables.

Response: Prohibitions on retention of halibut by charter vessel guides, operators, and crew may make it more costly for them to harvest halibut for personal use.

In 2006 and 2007, the State Commissioner of the ADF&G (Commissioner), consistent with his authority, issued emergency orders prohibiting the retention of all fish by the skipper and crew of a charter vessel in Area 2C (ADF&G Emergency Orders 1–R–01–06, 1–R–02–07). The Commissioner could not make his emergency order apply only to halibut because the State of Alaska is not authorized to directly regulate halibut fishing. The comprehensive application of the emergency order to all fish effectively prevented charter vessel skippers and crews from harvest of salmon, rockfish, lingcod, and other species. No emergency order was issued in 2008 when NMFS implemented a similar prohibition, but which would only apply to halibut, as a part of the one-fish bag limit rulemaking. No emergency order has been issued as of March 2009.

This action provides charter vessel operators relief from a potential comprehensive state prohibition on skipper and crew harvests by having a federal prohibition on skipper and crew harvest apply only to halibut. Assuming that the Commissioner would issue an emergency order prohibiting skipper crew and harvest if a federal prohibition was not forthcoming, this action would relieve charter vessel skippers and crew from the more comprehensive prohibition against retention of all fish on charter vessels but would impose this prohibition on the retention of halibut. This substitution of the federal restriction for the more burdensome state restriction helps minimize the burden on guided charter operators.

Comment 58: This action will increase enforcement costs.

Response: This action may or may not increase enforcement costs. The analysis noted that this action will increase incentives for charter vessel anglers to illegally harvest more than one fish a day, and for guides to help them do it. However, it also noted that the enforcement procedures for enforcing a one-fish bag limit were not substantially different from those for enforcing a two-fish a day limit or a size limit and that this action may reduce the number of separate operations to be monitored, as explained in the analysis. The analysis also noted that the level of enforcement effort was a policy decision.

Comment 59: The one-fish limit will lead to legal and illegal avoidance activity. People will try to get around the rules. They may switch to bare boat charters, fail to register as guides or charters, fish for other species and ''incidentally'' catch halibut, or take other actions. These measures will defeat the purpose of the rules. Some commenters indicated that because of problems they saw with the proposed rule, they would not accept the regulations.

Response: NMFS agrees that this action will increase incentives for anglers to substitute non-guided fishing for guided fishing, and for guides and anglers to conspire to illegally evade the bag limit for guided anglers. To the extent this happens, the reduction in guided sport fishing may be offset to a greater or lesser extent by an increase in unguided sport fishing.

NMFS, however, does not have the information to estimate the extent to which the substitution of unguided for guided sport fishing will take place. Much will depend on the preferences of anglers, their opportunities to fish elsewhere, and the ability of businesses to substitute unguided for guided capacity.

NMFS notes that it would expect proportionately more substitution of unguided for guided sport fishing by persons visiting on multi-day and overnight trips than by persons visiting Alaska on cruise ships.

Comment 60: The adverse impacts to the guided sport fishery will be in addition to adverse impacts associated with the economic crisis, and to adverse impacts associated with restrictions on harvests of other species targeted by sport fishermen. The depressed economy on its own is projected to decrease tourism to Alaska by 30 percent. The combination of the recession and one-fish limit could reduce total demand by 50 percent. Consideration of the one-fish limit must take account of the 48-inch minimum size limit for king salmon in the second half of the summer, and the prohibition on taking ling cod from June 16 to August 15.

Response: NMFS agrees that the current recession and financial crisis are likely to reduce demand for guided sport fishing trips in the summer of 2009, and perhaps in subsequent years. Moreover, in recent years the State of Alaska has tightened regulations governing the harvest of other species of fish targeted by sport anglers. These tighter restrictions can be assumed to

reduce the attractiveness of a Southeast Alaska fishing trip and to reduce the demand for guided charters. The adverse impact of this final rule on guides will be in addition to these other impacts. Although NMFS is unable to quantify these other impacts, they were considered qualitatively in developing the final rule.

Comment 61: This action creates a paperwork burden for guided charter operations. A five-minute response per angler for new reporting requirements adds about a half hour to the paperwork time at the start of each four-hour half-day charter. Did NMFS consider the capabilities of non-English speaking, younger, and older anglers when estimating the compliance burden associated with these requirements?

Response: In the proposed rule, NMFS reported that the new logbook information required for this action includes the regulatory area in which halibut were caught and kept during the fishing trip, the printed name of the charter vessel angler, including youth anglers under 16 years of age, and the signature of the angler on the back of the logbook sheet to verify that the number of halibut caught and recorded is accurate. NMFS estimated that the additional time requirement for each trip was four minutes for the guide and one minute for each angler. For example, for a guided charter vessel with six anglers, total elapsed time to comply with this reporting requirement could be 10 minutes. Actual total elapsed time is likely to be shorter. The discussion in the preamble to the proposed rule did not estimate a reporting burden of five minutes per angler. Only the charter vessel guide would need to have an ability to read and write English. A charter vessel angler would be required only to sign his or her name. This can be done in a minute, on average, even considering the groups identified in the comment.

Comment 62: It is erroneous to assume that all guided sport fishing lodges are small entities. In testimony before the Council owners of certain Area 2C lodges have said that their businesses annually gross between $7 million and $12 million. The threshold for identifying large and small entities in the fishing guide service industry is $7 million. The number of large lodges should be documented in the record.

Response: The Regulatory Flexibility Act (RFA) required NMFS to provide an estimate of the numbers of small entities that are directly regulated by the action. The threshold for discriminating between large and small entities under the RFA in this case is $7 million in gross revenues. NMFS does not have access to systematic estimates of lodge operation gross revenue estimates similar to those that are available for the commercial setline fishery, or for many other commercial fisheries in Alaska. Moreover, the RFA requirement is to provide an estimate of the number of small entities, not the number of large ones. While the analysis did indicate that there may be large lodges according to this criterion, it did not subtract an estimate of their number, which was unavailable, from the count of total entities to estimate the number of small entities. Since the number of large entities is likely to be small in comparison to all entities, it is unlikely that this would seriously bias the estimate of small entities.

Comment 63: This action will not significantly adversely impact angler demand for guided charters and charter operators can address adverse impacts by modifying their operations. One guide indicated that the customers will still come. This was a very small minority among the guides. Similarly, a very small proportion of comments from anglers indicated that they, personally, would not reconsider a trip to Alaska. Another comment indicated that, based on a study given to the Council in June 2007, when asked about the impact of a one-fish limit, as many respondents (26 percent) said it wouldn't make a difference as said they would be much less likely to return (24 percent). One commenter notes that this will not put the guided charter companies out of business, but will force them to move to a charter business that is friendlier on the natural resource such as catch-and-release and sightseeing.

Response: As noted in its response to Comment 53, this action is likely to reduce the demand for guided sport fishing in Southeast Alaska, as indicated in the analysis. The comment that charter operations may modify their operations so as to take advantage of other Southeast Alaska resources, or to engage in more catch-and-release fishing, is most likely accurate.

Comment 64: The guided sport fishery, as conducted, is adversely impacting the commercial longline fishery. Charter GHL overages affect the long-term constant exploitation yield, and potentially the long-term sustainability of the halibut stock. This has an adverse indirect impact on longline fishermen. Guided angler harvest overages have been deducted from the longline catch limit, imposing a direct burden on longline fishermen. Guided anglers operate in the summer when larger females are inshore and more susceptible to rod and reel gear. Thus they tend to target the larger fish that contribute more in proportion than smaller fish to the reproductive capacity of the halibut stock. This has an adverse indirect impact on commercial fishermen. Many commercial fishermen have had to borrow money, sometimes mortgaging their homes, to buy the halibut quota share (QS) they needed to operate in the fishery. The decline in current and prospective longline revenues and profits makes it harder for them to repay these loans. Moreover, declines in current and prospective profits reduce the market value of their QS.

Response: NMFS acknowledges that guided charter harvests in excess of the GHL can have direct and indirect adverse impacts on commercial fishermen, and that many commercial longline fishermen have had to borrow money to purchase quota shares. NMFS agrees that allocative and stock impacts can reduce their ability to repay those loans. See also responses to Comments 1 and 19.

In 1999, the IPHC reviewed options for a maximum size limit of 60 inches (150 cm) in the commercial fishery and concluded that, based on the research at the time, it did not add substantial production to the stock. Applying the limit to the sport fishery would have an even smaller benefit because the sport fishery harvest is much smaller than commercial harvest, and also because this action would only apply to Area 2C. The halibut stock is managed as a single population throughout its entire range. Also see response to Comment 103.

Comment 65: The guided sport fishery, as conducted, is adversely impacting subsistence, personal use, and unguided sport fisheries. Two issues have been raised: (1) Excessive harvest hurts these user groups in the same way it hurts commercial fishermen; (2) localized depletion of stocks creates a special burden for these other user groups. Subsistence can be an important source of food, particularly in remote, rural communities with high poverty rates. Excessive harvest by the guided sector requires subsistence and local sport anglers to travel farther to catch halibut and can result in fishing grounds preemption by charter vessels anglers. The distance issue becomes worse when fuel costs are high. Guided sector harvests violate the subsistence priority. The area within which localized depletion is occurring is getting larger as charter operations upgrade their equipment. Localized depletion may have cultural impacts for Native fishing communities via the impact on subsistence harvests. Commenters report localized depletion near Sitka, Juneau, Craig, Prince of

Wales Island, and in the Icy Straits area. Commenters cite ADF&G estimates of catch per rod hour as evidence of localized depletion near Sitka and Craig. Localized depletion may also occur for species such as rockfish, taken as bycatch by sport fishermen. Localized depletion was recognized by the Council in its 1993 problem statement and played an important part in the Council's GHL allocation decision. Halibut harvest by the guided fishery should be managed to stay below the GHL because of concerns about depletion of local stocks and the long-term effects on local businesses.

The record should be supplemented to include the effect of guided charter fishing in excess of the GHL on local depletion, the effect of local depletion on subsistence harvesters, and the weight given to subsistence concerns when the Council recommended the GHL allocation adopted in 2003.

Response: NMFS agrees that subsistence harvests of halibut are an important use of halibut in Southeast Alaska, and that a key factor in their importance is the significant cultural role they play in the lives of Alaska Natives. While there is no direct allocative effect, NMFS agrees that harvest in excess of the GHL can complicate the sustainable management of the halibut stock and potentially indirectly impact other non-commercial users.

With respect to localized depletion, NMFS does not have data to confirm that short-term localized depletions of halibut are due to focused harvest activity by one or more fishing sectors. Current data do not clearly indicate what the causes, magnitude, and geographical distribution of nearshore depletions might be. While it is accurate that commercial fishermen may fish in areas that are accessible to sport fishermen, any localized depletions resulting from high halibut catch rates may be offset in the medium-to-long term by egg and larval drift and migrations of juveniles and adults.

Comment 66: The guided sport fishery, as conducted, is adversely impacting communities that depend on the commercial fishery. The Area 2C halibut fishery is the economic lifeblood of many longline fishermen and the fishery dependent communities in which they live. The livelihoods of too many Alaskans that live away from the major transportation corridors of Juneau, Sitka, and Ketchikan have been seriously harmed. The guided fishery harvest must be limited to established GHL amounts. The unrestricted growth of the guided charter fishery is creating stress in coastal communities. The economic insecurity inflicted by the combination of reduced quotas, reduced access to subsistence resources due to charter-driven local depletion, and the federal government's stalled effort to restrict guided sport harvest to established catch limits, after 15 years of policy reversals and ineffective actions, has intensified conflicts in small coastal communities. These tensions are manifested as stress, hostility, and other socially destructive responses that are pitting neighbor against neighbor. The failure of the management system to adequately regulate and enforce existing regulations on the guided sport fishery near Sitka has led to social unrest in the community and increasing conflicts on the grounds.

Response: As noted in the responses to Comments 64 and 65, NMFS agrees that the commercial longline fishery, and potentially the unguided sport and subsistence fisheries, may be adversely impacted when the guided charter fishery exceeds its GHL. This occurs through allocative impacts to the commercial fishery, and by complicating the sustainable management of the halibut stock. NMFS does not have data to confirm that short-term localized depletions of halibut are due to focused harvest activity by a particular user group. NMFS believes that adverse impacts to these fisheries listed above affect the communities in Southeast Alaska in which these fisheries are based. As noted in the analysis, the information that would make it possible to measure these impacts is not available.

NMFS acknowledges that the controversy has created conflict in some Southeast Alaska communities; the analysis (see **ADDRESSES**) cited a study from the U.S. Forest Service's Northwest Research Center that noted that ''[c]ompetition for fish has created tension within communities with sizeable charter fishing fleets, such as Craig and Sitka.''

Comment 67: When the guided sport fishery exceeds its GHL, there are secondary impacts on the commercial crab fishery. Many of the small processors around Southeast are being affected by the lowered halibut quotas and face insufficient production to cover overhead costs. The processor that would usually service the upcoming crab season is saying that it can't afford to cover the overhead to open the plant earlier without the additional halibut production.

Response: NMFS acknowledges the potential for secondary impacts of any fishery exceeding harvest targets. This action should reduce the effects of these impacts by maintaining the guided sport fishery in Area 2C to its harvest target.

Comment 68: The guided sport fishery is not or is minimally adversely impacting the commercial longline fishery. Estimates of the loss to the commercial sector in the analysis appear to be minimal and are based on arbitrary assumptions. When the longline fishery has quota reductions, the decrease in production generally results in an increase in price that buffers the impact. Quota reductions in the sport fish industry do not have a similar buffering impact. In fact, the opposite happens in that the product becomes harder to sell. A number of metrics indicate that the longline fishery has been doing well during the period when the guided sport harvests have been increasing, contradicting the problem statement. IPHC policy changes have provided catch limit windfalls to the commercial fishery that have not been enjoyed by other gear sectors; QS values, ex-vessel prices, and overall ex-vessel earnings have increased a great deal; 75 percent of commercial ex-vessel revenues are personal profit; and two-thirds of QS holders are initial recipients who have enjoyed massive financial windfalls with no economic responsibility (presumably without having to take out loans).

Response: Halibut harvests in the guided charter fishery appear to impact the commercial setline fishery. NMFS does not have the information to prepare a quantitative analysis of the impacts although the analysis includes an illustrative table (Table 5) showing the scale of the potential gross revenue impacts. NMFS agrees that halibut prices have risen in recent years. In inflation-adjusted terms, the ex-vessel price for halibut rose by about 79 percent between 2001 and 2007.

NMFS agrees that a reduction in the quantity supplied may lead to an increase in price, all other factors held equal, and that this may buffer the impact of harvest reductions. However, NMFS does not believe that the impact of Area 2C harvest reductions on Area 2C price will be large as a result of this action. Halibut from Southeast Alaska compete with halibut produced from California to the Bering Sea in a regional (and international) market. Prices in this market are determined by overall supply, the prices of substitute goods, income, exchange rates, inventories, and other factors. Area 2C fishermen only contribute a part of the overall market supply, and thus a change in their production is likely to only have a modest impact on the price they receive.

IPHC statistics show that Area 2C longline harvests have fluctuated

between 8,410,000 lbs and 10,630,000 lbs over the last ten years, although since 2005, the IPHC catch limit has dropped in each year, falling by 54 percent overall. This decline in the catch limit is indicative of a large adverse impact to the longline fishery in recent years. Only part of this impact is attributable to the guided charter fishery GHL overages. Many factors affect ex-vessel prices and the value of QS. The fact that these values have increased in the past does not mean that guided charter operations have not had an adverse impact on these operations, although guided charter overages were a contributory factor during the years when the IPHC based its projections of guided landings on extrapolations from past landings and not on the GHL.

The comment about profitability appears to refer to a McDowell Group study prepared in April 2007 for The Halibut Coalition titled, ''Economic Impact of the Commercial Halibut Fisheries in Areas 2C and 3A.'' While the McDowell group estimates that 75 percent of ex-vessel earnings become personal income for halibut fishery participants, this includes earnings for QS holders, management, and skipper and crew labor, as well as business profits. The 75 percent estimate would overstate profits.

Comment 69: The commercial longline fishery, as conducted, is adversely impacting the guided sport fishery. Removals in a given year will have an effect on Total CEY in subsequent years. In 2008 commercial catch limits were above the Fishery CEY by 2,300,000 lbs. If these halibut had been left in the water, assuming a 20 percent exploitation rate, the 2009 Total CEY would have been high enough to produce a GHL of 931,000 lbs rather than 788,000 lbs.

Current longline fishing methods and regulations have allowed longline fishing to occur nearly year-round every year and in unrestricted fishing grounds. Where halibut were once plentiful before the IFQ system, there are now few to be caught. Sport fishermen must use more resources and assume more personal risk for the opportunity to catch two halibut. When commercial long-line fishing was limited to season openers over a shorter period of time, halibut were able to migrate closer to shore and offered sport fishermen greater opportunity for success. The IFQ system reduced risks for commercial fishermen, as intended, but shifted them to sport fishermen.

Response: In part, this is a comment about the impact of the IFQ system on halibut sport fishermen. The IFQ program is not the subject of the current action. NMFS agrees that leaving fish unharvested contributes to biomass and Total CEY in subsequent years. NMFS notes that, as shown in Figure 2 in this preamble, Fishery CEY has exceeded the catch limit by large amounts in the past, so that large portions of the Fishery CEY have been left unharvested. The change in Total CEY is the result of a number of factors including changes in our understanding of halibut stock biology and commercial longline and other harvests (including guided harvests in excess of the GHL between 2004 and 2008).

As discussed in the response to Comment 65, NMFS does not have data to confirm that short-term localized depletions of halibut are due to focused harvest activity by one or more sectors.

Comment 70: The environmental and cost-benefit analyses are inadequate. Commenters had a number of concerns: (a) The analysis tended to provide more information about commercial fishery impacts under the status quo than it did about the costs of the action alternative to the sports fishermen; (b) the analysis failed to estimate the net benefits or costs of the action; (c) additional economic research is necessary; (d) the analysis failed to adequately address the impacts of the status quo on subsistence and non-guided sport users; (e) the analysis failed to adequately recognize that GHL overages are a conservation issue; (f) NMFS erroneously assumes there will be an increase in charter boats and guided harvests in 2008 and 2009 over 2007; and (g) the analysis fails to provide an estimate of the number of large lodges, according to the criteria of the Regulatory Flexibility Act.

Response: Several of these issues have been addressed in other comments. Comment 70(a) is addressed in detail in the response to Comment 71. Comment 70(b) is addressed in response to Comment 73. Comment 70(c) regarding research projects underway, these are identified in the analysis (see **ADDRESSES**). The response to Comment 72 describes two studies released since the analysis was prepared. With regard to Comment 70(d), NMFS has modified the analysis to provide a brief description of unguided sport and personal use fishing activity. However, the discussion also notes the lack of information on the causes of localized depletion.

In response to Comment 70(e), the relationship of this action to conservation is discussed in detail in the responses to Comments 1 through 27. The response to Comment 7 notes that the environmental assessment part of the analysis is meant to determine whether the impact of the action would have a significant impact on the human environment and does not determine whether an action has a conservation objective.

In response to Comment 70(f), NMFS did not assume that there will be an increase in the number of operations in 2009. NMFS notes that the GHL for 2008 was 931,000 lbs. As shown in Table 1 of the analysis, the guide sector has caught more than the 931,000 lbs every year over the period from 1997 to 2007. The best available harvest information for 2008 indicates that the guided fishery exceeded the 2008 GHL in that year as well. NMFS did not project increases in future guided angler activity. NMFS's conclusions about the impact of the action were based on the assumption that in the absence of action, if guided harvest levels persisted at levels observed in recent years, or even declined significantly, the guided fishery would harvest in excess of the GHL, as observed in recent years.

The response to Comment 70(g) is addressed in the response Comment 62.

Comment 71: The analysis tended to provide more information, including quantitative information, about commercial fishery impacts under the status quo than it did about the impacts of the action on the guided charter fishery. The analysis does not include estimates of gross revenue impacts to the charter fleet, even though NMFS provided such estimates for its analysis of the Catch Sharing Plan. The analysis of the Catch Sharing Plan included rough estimates of revenue impacts accruing to the guided charter fishery from a range of options. A comparison of two of the Catch Sharing options (1c and 2c in Table A–42, page 74) suggests that this action would have adverse revenue impacts of about $10.4 million in the year the restriction was imposed. Despite the fact that NMFS was able to make gross revenue estimates of the impacts on guided charter operators from the Catch Sharing Plan action, it has not done so for the current bag limit action.

Response: The analysis includes a qualitative analysis of the impacts to charter vessel anglers (Section 2.5.1) and to guided operations (Sections 2.5.2 and 2.5.3) that is comparable to that provided for impacts to longline fishermen (Section 2.5.4). The analysis does not provide a quantitative projection of the impact on longline fishermen, although it does provide an illustrative table showing the longline costs under the status quo for one set of assumptions.

NMFS has not provided a similar illustrative table for the guided sport fishery because the fundamentally

different natures of the products of the two sectors (halibut sold in competitive markets as opposed to fishing experiences which are affected by the availability of halibut) preclude guided charter gross revenue estimates with the information currently available. The output of the commercial longline sector is halibut, and this output in Area 2C is small enough compared to overall output on the West Coast that the impact of changes in Area 2C production on Area 2C halibut prices are probably small. The quantity supplied by the longline sector appears to be closely related to the annual catch quota set by the IPHC. Under these conditions, NMFS has been able to provide illustrative calculations of gross revenues for the longline sector. However the situation is very different in the guided sector. The output in the guided sector is not halibut, but days of angler fishing time. To estimate gross revenue changes in the guided charter fleets, NMFS would have to have demand models based on survey research, which would allow the determination of changes in angler participation in the lodge-based and cruise ship-based industry segments in response to changes in the bag limit. Moreover, NMFS would need better information than it has on the possible guided charter operation supply responses.

The analysis for the one-fish bag limit included the best scientific and commercial information available to NMFS. The Catch Sharing Plan analysis cited in the comment was prepared for the Council. This analysis has not yet been submitted to NMFS for review.

As noted above, the analysis for the bag limit includes a qualitative discussion of the impacts of this action on guided anglers, half-day guided operations, and full and multi-day guided operations. Different assumptions and models will generate different approaches to a problem and different results. NMFS has worked with a conceptual model in which retained halibut catches are one input into the demand for guided charter fishing days. A change in the number of halibut retained will shift the demand curve; guided charter businesses may respond by altering their business models or prices. The impacts will be different in the half-day and full- and multi-day segments of the guided charter business. NMFS does not have the data necessary to better specify or estimate the parameters of this model. As noted in the analysis (see **ADDRESSES**), ongoing research conducted by NMFS at the Alaska Fisheries Science Center may change this in the future.

The model used for the Catch Sharing Plan implicitly assumes that fishermen come to catch a certain weight of halibut, that the demand in terms of the number of angler-days is fixed for any given GHL, and that demand is not responsive to price or any other factor. The model assumes anglers come to Alaska to harvest 24 lbs of halibut (an estimate based on average harvests by charter vessel anglers in Area 2C) and the model equilibrates so as to set the number of angler-days demanded equal to the GHL divided by 24. The quantity of halibut harvested is central to the Catch Sharing Plan model, while the fishing experience in Southeast is central to the model used in this analysis. As the Catch Sharing Plan analysis notes, the analysis was provided at the request of Council members, despite the impossibility of providing rigorous estimates of charter sector revenue with the information available.

Comment 72: In December 2008, an economic study of the economic impacts and contributions of sport fishing, prepared by the Southwick Associates consulting firm, was published by the ADF&G. The new information in this study should be used in the analysis of this action.

Response: NMFS appreciates this comment, bringing this report to its attention. In fact, since the preparation of the analysis for the proposed rule, two new reports describing the relationship between sport and commercial fisheries and regional economies have become available. One, prepared by consultants to ADF&G, estimates regional impacts for fresh and salt water sport fishing in Alaska; a second, prepared by consultants for a consortium of fishing industry groups, estimates regional impacts for Alaska commercial fisheries. While the two studies are useful additions to the literature on the social impacts of Alaska fisheries, they are of limited use in estimating the impacts of the proposed action in Southeast Alaska.

Both studies are driven by changes in the quantity of the good or service demanded. In the case of the sport fishing study the demand is for days of fishing time, and in the case of the commercial study the demand is for volume of fish products at the first wholesale level. Neither study discriminates between halibut fishing and other types of sport or commercial fishing. This is a more important shortcoming for using the commercial study to evaluate the action's impacts than it is for the sport study, since the level of aggregation is higher in the commercial study. The analyses do not provide information that would make it possible to estimate how this action would change the quantity of the outputs demanded. This is a serious shortcoming since there is great uncertainty about the impact of this action on days of guided sport fishing demanded. Moreover, both studies assign impacts based on the location where the fishing activity takes place, and not on the place of residence of the individuals earning incomes. Thus, for example, the impacts for a charter guide or longline crew member from Washington State or South Central Alaska are attributed to Southeast Alaska, where the activity took place. However, in each case, the individual in question may have had very limited contact with the Southeast economy and may have spent all their income outside of the region. Finally, as noted in the response to Comment 73, these studies are impact studies and not designed for cost-benefit analysis. The sport fishing study results were based in part on survey research on activity and spending during 2007. The analysis did not focus on or provide special information about trips targeting halibut. The information from the commercial study must be inferred from figures because it contains little tabular data.

NMFS recommends reading the actual studies for more information. The sport fishery study, titled ''Economic Impacts and Contributions of Sportfishing in Alaska, 2007'' is available online at *http://www.sf.adfg.state.ak.us/Statewide/economics/;* the commercial fisheries study, titled ''The Seafood Industry in Alaska's Economy'' is available at *http://www.marineconservationalliance.org/docs/SIAE_Jan09.pdf.*

Comment 73: A number of comments go beyond pointing to the impacts that imposing a one-fish daily bag limit will have on individual sectors and communities and make explicit comparative statements about which alternative will produce the greatest balance of benefits to costs. For example, one commenter notes that the December 2008 report from ADF&G discussed in the response to Comment 72 gives NMFS the information needed to properly weigh the benefits and costs of this action. This shows that the action may cause a 2009 loss of up to 40 percent of $175 million (in non-resident angler spending in Southeast Alaska) for a benefit of additional revenues to longline fishermen of about $2.5 million in 2009. Another commenter cites national figures from the NMFS

publication ''Fisheries Economics of the U.S.,'' to argue that, because implied average income per job is higher in the recreational fishery than in the commercial fishery, a national shift from commercial to recreational fishery use of fish resources could lead to significant increases in national income. A third asks, what is better for our communities: one wealthy commercial fisherman spreading his wealth or several tourists spreading their wealth and creating word of mouth about the beauty and splendor of our waters? Which supports our community better, transporting a commercial crew a couple times over the summer or transporting charter vessel anglers a couple times a week? Which supports our community better, a commercial crew visiting in town between trips or a group of tourists seeing us for the first time or at least the first time this year? If we accept in theory that the same amount of money is made by both operations, then look at which operation puts more dollars back into Alaska and more importantly back into the economy; then the only rational argument is for the charter operation. These are offered as examples; there are other similar comments.

Response: With the limited information available, it is not possible to conduct quantitative cost and benefit analyses comparing the benefits and costs to the commercial longline and guided sport industries or evaluating impacts on the regional economy. In the absence of quantitative information, NMFS has conducted a qualitative analysis using the best information available to it. NMFS notes that many of the comparative comments about benefits and costs relate to costs and benefits in Southeast Alaska. While NMFS has a responsibility to look at impacts in Southeast Alaska, its ultimate responsibility is to conduct an analysis from a national accounting perspective. As noted in the response to Comment 72, while studies have recently become available that provide information on the output, income, and employment impacts of sport and longline fishing in Alaska and the Southeast Alaska region, these are not designed for use in a cost-benefit analysis and are not adequate to support an input-output analysis of the proposed action. These studies are useful, but they don't provide enough information to do a fully meaningful impact analysis of this action for several reasons described earlier.

Impact analyses such as these do not provide information that would be useful for a cost-benefit analysis. Impact multipliers measure gross changes in income and jobs. Regional impact multipliers might show regional income and job changes, but would be much less likely to show national income and job changes because income and jobs created in one region would come at the expense of income and jobs in other regions.

Fairness

Comment 74: The allocation incorporated into the GHL system is not fair and equitable within the terms of reference of the Halibut Act. Although the proposed rule mentions 16 U.S.C. 773c (Halibut Act) in passing, it never mentions the ''fair and equitable'' standard, and it states that the Secretary is relying on the general rulemaking authority contained in subsections 773c(a) and (b). There never has been a determination by the Secretary that the GHL represents an allocation that is tied to any rational standard, much less the ''fair and equitable'' standard of the Halibut Act. The Secretary needs to explain how the ''fair and equitable'' clause in the Halibut Act is fulfilled in current action. The Secretary cannot merely assume that regulating to the GHL will result in an appropriate and legally defensible allocation; rather the Secretary must explain why that is so. The Secretary has not done this and as a result, the entire proposed rule is built on a faulty premise.

Response: NMFS disagrees. This action complies with the fair and equitable requirement of the Halibut Act. This Halibut Act requirement reads as follows:

> If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges. (section 773c(c)).

The ''fair and equitable'' provision in 16 U.S.C. 773c(c) quoted above is substantially the same as the ''fair and equitable'' provision found at 16 U.S.C. 1851(a)(4), i.e., National Standard 4 of the Magnuson-Stevens Act. The only difference is the addition of the word ''halibut'' before ''fishing privileges'' in the provision in 16 U.S.C. 773c(c). Because of this similarity, NMFS determined that use of regulations promulgated by NMFS as guidelines for the National Standard 4 would be helpful to illustrate why this action, even though it is taken under the Halibut Act and not the Magnuson-Stevens Act, meets the statutory requirement.

Guidelines to National Standard 4 provide that an allocation of fishing privileges should be rationally connected to the achievement of optimum yield or the furtherance of a legitimate fishery management objective (50 CFR 600.325(c)(3)(i)(A)). The Council and NMFS have articulated a legitimate objective for this action, i.e., to limit the use of halibut by one sector that has grown significantly in proportion to the other sectors that harvest halibut.

Further, the guidelines to National Standard 4 acknowledge that inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of fishery management objectives; otherwise, the disadvantaged user groups or individuals will suffer without cause (50 CFR 600.325(c)(3)(i)(A)). Here, the fishery management objective has been articulated by the Council and NMFS, starting with the 1995 problem statement by the Council and continuing through this final rule. The 1995 problem statement (as revised in the 2001 GHL analysis) demonstrates that the Council was concerned about the expansion of the halibut charter industry and how that expansion may affect ''the Council's ability to maintain the stability, economic viability, and diversity of the halibut industry, the quality of the recreational experience, the access of subsistence users, and the socioeconomic well-being of the coastal communities dependent on the halibut resource.'' The Council went on to indicate six issues of particular concern, including the absence of limits on the annual harvest of halibut by the guided sector and the rapid growth in that sector, which amounted to an ''open-ended reallocation from the commercial fishery to the charter industry.''

To address the open-ended reallocation, the Council established a GHL, based on historic catches in that sector (125 percent of the average harvest from 1995 to 1999). The decision to make the GHL 125 percent of actual harvest would ''allow for limited growth of the guided recreational fishery, but would effectively limit further growth at the (GHL) level'' (68 FR 47256, 47259, column 2, August 8, 2003).

Under the fair and equitable requirement, the motive for making a particular allocation should be justified in terms of the objective. Hence, the legitimate objective is to limit the growth of one sector and the resulting

reallocation from other sectors that use the same finite resource. The GHL accomplished that objective by basing harvest limits on historic catches with some room for additional growth.

The development of this action, and the actions that preceded it, illustrate how the fair and equitable standard was met throughout the process. The Council articulated a legitimate objective and established an allocation consistent with that objective, allowing some growth of harvests by the guided recreational sector. This action implements management measures to give effect to that allocation. It should be understood that a fair and equitable allocation does not mean that all U.S. fishermen should be able to harvest equal amounts of the halibut resource. However, a legitimate objective is required and the means to achieve that objective must be reasonable. This action is consistent with those requirements.

Comment 75: The proposed rule is consistent with the fair and equitable clause of the Halibut Act. The guided charter fishery was given a fair and equitable GHL and allowing them (i.e., charter vessel anglers) to exceed it is unfair and inequitable to all other halibut harvesters. The original GHL allocation was fair and equitable for several reasons. It allowed for guided sector growth; the Council evaluated and balanced the needs of all halibut user groups; it is based on a long public record; and guided charter fishermen did not challenge the allocation when the GHL rule was published in 2003. Continuing to allow charter vessel anglers harvests to exceed the GHL is unfair and inequitable to other harvesters, including those who supported conservation through quota cuts.

Response: NMFS acknowledges the comment and agrees that this action is fair and equitable as required by the Halibut Act. Also see the response to Comment 74.

Comment 76: This action provides special benefits to the longline fishermen at the expense of the American public. Halibut is a public resource that belongs to all citizens of the United States, and public access should not be restricted to benefit commercial fishermen. The proposed rule would give poundage back to the commercial fleet and cut the guided sport catch, which discriminates against recreational fishermen. This violates the fair and equitable terms in the Halibut Act, Magnuson-Stevens Act, and other statutes. The Magnuson-Stevens Act clearly indicates that holders of halibut IFQ do not hold ownership or property rights. The citizenry is endowed with priority access to natural resources, yet this action reduces the non-commercial catch privilege by 50 percent in favor of the commercial sector.

Response: NMFS disagrees with the commenter's assertion that this action disproportionately benefits the commercial setline fishery. The halibut catch limit for Area 2C commercial fishermen is reduced by about 19 percent from 2008 to 2009 and has decreased by 54 percent between 2005 and 2009. During the comparable period of 2005 through 2008, the guided fishery harvest in Area 2C has remained high, exceeding its GHL by about 32 percent (compare Figures 1 and 2 above). See the response to Comment 74 with regard to fairness and equity.

Comment 77: All Alaskans share the halibut resource and all have equal rights to it. Many commercial boats are not from Alaska.

Response: Federal law prohibits NMFS from discriminating between residents of different states when implementing halibut fishery regulations that are applicable to nationals or vessels of the United States. Also see the responses to Comments 76 and 82.

Comment 78: There is a commercial bias in the IPHC and Council. The IPHC and Council have supported growth in commercial harvest while stifling the guided sector. The guided charter vessel owners do not have representation in these bodies; therefore, all decisions tend to favor the commercial sector. This creates concerns about the fair and equitable allocation of fishing privileges, and as a result, the commercial sector was allocated an excessive share of the halibut resource. This is inconsistent with the Magnuson-Stevens Act, the Halibut Act, and the Alaska Constitution. The Secretary of Commerce needs to address the question of whether or not the membership of the Council is ''fair and balanced'' in accordance with the Magnuson-Stevens Act. Guided charter vessel operators will not accept regulations that come from the Council or NMFS until they have a meaningful way to determine a ''fair and equitable'' allocation with ''fair and balanced'' representation.

Response: This action is being taken by NMFS based on a recommendation by the Council. Actions by the IPHC are evaluated and approved under a different process.

The process for selecting Council members is set in statute and employs mechanisms to assure representation of the various states represented on the Council and fair and balanced apportionment to the extent practicable. The Council makes decisions through a transparent and public process, and in a manner that is consistent with the requirements of the relevant statutes.

The Council has the authority to develop regulations to address allocation issues among different domestic sector users of halibut off Alaska, including the commercial and guided sport fisheries. In 1998 the Council initiated a public process to identify GHL management options and formed a GHL committee including representatives from the guided industry. The Council has continued to use this committee to develop long-term management recommendations that promote harvest stability between the commercial and guided sport fishery sectors. The Council has used the recommendations from this committee to formulate its GHL management options. Furthermore, NMFS reviews all Council regulations for consistency with the Halibut Act, the Convention, and other applicable law. This final rule does not unfairly favor any sector over any other.

Comment 79: The combination of SUFD and GHL policy has resulted in an annual *de facto* reallocation to the commercial sector solely to the economic benefit of the longline fleet with no consideration of fairness or equity for other users. The stair-step provisions of the GHL are compromised by three distinct non-scientific IPHC policies that directly result in an increased allocation to the commercial fishery: (1) The ''fast down'' policy sets a commercial harvest level in excess of the Fishery CEY in times when biomass is decreasing, which in turn triggers the lowering of the GHL; (2) the substitution of the GHL for the best estimate of guided sport fishery harvest instead of a more realistic harvest estimate inflates the Fishery CEY and the subsequent overharvest of Total CEY by the same amount; and (3) the IPHC catch decisions can differ from IPHC staff recommendations for political reasons and have resulted in allocation schemes that allocate millions of pounds of fish in excess of the Fishery CEY to commercial fishermen at the expense of the GHL in following years.

Response: The policies followed by the IPHC in setting annual commercial catch limits are beyond the scope of this action. However, although different approaches for projecting halibut mortality in different sectors could be used when setting annual catch limits, the IPHC's approach accounts for total mortality of halibut in a manner that conserves the halibut resource.

The response to Comment 4 discusses the SUFD management policy and why this policy is not necessarily advantageous to the commercial sector. See also the response to Comment 3 for why the IPHC adopted the GHL as its projection of the guided sport harvest in response to a commitment by NMFS to implement the one-fish bag limit for 2008 and again in 2009. Finally, the response to Comment 5 addresses the IPHC's rationale for deviating from its staff recommendations for Area 2C fishery CEY while managing the halibut resource area-wide in a manner intended to meet overall objectives for resource exploitation rates.

Comment 80: This action discriminates inappropriately between guided and unguided sport fishermen. Sport fishermen without their own boats, who choose to fish from charter vessels, would be penalized, especially those who because of residence, age, physical ability, or financial limits cannot operate or buy their own boat. Unguided anglers would still have the two-fish daily limit. This violates equal access and equal protection rights. All recreational anglers should be treated equally and be subject to the same regulations.

Response: NMFS disagrees that this action inappropriately discriminates between guided and unguided anglers. The problem the Council and NMFS are addressing was the growth of the guided recreational sector compared to other halibut user groups. According to the analysis, participation and harvest levels for the unguided recreational sector has remained relatively steady, while participation and harvest levels for the guided recreational sector has increased to a level that prompted action by the Council and NMFS. The Council articulated the objective of limiting the guided recreational sector, which by its growth was affecting other user groups that historically utilized the halibut resource. The Council established an allocation level consistent with that objective, i.e., the GHL. The one-fish daily bag limit was determined by NMFS to be a reasonable means to achieve the objective of limiting the guided recreational sector to approximately the GHL established for that sector.

Comment 81: The proposed action does not discriminate inappropriately between guided and unguided sport fishermen. A charter vessel angler receives the benefit of the guide's knowledge and skill, which provides a higher harvest success rate. In addition, when the GHL was adopted, the guided sport sector was growing, while other sport sectors remained stable.

Response: NMFS agrees. NMFS also notes that the guided sport harvest in Area 2C grew every year from 1999 to 2005. During that time the non-guided sport harvest fluctuated from year to year, not showing any strong increasing trend. In 2006 and 2007, the guided sport harvest was slightly down from its 2005 peak but remained high and substantially above the GHL, while the non-guided sport harvest grew slightly but stayed within its 1999 through 2005 range. Therefore, self-guided angler harvest is not restricted by this action. It is the increase in halibut harvest by the guided industry that prompted the Council and NMFS to propose controls on the Area 2C charter vessel angler harvest consistent with the Halibut Act.

Comment 82: The proposed rule discriminates between residents of different states. The supplementary information states, ''In Area 2C, the sport fishery is comprised of guided fishing on charter vessels and unguided angling. Residents of Southeast Alaska and their family and friends are the primary unguided anglers, while non-resident tourists are the main clients for guided fishing on charter vessels.'' From this passage, it is clear that the rule is primarily intended to restrict non-resident tourists while not restricting Southeast Alaska residents and their family and friends. This is in direct violation of the Halibut Act, which states it is illegal to differentiate between users from different states.

Response: Regulations established by this action apply to all charter vessel anglers, regardless of their state of residency. See the response to Comment 80. NMFS did not propose to limit halibut harvests by non-guided sport and subsistence fisheries, or halibut mortality from bycatch and wastage in commercial fisheries because the analysis (see **ADDRESSES**) indicated that removals from categories other than the guided sport sector have remained relatively stable during the past five years and have not grown at the rate of the guided fishery. It is this information that originally prompted the Council to recommend restrictions in 2007 to limit Area 2C charter vessel angler harvest, and prompted NMFS to take this action.

Comment 83: The prohibition of captain and crew fishing unfairly discriminates against the sport fishing rights of these individuals and may not comply with the non-discrimination clause in the Halibut Act. The prohibition is not justified because skipper and crew harvest was not included in the GHL allocation. Captain and crew members are required to have a current fishing license while they are on the vessel, and their catch should be considered unguided sport harvest and limited to two halibut per day. Captain and crew are simply trying to minimize the costs of fuel and use of their time by combining personal use fishing with their charter trips, rather than making a separate trip for their recreational limit. Many captain and crew depend on halibut for food at home and should not be penalized for trying to gather halibut in an efficient manner.

Response: NMFS disagrees. The Council and NMFS, working with stakeholders, approved a prohibition on the catch and retention of halibut by charter vessel guides, operators, and crew as a preferred first tool for restricting harvest in the guided fishery. The Council intended that the GHL include halibut harvested by captain and crew. The ADF&G estimated that its prohibition on crew-caught fish reduced halibut harvest in the guided sport fishery by between 78,000 lbs and 84,000 lbs in 2006.

Captains, guides, and crew are on guided charter vessels in their commercial capacity to operate the charter vessel and to direct charter vessel anglers on fishing expeditions, and their commercial status is fundamentally different from other individuals doing non-guided sport fishing. Also, their ability to retain one or two halibut could disguise the retention of halibut in excess of the bag limit applicable to charter vessel anglers. Preventing this potential circumvention of daily bag limits is a rational means of achieving the objective of NMFS for this action.

NMFS acknowledges that the prohibition on retention of halibut by charter vessel guides, operators, and crew could lead to higher costs for these individuals to harvest halibut for their personal use. Requiring a separate fishing trip for this purpose, however, does not make fishing any more expensive than it is for any other individual engaged in recreational fishing. Also see the response to Comment 57.

Comment 84: This action will have an unfair economic burden on lodges, hotels, B&Bs and charter operators that offer full day or multi-day trips. The number of cruise ship visitors to Alaska has grown over the last 10 years. Many of these cruise visitors take half-day charters and have significantly contributed to the increase in halibut catch over that time period. Therefore, the economic burden of this rule will be borne unfairly by those businesses that depend on full day or multi-day charter trips.

Response: The analysis (see **ADDRESSES**) indicates that the segment

of the charter industry that caters to cruise ship tourists will not be impacted by changes to the daily bag limit to the same extent as the lodge-based guided charter businesses. Tourists on the four-hour charter fishing trips associated with cruise ships often do not have enough time to harvest two halibut. Tourists coming to communities on cruise ships and choosing to take a charter trip for halibut will likely continue to do so and businesses that cater to these tourists will continue to benefit from their visits.

NMFS acknowledges that independent or repeat tourists who take multi-day vacations at lodges within Area 2C may consider the reduced halibut bag limit in their decision to book a vacation, along with considerations for alternative fishing or tourist opportunities. The potential impact on bookings and demands for tourist activities is discussed in the analysis supporting this final rule, but quantitative estimates of how such impacts will influence demand for these services and commensurate impacts on local communities are unavailable. Other than acknowledging the potential for lost business, NMFS cannot quantify the probability or extent to which this might occur.

Comment 85: The commercial fishery benefits a few participants, and the recreational fishery spreads benefits more broadly. This action represents the big commercial interests trying to drive out the smaller guided charter operators.

Response: NMFS disagrees that the recreational fishery necessarily has more beneficiaries than the commercial fishery. In addition to commercial fishermen, the commercial fishery benefits persons working in the processing, transport, wholesale and retail industries, and ultimately the large number of persons who buy halibut in grocery stores or restaurants. Businesses that serve commercial fishermen in communities in which the commercial halibut fishing industry is based also are beneficiaries. Of course, there are also many beneficiaries of the guided sport fishing industry other than the charter vessel anglers. However, claims that the guided industry or the commercial fishing industry has more or less beneficiaries than the other misses the objective of this action, which is explained above under ''Objective of this action.'' Regarding the relative size of commercial interests in the guided and commercial fishing industries, NMFS observes that both industries have large and small operations and both industries participate in Council meetings.

Comment 86: The timing of this action is unfair to sport fishermen and guided businesses. It is unfair to those who have already made reservations or paid nonrefundable deposits for 2009. The timing is also unfair to those recreational fishermen considering whether to make advance reservations; many are leery of planning a trip when the season bag limits are uncertain. Finally, this is unfair to guided businesses dependent on long reservation lead times, which are often made two years in advance.

Response: NMFS acknowledges that a change in guided sport fishing regulations can be disruptive at any time of the year and may cause some charter vessel anglers to reconsider bookings. However, information about the potential for this action has been available since June 2007 when Council action indicated a potential for a one-halibut daily bag limit for charter vessel anglers in 2008. A final rule was published to implement this requirement in 2008 (73 FR 30504, May 28, 2008), but NMFS withdrew this final rule in response to a court order (73 FR 52795, September 11, 2008). This action to implement a reduced daily bag limit in 2009 was proposed on December 22, 2008 (73 FR 78276), and invited public comments until January 21, 2009. Most recently, a notice of the GHL that resulted from the 2009 IPHC annual meeting was published on February 24, 2009 (74 FR 8232) announced a reduction in the GHL for Area 2C to 788,000 lbs (357.4 mt), a further indication that some limit on the harvest of halibut by charter vessel anglers would be likely. NMFS took action to inform the public and the guided sport industry about the proposed regulation changes as soon as possible through an information bulletin and a press release published on its Web site. Hence, sport fishermen and guided businesses have had nearly two years to become informed and prepare for the potential of this action.

Comment 87: The burden of conservation cutbacks should fall on the commercial fishermen. Recreational fishermen take a very small percentage of halibut compared to the commercial fleet. Individual commercial boats can take large amounts of fish at one time compared to individual anglers with a single hook. Reducing commercial harvests to accommodate the two-fish guided sport bag limit would impose a small burden on individual longliners in terms of lost average harvest. Commercial fishing has a significant impact on the ecosystem and on food supplies for wildlife. In addition, the amount of halibut ''bycatch and wastage'' by the commercial fleet is greater than the total amount of recreational catch. Sport anglers have a smaller environmental impact. If there is a conservation concern, NMFS should impose more restrictions on commercial catch, such as reduced harvest limits or better bycatch controls.

Response: The burden of conservation cutbacks appears to have fallen primarily on commercial fishermen. Between 2005 and 2009, the commercial catch limit has been reduced by about 54 percent. Between 2005 and 2008, however, the guided sport harvest was relatively high and steady (see Figures 1 and 2). NMFS agrees that the commercial fishery removes more halibut than the recreational fishery, but disagrees that the recreational harvest of halibut in Area 2C is a very small percentage. The best available estimates of 2008 removals indicate that the commercial fishery took 59.2 percent of the total halibut harvest in Area 2C while guided and unguided sport fisheries took 29.7 percent (IPHC 2009 annual meeting ''blue book'' Table 1). Based on this information, the combined commercial and sport harvest removed 88.9 of the total halibut removals in Area 2C during 2008 leaving all other sources of halibut mortality (i.e., subsistence, bycatch, wastage, and research) to account for about 11 percent of total halibut removals. Looking only at the proportions of the commercial and sport harvests combined, the commercial sector took about two-thirds and the sport sector took about one third of the combined harvest in Area 2C during 2008. Hence, the sport harvest of halibut in Area 2C is not trivial. Estimates of sport harvests of halibut in this area during the four-year period 2004 through 2007 indicate that charter vessel anglers took an average of two thirds of the total sport harvest annually.

The commercial fishery for halibut, although larger than the sport fishery in Area 2C, is governed by an annual catch limit. The catch limit is distributed among commercial fishermen under the IFQ program. Fishing must stop when each fisherman reaches the limit of his or her IFQ, thus assuring that the commercial catch limit is not exceeded. By contrast, the sport fisheries are governed primarily by daily bag and gear limitations, but are not required to stop fishing when an overall annual limit is reached. An overall annual catch limit for the sport fisheries in Area 2C similar to the commercial catch limit was not considered as an alternative to this action because further restrictions on halibut mortality in the non-guided

sport fishery, the subsistence fishery, or on bycatch and wastage in the commercial fisheries were not considered as an alternative to this action and because harvest estimates indicate that halibut removals from these categories have remained relatively stable during the since 1999 and have not grown at the rate of the guided sport fishery.

In implementing the reduced daily bag limit for the guided sport fishery, NMFS has considered conservation and management objectives for this resource that have been reflected in the recommendations by the Council and management decisions by the IPHC. Hence, this final rule is objective and necessary to reduce the harvest of halibut in the guided sport fishery to address conservation concerns expressed by the IPHC and the competition for the halibut resource between the commercial and guided fisheries.

Comment 88: This action is inconsistent with the requirements of the Americans with Disabilities Act.

Response: NMFS disagrees. This rule is not inconsistent with the Americans with Disabilities Act because physical access to guided sport fishing opportunities is not the subject of this action. This final rule is designed to reduce the harvest of halibut in the guided sport fishery to approximately the GHL to address conservation and allocation problems. Recreational anglers who could be physically accommodated as a charter vessel angler under the former regulations may be similarly accommodated under this action. This final rule does not discriminate based on physical ability.

Comment 89: Guided charter fishing is a recreational fishery. A sport fisherman with a valid sport fishing license catches the fish, not the charter operator.

Response: NMFS agrees. Also see response to Comment 92.

Comment 90: It is unfair for commercial halibut fishermen to make sacrifices for conservation when guided sport fishermen do not. All user groups must bear the economic burden of managing the halibut fishery in a way that is fair and sustainable. Retrospective analysis shows that the IPHC has been overestimating abundance for the last four years and halibut harvest should be reduced. The commercial harvests of halibut were reduced in Area 2C over the past three years to address the long-term sustainability of the resource, which resulted in significant reductions in income for commercial fishermen. The guided sport fishery also must reduce its halibut harvest. Implementing the one-halibut daily limit for Area 2C is essential for rebuilding the halibut stocks and addresses the continued overharvest of the halibut resource by charter vessel anglers.

Response: NMFS agrees that implementing the one-halibut daily bag limit for the guided sport fishery, as well as managing other sectors consistent with conservation principles, is essential to proper management of the halibut resource. The reduction in the 2009 Area 2C Total CEY will be shared by the commercial fishery, through the reduction in the Fishery CEY, and by the charter vessel fishery, through the reduction of the GHL to 788,000 lbs (357.4 mt). This reduction in the GHL is not a part of this action, but is a consequence of the GHL rule promulgated on August 8, 2003 (68 FR 47256).

Comment 91: Increased guided charter effort and concentration have caused local depletion in some areas, which reduces the availability of halibut and decreases catch rates for subsistence and unguided sport fishermen. In Alaska, subsistence harvest has priority over all other uses. The lack of charter regulation has violated that priority, imposing impacts that are unfair, inequitable, and legally suspect. Subsistence is not only culturally important in Alaska; it is an economic imperative for many residents, particularly native residents who have an extensive history of depending on cultural and traditional foods. Because charter vessel angler harvest is concentrated near towns to accommodate day anglers, allowing this harvest disproportionate to halibut abundance is directly and immediately causing irreparable harm to subsistence residents of rural communities throughout Southeast Alaska. In times of low halibut abundance in Area 2C, halibut should be allotted to residents with subsistence needs. The majority of Alaska's subsistence halibut harvest occurs in Area 2C, and it is unfair for the guided sector overages to negatively impact residents of local communities who rely on halibut for food.

Response: NMFS is implementing management measures in the final rule to achieve the objective of this action (see ''Objective of this action'' above). The extent to which a one-halibut daily bag limit will reduce the guided sport harvest depends on numerous factors, including the possibility that current economic conditions will limit the amount of disposable income that potential anglers will choose to spend on a charter vessel fishing trip and the costs of alternative fishing trips.

NMFS agrees that subsistence fishing in Alaska is culturally important. As explained in the response to Comment 65, NMFS does not have scientific information indicating localized depletion of halibut. Addressing localized depletion is not the purpose of this action.

Comment 92: Guided charter fishing is not a recreational fishery. Charter operators receive income based on use of the halibut resource. In addition, the volume of charter vessel anglers and the amount of fish they catch and take with them, along with a lack of catch and release behavior, qualify the charter sector for commercial status.

Response: Charter vessel anglers are recreational fishermen. Charter vessel operators run commercial businesses. These terms are defined in this action.

Comment 93: Commercial setline fishermen provide the Alaskan and American public with millions of meals yearly that are available in restaurants, supermarkets, and fish markets. This is the only access to halibut for most consumers, unless they can afford an expensive trip to Alaska to catch their own.

Response: NMFS acknowledges the comment although a sport fishing trip in Alaska (e.g., in Area 2C) may or may not be considered expensive by the angler, depending on individual circumstances.

Comment 94: Charter vessel anglers are highly motivated to take home large quantities of halibut, usually at least two 50-lb boxes of filleted halibut or more per angler. After taking four large fillets off each fish, the carcasses are dumped overboard, with considerable wastage of fish meat, including all the belly meat. Many people in our community are upset about the waste, greed, and the depletion of the halibut stock in our area.

Response: The purpose of this action is to limit the harvest of halibut by charter vessel anglers in Area 2C. It is not intended to control what anglers choose to do with legally harvested halibut, how they butcher their halibut, or whether they choose to keep or give away the meat. During the past few years, charter vessel anglers have been required to retain carcasses until an angler leaves the vessel at the end of a trip so that angler compliance with halibut size limits can be monitored and enforced. This final rule removes the size restriction on halibut, so carcasses no longer must be retained until the guided charter vessel reaches port.

Comment 95: Commercial fishermen should not profit from leasing their halibut quota to others and never setting foot on a boat. If commercial fishermen

transfer their halibut quota for any reason, they should lose their permit.

Response: This action makes no change to rules concerning the transfer of halibut IFQ or quota share. No such changes were proposed and are beyond the scope of this action. However, the Council has recommended a program that would allow commercial IFQ holders to lease some IFQ poundage to guided charter business owners. This proposed program will be the subject of a future proposed rule for public comment.

Alternative Management Measures

Comment 96: It is important to keep the guided charter bag limit at two fish per day. Some respondents to a survey of charter vessel anglers proposed increasing the bag limit to three or five halibut per day, while others submitted that there should be no bag limit at all.

Response: The analysis (see **ADDRESSES**) indicates that a two-halibut daily bag limit for charter vessel anglers would not be sufficient to meet the objective of the action (see ''Objective of this action'' above). Daily bag limits higher than two halibut per day could result in total halibut harvests by charter vessel anglers that are larger than recent harvests which have been substantially in excess of the GHL in Area 2C. Hence, a higher daily bag limit would not accomplish the objective of this action.

Comment 97: Better data and additional monitoring and enforcement measures are needed for the guided charter fishery. NMFS should adopt the National Research Council's recommendation that recreational fisheries need to be managed more like the commercial sector in terms of survey and reporting requirements. Management agencies need better survey, reporting, and in-season monitoring information for the guided charter fleet. Guided charter operators should record real-time harvest either with cameras on board their vessels or on a punch ticket to improve the precision of catch estimates. All guided charter halibut should be weighed and logbooks checked at the dock to ensure they are not taking more than their limit. NMFS should also check boxes that are shipped from lodges to anglers to ensure that anglers are in compliance with regulations, just as commercial shipments are checked.

Response: Significant effort is being made to improve reporting. ADF&G has made numerous changes to its logbook program in recent years. For example, ADF&G has conducted dockside checks and post-season charter vessel angler verifications to validate logbook data. In addition, NMFS has coordinated with ADF&G to establish new logbook requirements that will further validate halibut harvest information recorded in the State's Saltwater Sport Fishing Charter Trip Logbook, including requiring the signatures of anglers to verify that the number of halibut caught and recorded is accurate. ADF&G supports this requirement as it will lead to more reliable logbook data and more accurate estimates of guided charter halibut harvest. Enhanced recordkeeping and reporting, together with ongoing monitoring and enforcement by state and federal enforcement personnel as time and resources allow will serve as a deterrent to large scale violations of sport fish regulations. NMFS has been exploring the possible use of electronic monitoring of small vessels. See the response to Comment 122.

Comment 98: Reduce halibut harvest in the commercial sector by buying back IFQ from Areas 2C and 3A when it comes available on the market. Government agencies should fund this reallocation. For example, the State of Alaska could purchase IFQ to take it off the market and reduce the amount of commercial harvest.

Response: Government purchasing commercial quota share or IFQ was not proposed and would not address the objective of this action (see ''Objectives of this action'' above).

Comment 99: Implement a charter IFQ program. If charter IFQs had been implemented at the time they were proposed in 1993, the rapid growth of the guided charter fleet would have been controlled.

Response: The Council adopted a recommendation in 2001 to include the guided sport fishery in the existing IFQ system. In 2005, however, on request from NMFS, the Council failed to confirm its 2001 decision. The proposed rule for the charter IFQ program was never published as a consequence. If an effective IFQ program had been implemented, NMFS agrees that the current allocation problems between the commercial and guided sectors might have been easier to resolve.

Comment 100: Any plan to limit charter harvest should include a requirement that they pay back their overages for the last few years.

Response: This final rule is intended to reduce the guided sport harvest in Area 2C. The GHL for this area was designed to serve as a benchmark or harvest policy target and not as a ''hard cap'' or firm catch limit that can not be exceeded. Harvests above or below the GHL could occur because the management measures used are not so finely tuned that they can control guided sport harvests precisely to a specific point. Amounts of harvest in excess of the GHL can not be attributed as a violation to a person who legally harvested halibut in the guided sport fishery under the regulations that existed at that time.

Comment 101: Delay implementation of the one-fish bag limit.

Response: NMFS disagrees. The GHL has been exceeded in Area 2C every year since 2004. Delaying the one-halibut daily bag limit would not achieve the policy objective of the Council and NMFS to limit the guided sport halibut harvest to approximately the GHL. The one-fish bag limit will reduce the harvest of charter vessel anglers to a range of 1,495,000 lbs (678.1 mt) to 602,000 lbs (273.1 mt) and was the only management option that could reduce guided sport harvest consistent with the objective of this action.

Comment 102: Guided charter anglers should not have to lease Guided Angler Fish from the commercial fleet to catch more than one halibut per day.

Response: The concept of Guided Angler Fish is associated with the Council's proposed Catch Sharing Plan. This was not proposed and is not part of this action. NMFS is assisting the Council to develop regulations that may implement the proposed Catch Sharing Plan if it is approved. A proposed rule for the Catch Sharing Plan, including the Guided Angler Fish concept, likely will be published in the future for public comment.

Comment 103: Adopt female catch and release.

Response: This comment presumes that large halibut generally are females that contribute disproportionately to the reproductive potential of the stock, and that harvest of these females will substantially decrease juvenile halibut abundance. In 1999, the IPHC reviewed options for a maximum size limit of 60 inches (150 cm) in the commercial fishery and concluded, based on the research at the time, that it did not add substantial production to the stock. Applying the limit to the sport fishery would have an even smaller benefit (if any) because the sport fishery harvest is smaller than commercial harvest, and it would apply only to Area 2C. The halibut stock is managed as a single population throughout its entire range. See also the response to Comment 64.

Comment 104: Consider in-season closures in the event of charter overages.

Response: At this time, charter vessel angler harvest data do not become available to NMFS in a timely manner that would permit this regulatory approach. Moreover, the Council stated its intent that guided sport harvests in

excess of the GHL should not lead to mid-season closure of the fishery because such closures would be disruptive to guided operations and anglers who booked a charter fishing trip after the date on which the fishery was closed. The potential for in-season closures for guided charter anglers would likely discourage anglers from booking charter vessel fishing trips in advance.

Comment 105: NMFS should keep the carcass retention provisions. This requirement, implemented in 2007, has greatly improved data quality, and the need for fish to cross the dock for enforcement. Carcass retention is also necessary to implement size restrictions, which should be implemented in conjunction with the one-fish limit, to restrict the guided harvest to the GHL.

Response: In 2007, NMFS implemented a size limit in Area 2C on one of the two halibut that could be harvested under the two-fish daily bag limit at that time. To help enforce this size limit, NMFS prohibited mutilating or otherwise disfiguring a halibut carcass such that the head-on length could not be determined. This requirement to retain carcasses is no longer necessary with a one-halibut daily bag limit and no size limit. This action requires only an ability to count the number of halibut retained by a charter vessel angler. Hence, IPHC regulations in the annual management measures published March 19, 2009 (74 FR 11681) prohibit the possession of halibut ''* * * that has been filleted, mutilated, or otherwise disfigured in any manner except that each halibut may be cut into no more than 2 ventral pieces, 2 dorsal pieces, and 2 cheek pieces, with skin on all pieces'' (section 28). This allows sport fishermen to butcher their halibut before returning to port while improving the enforcement officers' ability to count the number of fish in possession by an angler. Discussion of the need for a size limit is deferred to the responses to Comments 64 and 110.

NMFS agrees that carcass retention facilitates enforcement and more accurate data collection, but it is burdensome to guide operators given that this action does not include a size limit on retained halibut. Guide operators have expressed concerns about disposal of carcasses at ports, time constraints, the diminished meat quality of fish that are not processed immediately, and limited storage space onboard some vessels.

Comment 106: Limit entry into the guided charter fishery rather than the number of fish they may catch.

Response: In March 2007, the Council adopted a recommendation to implement a moratorium on entry into the guided sport halibut fisheries in Areas 2C and 3A. The proposed moratorium program is a limited entry program. The April 2007 Council newsletter provides an overview of the proposed program. A proposed rule and solicitation for public comment on the recommended limited access proposal was published on April 21, 2009 (74 FR 18178). NMFS expects that, if approved, the limited entry program would complement but not substitute for the harvest controls implemented by this action.

Comment 107: The one-fish bag limit for halibut could shift guided charter fishing effort to other groundfish species such as lingcod and red snapper. NMFS should monitor these fisheries if the rule is implemented.

Response: NMFS acknowledges that this action may cause some charter vessel businesses to modify their operations to supplement fishing experiences for their anglers. The analysis (see **ADDRESSES**) reviewed the potential impacts on other species, such as salmon or rockfish, and found no significant impacts on those resources. Sport fishing for these stocks currently is managed by the State of Alaska. An increase in the sport harvest of these species may lead to increased allocation problems between sport and commercial sectors. However, any such allocation problems that may occur because of this action would be resolved by state and federal governments to maintain sustainable stocks.

Comment 108: Relax minimum size and bag limit restrictions on lingcod caught in the recreational fishery.

Response: The State of Alaska, not NMFS, currently manages lingcod fisheries and has established seasons, size, possession, and annual limits for sport lingcod fisheries. Also, the suggested change in restrictions on sport fishing for lingcod is beyond the scope of this action, which is to restrict guided sport halibut harvests in Area 2C.

Comment 109: Rather than impose substantial economic hardship and further litigation on the guided charter sector, NMFS should withdraw the one-fish daily limit rule and focus its efforts on establishing a long-term, fair, and equitable solution to the issue of allocation among recreational anglers (both guided and unguided), subsistence users, and commercial halibut fishermen. Develop a stable, long-term management plan for the guided charter sector.

Response: This action is complementary to long-term management of the guided sport halibut fishery. The Council has adopted a limited access system for this fishery and a Catch Sharing Plan to promote the stable, long-term management of the halibut fisheries. Consistent with approved Council policy, this action is necessary to manage the halibut harvest of the guided sport fishery to the GHL until a different allocation system is proposed, approved, and implemented. NMFS acknowledges that this will impose costs on certain charter businesses. The analysis (see **ADDRESSES**) supporting this action addresses these costs.

Comment 110: The one-fish daily limit rule may not adequately control harvest to the GHL and additional measures may be necessary. NMFS should also implement a maximum size limit on the retained halibut for guided charter anglers.

Response: The analysis (see **ADDRESSES**) provides a range for the potential harvest reduction that the one-fish bag limit may realize. The analysis notes that even in the absence of the current uncertain economic climate, a reduction in demand may result from the one-halibut daily bag limit. NMFS does not have information that will allow it to select an estimate of the likely reduction in demand, which is why a range of potential reductions is provided. For future regulatory actions, consideration of size restrictions or other controls may be necessary. The Council considered minimum size limits of 45 and 50 inches on a second fish (assuming a two-fish bag limit). A key reason why the Council rejected alternatives with minimum size limits was the difficulty in measuring larger fish. Also see the response to Comment 115.

This action imposes additional restrictions to the one-halibut daily bag limit to achieve the objective of this action (see ''Objective of this action'' above). This action prohibits harvest by the vessel's guide, operator, and crew members during a guided sport fishing trip for halibut and limits the number of lines that could be fished to the number of charter vessel anglers onboard the vessel or six, whichever is less. See the response to Comment 57 for more details.

Comment 111: Develop a Catch Sharing Plan for Area 2C. The plan should include a mechanism for guided charter anglers to lease IFQ from the commercial fleet so commercial fishermen are compensated for any reallocation between the sectors.

Response: The Council took final action on a Catch Sharing Plan in October 2008. The plan includes a

Guided Angler Fish provision that allows for the transfer of halibut IFQ pounds to fish that may be harvested by charter vessel anglers. The details of the Guided Angler Fish provision will be explained in a proposed rule for the Catch Sharing Plan, which currently is under development. That proposed rule will allow additional public comment on the Catch Sharing Plan and its Guided Angler Fish proposal.

Comment 112: Do not impose annual halibut limits on guided charter anglers.

Response: The Council and NMFS considered but did not choose to include an annual limit as a recommended management measure for this action.

Comment 113: Impose an annual limit on numbers or pounds of fish taken by guided charter anglers rather than a daily limit.

Response: NMFS has reviewed the potential for annual catch limits of four, five, and six fish, alone and in combination with other measures. Annual catch limits create an additional monitoring burden, and in comparison to this action, were not as effective in achieving the objectives of this action. An annual limit on the pounds of halibut retained by charter vessel anglers is similar to an annual limit on numbers halibut retained and it would have similar effects.

Comment 114: Eliminate carcass retention provisions or skin-on requirements.

Response: This action removes the previous requirement to retain halibut carcasses. The previous carcass retention requirement was necessary to enforce the previous maximum size limit on one of two halibut retained by charter vessel anglers. Substitution of this size limit by the one-halibut daily bag limit removes the need for the size limit, and therefore the need to retain halibut carcasses. Current IPHC regulations (at section 28(2)) published March 19, 2009 (74 FR 11681) prohibit the possession on board a vessel of halibut that has been filleted, mutilated, or otherwise disfigured in any manner except that each halibut may be cut into no more than two ventral pieces, two dorsal pieces, and two cheek pieces, with skin on all pieces. See also the response to comment 105.

Comment 115: Adopt a slot limit based on size or weight, such as a poundage limit between 20 and 80 lbs. Large numbers of small halibut are taken by sport fishers coming to Alaska, and this harvest reduces recruitment. The safety concerns from measuring large fish could be addressed with a pre-measured mark on the hull of the vessel and the fish could be measured without bringing them on board.

Response: The purpose of this action is to limit the harvest of halibut by charter vessel anglers in Area 2C. Restrictions on the size or weight of halibut retained by charter vessel anglers would not achieve this purpose without other harvest constraints. The analysis developed by the Council in support of its June 2007 recommendation for a one-halibut daily bag limit considered halibut slot limits. These slot limits were rejected because they potentially could result in an increased harvest, and with other options, they could increase monitoring and enforcement costs beyond what is necessary to achieve the objective of this action. Minimum size limits of 45 or 50 inches in length were rejected in part because of the difficulty in measuring and releasing large fish without injuring them. Also, safety concerns were raised for charter vessel anglers and crew when attempting to measure large muscular fish. Moreover, the previous maximum size limit has not been effective in reducing the halibut harvest of charter vessel anglers. To minimize the burden on the guided charter fishery, NMFS implemented a 32-inch maximum size on one fish in 2007, without apparent effect on guided harvests. The Council and NMFS have looked at the potential efficacy of a large number of alternative restrictions and none appear to be able to achieve the objectives of this action.

Comment 116: The bag limit should be the same for the entire Alaska and British Columbia coastline so that no one area is more desirable than another to anglers. This would prevent overharvest in other regions if guided sport fishermen substitute other areas for Area 2C. It will also reduce the incentive for Area 2C fishermen to leave Area 2C for those other areas and help protect the Area 2C economy.

Response: This action responds to concerns that are specific to Area 2C. The harvest of halibut by charter vessel anglers in Area 2C has substantially exceeded the annual GHL for this area each year since 2004. Conversely, the harvest of halibut by charter vessel anglers in other areas off Alaska has not posed the level of management concern that warrants restriction at this time.

NMFS recognizes that different restrictions for the guided sector in different IPHC regulatory areas off Alaska and British Columbia may influence where charter vessel anglers choose to fish. However, applying different regulations and bag limits to different areas to respond to management needs specific to those areas is a common practice in fishery management. Although a one-halibut daily bag limit in Area 2C may change the demand for guided charter trips if anglers are unwilling to substitute other species, as noted in response to Comment 53, charter vessel anglers traveling by cruise ship may show little inclination to change their behavior.

NMFS lacks authority to manage halibut fisheries in British Columbia. NMFS notes that in 2009, the recreational fishery in British Columbia will open its season with a one-halibut daily bag limit. This may be increased to a two-halibut daily bag limit later in the season, depending on recreational harvest levels.

Comment 117: The rule needs a sunset provision. Without it, the rule may continue well beyond 2009 and NMFS will not have a mechanism to rescind the one-fish bag limit in a timely manner when other long-term management measures are developed for the guided charter sector.

Response: NMFS disagrees that the rule needs a sunset provision. Although proposed rules are being developed for a limited access system for guided sport businesses and a Catch Sharing Plan, fishing under these proposed new programs, if approved, likely will not occur before 2010 or 2011, respectively. NMFS may rescind or change this action in subsequent rulemaking if necessary. In the interim, the proposed action is needed to restrict the halibut harvest of guided sector to approximately the GHL until these long-term management measures are implemented.

Comment 118: Adopt the Charter Halibut Task Force proposal.

Response: The Charter Halibut Task Force proposal, as presented to the Council in October 2008, would adopt a coastwide halibut spawning biomass of 225,000,000 lbs (102,059.3 mt) as a threshold. When the halibut biomass is above this threshold, the daily bag limit would be two halibut for guided and unguided sport fishermen alike. When the biomass is below that threshold, the daily sport bag limit would be one halibut. This proposal was advanced at the Council meeting as an alternative to the Catch Sharing Plan. The Council did not endorse this proposal. Implementing the Charter Halibut Task Force proposal is beyond the scope of this action, which is to limit the guided sport fishery harvest to the GHL adopted for that harvest by the Council and NMFS.

Comment 119: A two-fish bag limit with a 32-inch maximum size limit on one of the fish will not have a positive effect on halibut stocks.

Response: NMFS agrees that the previous bag limit and size limit

combination will not achieve the objective. NMFS implemented this combination first in 2007 as an alternative to a seasonal one-halibut daily bag limit. The combination bag and size limit was expected to have a comparable effect as the seasonal one-halibut daily bag limit in reducing the guided sport fishery harvest. Instead, the guided sport harvest in Area 2C actually increased in 2007 under this combination rule relative to 2006. The GHL in Area 2C in 2007 was 1,432,000 lbs (649.6 mt) and the guided sport harvest of halibut was 1,918,000 lbs (870.0 mt), or 486,000 lbs (220.4 mt) over the 2007 GHL and more than twice the 2008 GHL of 931,000 lbs (422.3 mt) (see Table 1 above). Because the two-halibut daily bag limit in combination with a maximum size limit proved ineffective, it is likely, even if the current economic recession leads to a substantial decrease in guided fishing activity, that the 2009 harvest would exceed the 2009 GHL in the absence of this action.

Comment 120: Adopt a two-fish bag limit, with no size limits.

Response: A two-halibut daily bag limit with no size limit would be less restrictive than the previous two-halibut daily bag limit with a maximum size limit on one halibut that was first implemented in 2007. This two-halibut daily bag limit combined with a maximum size limit proved ineffective in reducing the halibut harvest by charter vessel anglers in Area 2C that year (see response to Comment 125). Therefore, a less restrictive two-halibut daily bag limit with no size limit would not achieve the objective of this action.

Comment 121: Instead of a one-fish bag limit, the halibut resource could be better managed using other measures, such as a halibut tag to fund halibut farming or ranching.

Response: The suggested alternative of raising funds through a fish tag to support halibut farming would not address the objective of this action.

Comment 122: Do not implement a one-fish bag limit on guided charter anglers. If conservation of the halibut resource is a concern, NMFS should implement additional commercial catch regulations to reduce that sector's halibut harvest. These could include implementing requirements for video monitoring on commercial halibut vessels to improve recording of catch, discards, and wastage; reducing commercial bycatch by prohibiting bottom trawling or reallocating some of the commercial bycatch limit to the recreational sector; reducing the length of the commercial fishing season; or developing markets for bycatch species in the halibut longline fishery such as arrowtooth flounder and dogfish.

Response: Implementing additional restrictions on the commercial fishing sector would not address the objective of this action and is outside the scope of this action. The commercial halibut setline and groundfish trawl fisheries currently are subject to binding limits set by the IPHC and Council, respectively, as a part of their efforts to maintain sustainable groundfish stocks. These commercial fisheries are required to stop fishing when their halibut limits (IFQ or prohibited species catch limit) are taken. Commercial groundfish fisheries are often closed before quotas of their target species have been fully harvested. Participants in these fisheries incur significant costs to stay within their halibut catch limits. These halibut resource user groups are adequately constrained by their catch limits, which have not been increasing. For example, the catch limit for Area 2C commercial halibut fishermen has decreased 54 percent between 2005 and 2009.

Halibut vessels are often small, and it has not been feasible to place observers on them. The IPHC and NMFS are investigating the use of electronic monitoring measures to provide more comprehensive monitoring at sea. A report on a workshop on electronic fisheries monitoring, held at the Alaska Fisheries Science Center in July 2008, may be found at *http://www.alaskafisheries.noaa.gov/npfmc/misc_pub/EMproceedings.pdf.*

Comment 123: Restrict the guided sport charter vessel fishery to only allow retention of halibut greater than 32 inches in length like the commercial sector to protect recruits of the halibut biomass.

Response: Implementing a size limit in addition to the one-fish daily bag limit would be overly restrictive. Other reasons may exist to consider size restrictions in the guided charter fishery in the future, but not as a provision of this final rule. NMFS notes that the Council has considered minimum size limits of 45 and 50 inches on a second fish (assuming a two-fish bag limit), but determined that these measures would not accomplish the objectives of the proposed action. Thus, these options were rejected without further consideration in the analysis supporting this final rule. A key reason why the Council rejected alternatives with minimum size limits was the difficulty in measuring larger fish.

General Comments

Comment 124: This action will adversely affect the safety of sport fishing in Southeast Alaska since it will encourage guided anglers to substitute unguided for guided fishing days.

Unguided days are not as safe as guided days. In order to become a licensed sport fishing guide on a charter boat in Southeast Alaska, a person must meet the following requirements set by the U.S. Coast Guard: (1) A minimum of 365 days at eight hours/day or the equivalent of 2,920 hours on the water; (2) attend a U.S. Coast Guard approved sea school; (3) pass four tests including: rules of the road, general deck knowledge, navigation, and charting; (4) enroll in a random drug testing program; and (5) obtain a transportation worker identification card. As the Coast Guard will attest, the saltwater charter fleet has the finest safety record of all boaters in Alaska, with the last accidental fatality on a charter boat occurring in 1998. In contrast, unguided angler fatalities occur in Alaska every year. It should be readily apparent to NMFS that any movement of anglers from guided access to unguided access will be accompanied by a statistically measurable decrease in safety.

Magnuson-Stevens Act National Standard 10 requires that conservation and management plans shall, to the extent practicable, promote the safety of human life at sea. While National Standard 10 does not apply to halibut, it is a common sense standard that should not be overlooked just because halibut is managed under the Halibut Act.

Safety status affects the enjoyment of a halibut fishing trip, even in the absence of an accident; as one commenter said, ''We know we will be much safer on a charter boat that meets U.S. Coast Guard regulations and we do not have to worry about being safe while we are having fun catching our halibut.''

Response: NMFS agrees that this action may create some incentives for anglers to substitute non-guided fishing in Southeast Alaska for guided fishing. New information from an ADF&G study on sport fishing activity in Alaska indicates that non-guided fishing is a popular alternative to guided fishing for resident and non-resident anglers. In 2007, about 60 percent of salt water sport fishing days in Southeast Alaska were unguided and about 40 percent were guided. The non-guided proportion was higher for resident anglers and lower (about 40 percent) for non-resident anglers.

This rule may prompt some charter vessel anglers to substitute unguided fishing in Southeast Alaska for guided fishing so as to retain a two-fish bag limit. These anglers may make arrangements to go fishing with friends or relatives in Southeast Alaska, to

patronize lodges and rentals with associated skiffs, or to patronize businesses providing access to supported (lodging, meals, instructions, and gear) fishing from unguided small boats. This latter business model is already present in Southeast Alaska. Firms with this business model are likely to see an increase in demand for their product, and some guided firms may shift to this business model. This possibility is discussed in the analysis (see **ADDRESSES**).

NMFS, however, does not have the information to estimate the extent to which this substitution will take place. Much will depend on the preferences of anglers, their opportunities to fish elsewhere, and the ability of business to substitute unguided for guided capacity. Proportionately more such substitution could be expected by persons visiting on multi-day and overnight trips than by persons visiting Alaska on cruise ships. The U.S. Coast Guard is not convinced that a significant increase in the use of ''bareboat'' or non-guided charters will occur and does not see an overarching safety concern with this action.

NMFS has been unable to confirm with the Coast Guard the number of guided saltwater charter business fatalities since 1998. Guided sport fishing activity is included in commercial boating accident statistics. Coast Guard statistics show non-commercial boating deaths every year, with 12 fatalities throughout coastal Alaska in 2008. NMFS cannot rule out the possibility that some guided anglers will shift to unguided sport fishing in Southeast, and that a fatal accident may occur to one or more of these persons, just as it cannot rule out the possibility of fatal accidents on guided charter vessels.

Nevertheless, NMFS believes it is appropriate to implement this final rule for several reasons. First, a potential shift from guided to unguided fishing within Southeast Alaska focuses on one option available for guided anglers. While some may make this substitution, others may substitute activities in other regions, and those activities may be associated with their own risks which may be greater or less than those of guided charters in Southeast Alaska. While the guided charter vessel fleet may have a good safety record on the water, travel to and from the fishing site is often done in small airplanes which, in Alaska, has inherent dangers. It is possible that some charter vessel anglers may substitute activities with less overall risk considering all the elements involved in a guided charter fishing trip. The net effect of this action on risk when all elements are considered cannot be determined with the available information.

Second, NMFS anticipates that the potential for accidents among the persons making this switch will be smaller than for recreational boaters in Alaska in general. This is because at least a part of this switch is likely to be associated with tourist-service businesses providing supported recreational fishing. Some of these businesses will be firms that formerly provided guide services, or that begin to offer guided and unguided services. These firms are likely to provide monitoring of, and support to, anglers despite the absence of a guide on board a vessel.

Third, large proportions of resident and non-resident sport anglers already are involved in non-guided sport fishing in Southeast Alaska, and non-guided business models already are used to provide resident and non-resident access to halibut fishing opportunities. The risks associated with this practice and business model clearly are considered acceptable by sport anglers, businesses, and the broader community.

Therefore, the safety of anglers was considered for this action.

Comment 125: The proposed action would increase halibut mortality from catch-and-release fishing, because guided anglers would release many small halibut in order to take home the largest fish possible. In addition, many fishermen would substitute king salmon fishing for halibut fishing and increase the mortality rate for this species. The king salmon size limits for recreational anglers that are currently in place result in a high mortality rate, because many smaller fish are killed but must be released. Under this action, guided charter anglers will do more catch-and-release fishing and sightseeing. While this may be less environmentally damaging, the halibut mortality rate could increase. If the proposed action is adopted, NMFS should offer angler education to minimize release mortality and do a careful evaluation of the effects of increased catch-and-release on halibut mortality.

Response: NMFS acknowledges that this action may cause increased halibut catch-and-release mortality, but the impact on the resource will not be significant. The analysis (see **ADDRESSES**) discusses the halibut catch-and-release mortality rate for the Area 2C guided charter fishery. It noted that catch-and-release mortality for halibut is estimated to be small (about 5 percent) and that there may be limited opportunities for practicing catch-and-release fishing in the hope of harvesting a larger halibut in the sector of the guided fishery that serves anglers from cruise ships, given the relatively short (four hour) guided trips in this sector. NMFS agrees that there may be some substitution of king salmon for halibut fishing and that there could be additional king salmon catch-and-release mortality from this source. To the extent that charter vessel anglers fish for salmon and halibut together on the same trips, this action would tend to decrease demand for salmon fishing. This should ameliorate any adverse impacts on the salmon stocks from this source.

Comment 126: The proposed rule does not explain how this action is consistent with E.O. 12962. The one-fish bag limit is a *de facto* reallocation to the commercial sector. In addition, the proposed rule states that the one-fish bag limit does not diminish ''the potential productivity of aquatic resources for recreational fisheries'' or ''countermand the intent'' of E.O. 12962, which is ''to improve the quantity, function, sustainable productivity, and distribution of aquatic resources for increased recreational fishing opportunities.'' The proposed rule does not mention *how* it is improving or increasing recreational fishing opportunities by decreasing the halibut bag limit from two to one fish.

Response: This rule is consistent with Executive Order (E.O.) 12962. The pertinent part of E.O. 12962 as amended by E.O. 13474 appears in Section I of the E.O. under the heading, ''Federal Agency Duties.'' In part, this section requires Federal agencies, ''to the extent permitted by law and where practicable,'' to improve the quantity, function, sustainable productivity, and distribution of U.S. aquatic resources for increased recreational fishing opportunities. Of the means listed to accomplish this mandate, the one most applicable to this action requires management of recreational fishing as a sustainable activity. Exceeding the GHL in Area 2C year after year as has been done since 2004 is not a sustainable activity, under the approved GHL policy of the Council. Although the current GHL policy could be changed to allocate a greater portion of the halibut resource to the guided sport fishery, doing so is outside the scope and purpose of this action. To the extent that the overall realized harvest rate of halibut can be reduced closer to the IPHC's target harvest rate by this action, the abundance of halibut in Area 2C is fostered which would improve the quantity, function, sustainable productivity, and distribution of halibut

resources for increased recreational fishing opportunities.

Comment 127: Guided sport fishermen are harvesting more fish than they are legally entitled to.

Response: The GHL is a target for the aggregate halibut harvests of charter vessel anglers. Guided charter operators, individually and collectively, do not break any laws when the GHL is exceeded. See the responses to Comments 26 and 97 concerning general enforcement of the limitations placed on individual anglers.

Comment 128: Unconstrained growth of the guided sport sector is not consistent with Council intent to stabilize the longline fishery. The guided charter user group has grown without bounds and is displacing the existing fleet. This certainly does not reflect the expressed spirit and intent of the Council.

Response: NMFS agrees that the Council sought to stabilize the growth in the guided sport halibut fishery and to respond to concerns from the commercial fishery participants about growing competition among commercial and guided sectors. The Council intends to maintain a stable guided sport season of historical length, using area-specific harvest restrictions. If end-of-the season harvest data indicates that the guided sport sector likely would exceed its area-specific GHL in the following season, regulations would be implemented to reduce the guided sport harvest. This action is consistent with that intent.

Comment 129: The proposed action is necessary because the conservation and management problem in Area 2C will likely come to Area 3A soon and it should be addressed and corrected now to prepare NMFS and the charter fleet for its later implementation in Area 3A. The record of charter sector harvests of halibut and other species in Area 2C, such as rockfish and lingcod, clearly shows that the charter sector can have a significant impact on the abundance and availability of fisheries resources that are intended for the benefit of all users and all segments of the public. In recent years, the charter sector halibut harvest in Area 3A has been close to or has exceeded the GHL; long-term trends indicate that harvests will continue to increase steadily. It is only a matter of time before Area 3A is faced with the same problems that now plague Area 2C as a result of the growth in halibut catches by the guided charter sector.

Response: NMFS acknowledges the comment, although the characteristics of the fisheries in Areas 2C and 3A are different. The Council and NMFS are committed to using area-specific harvest restrictions that are tailored to the circumstances of the particular area.

Comment 130: Why does the IPHC include commercial bycatch and wastage in the ''other removals'' category instead of as a part of the commercial fishery quota? Isn't this a *de facto* reallocation away from the recreational sector?

Response: With respect to halibut, the IPHC regulations define ''commercial fishing'' in part as ''* * * fishing, the resulting catch of which is sold or bartered * * *'' (section 3 of annual management measures published March 19, 2009 at 74 FR 11681). Halibut taken as bycatch in directed fisheries for other species or wasted in the directed commercial halibut fishery are not sold or bartered and therefore are not considered part of the ''commercial harvest.'' The commercial catch limit set by the IPHC does not include bycatch and wastage amounts. For conservation purposes, however, the IPHC accounts for all sources of fishing mortality. Bycatch and wastage is not a *de facto* reallocation away from the sport fishing sector because that sector does not operate under a firm catch limit as does the commercial sector. Bycatch and wastage is a *de facto* reallocation away from the commercial sector because anticipated bycatch and wastage amounts, like the anticipated sport and other non-commercial harvests, are subtracted from the Total CEY to arrive at the Fishery CEY and ultimately the commercial catch limit. In Area 2C, bycatch and wastage combined account for about 5.5 percent of all sources of fishing mortality in that area, according to the IPHC 2009 annual meeting ''blue book'' Table 1.

Comment 131: The rule proposes to convert the GHL from an advisory harvest level to a firm allocation in both Areas 2C and 3A, without analysis and without proper notification to Area 3A user groups, and without the opportunity for public comment.

Response: This action does not change the GHL regulations at 50 CFR 300.65(c). The GHL is not a hard cap or catch limit, and by itself, does not restrict or limit charter vessel anglers (see the response to Comment 28).

Comment 132: The Council, NMFS, and the Secretary have failed to promulgate recreational harvest rules that pass the test of the Halibut Act and the APA. The root cause of the problem rests with the decision long ago by the Council to treat guided and unguided portions of the recreational fishery differently. Another cause is the willingness of NOAA Alaska General Counsel to openly seek out ways to circumvent published laws rather than follow them to the letter. The Secretary should consider peer review of future proposed recreational fishing rules by NOAA General Counsel based in areas other than the Pacific Northwest or by external parties. Hopefully, review by unbiased peers would reveal the flaws in proposed rules before they are published, saving taxpayer dollars as well as future embarrassment to NMFS resulting from the publication of such rules.

Response: All rules promulgated by NMFS go through the appropriate layers of agency review and comply with the applicable notice and comment procedures required by the APA in an effort to fully comply with applicable law. Despite that intention, some rules are overturned, or like the 2008 management measures for charter vessel anglers in Area 2C, some are stayed, i.e., have no force or effect, pending further adjudication. In the case of the 2008 management measures for charter vessel anglers in Area 2C, NMFS withdrew the rule before final disposition by the court.

Comment 133: The December 22, 2008 press release announcing the proposed rule for this action contained conflicting and misleading information. While the release implies that halibut stocks are threatened by the growth of the guided charter fishery, this is contradicted by NMFS' past statements in the 2008 proposed and final rules for a one-fish bag limit on halibut. The proposed rule states that it would allow each charter vessel angler to use only one fishing line, that no more than six lines targeting halibut would be allowed on a guided charter vessel at one time and that the rule would prohibit guides and crew from catching and retaining halibut while charter halibut anglers are on board. While this statement is correct, the press release does not point out that ADF&G already has regulations in place to control these activities and in the case of one line per fisherman, six line maximum per boat, these regulations have been in place for a number of years. The purpose of the proposed rule is to save ADF&G from issuing emergency rules on an annual basis, which also has been previously stated in earlier NMFS publications and proposals. NMFS does not issue a sport fishing regulation booklet readily available to the general public.

Response: The factual statements made in the press release are correct. The responses to Comments 1 through 27 discuss the conservation rationale for this action and this is not discussed further here. The proposed rule discusses the measures described above. A press release is often less detailed

than the subject it describes. NMFS plans to publish a brief summary of federal sport fishing regulations applicable to halibut fishing for the convenience of the public. Regardless of the presence or absence of this summary, guided or non-guided sport fishermen targeting halibut are obliged to comply with sport fishing regulations appearing at 50 CFR 300.65, 50 CFR 300.66, and the annual management measures published March 19, 2009 (74 FR 11681).

Comment 134: The proposed rule clarifies the issues associated with the *Van Valin* case. The proposed rule also clarifies NMFS's authority to implement management measures applicable to the current fishing season that prevent exceeding catch limits.

Response: NMFS agrees, but further clarifies here that this action will remain in effect until changed by subsequent rulemaking. Hence, this action may apply beyond the current fishing season. Also, the GHL does not serve as a catch limit or hard cap on the aggregate harvest of charter vessel anglers. See the response to comment 31.

Comment 135: A one-fish limit would reduce guided activity and lead to halibut overpopulation.

Response: Having too may halibut in the sea is not a current concern of the IPHC or NMFS. Information presented to the IPHC and public in January 2009 (IPHC 2009 annual meeting ''blue book''), indicates that the population of halibut, although healthy, has been in decline for the past several years. This trend may reverse if strong year classes of juvenile halibut recruit to the adult population. This forecast is based to some extent on an assumption that the target harvest rates set by the IPHC are actually realized. In Area 2C, the realized harvest rates in recent years have been more than twice the target harvest rate. This has prompted a conservation concern by the IPHC and a dedicated effort to reduce the realized harvest rate in Area 2C (and Areas 2B and 2A also). This action contributes to that effort.

Comment 136: The proposed rule contradicts NMFS's mission to promote sustainable fisheries, recover protected species, and maintain the health of coastal marine habitats in the United States. NMFS must reinforce its mission as a science-based organization and ensure a sustainable halibut fishery by balancing sport and commercial uses.

Response: On the contrary, this action serves the NMFS mission, as a science-based organization, to promote sustainable fisheries. The purpose of this rule is precisely to ensure a sustainable halibut fishery by balancing sport and commercial uses of the halibut resource.

Comment 137: Any size limit restrictions placed on guided sport fishermen should also be placed on commercial fishermen.

Response: This action does not include a maximum or minimum size limit on halibut retained by sport fishermen. Commercial fishermen, however, must comply with a minimum size limit that has been in effect for many years. The commercial size limit, set by the IPHC, is at section 13 of the annual management measures published March 19, 2009 (74 FR 11681) and requires no possession of halibut with a head on length less than 32 inches (81.3 cm).

Comment 138: Recreational anglers are one of the nation's most powerful forces for the environment, paying over $600 million a year in special federal excise taxes to support fisheries conservation and access. In 2006, Southwick and Associates estimated a total effect of recreational angling at almost $250 million annually in Alaska alone.

Response: NMFS acknowledges the comment. Recreational fishermen have been, and continue to be, an important source of funding and support for conservation programs. Halibut, like all fishery resources, is a finite resource. As users of this resource increase, regulatory regimes governing all users necessarily become more restrictive and complex to meet conservation and allocation policy goals. Most fishermen who participate in one or more of the halibut fisheries continued to be supportive of conservation of the resource and appreciate the need for balance in allocation policies. NMFS does not believe that this final rule will appreciably reduce that support.

Comment 139: Why is NMFS renaming the charter moratorium, established by the Council, a limited entry program? The moratorium was supposedly a temporary measure to allow closer examination of the guided charter industry. A limited entry program gives the impression of finality and similarity with commercial fisheries, when there is no similarity between guided fishing and commercial fishing.

Response: This comment is not relevant to this action, but pertains instead to a proposal to establish a limited access system for vessels in the guided sport fishery for halibut. A proposed rule and solicitation for public comment on the recommended limited access proposal was published on April 21, 2009 (74 FR 18178).

Comment 140: For over ten years, the ADF&G has told us their Statewide Harvest Survey is untouchable (even though it is not finalized until after the following summer) and logbook data cannot be relied upon. In 2007, the ADF&G did a major modification in their collection of halibut harvest data (prior to 2007, the ADF&G extrapolated pounds of halibut harvested from Sitka, with samples taken from Sitka that were biased and too small). Are we now supposed to have a high level of confidence in the logbook data, even though there is no other year with comparable data because of the change in methodology?

Response: NMFS is committed to using the best available information when making management decisions. At this time, this includes information provided by ADF&G based on the Statewide Harvest Survey. It also includes information from other sources of data, including logbooks and data obtained through creel census surveys. In an effort to obtain information for management in the timeliest manner possible, NMFS has pursued, and will continue to pursue, the use of data from reports required to be recorded contemporaneously or as close to the action being recorded as possible, and that require such information to be reported to the management agency in a timely manner (e.g., daily or weekly). Questions regarding ADF&G's observations and concerns about fishery data collected by ADF&G should be addressed to ADF&G.

Comment 141: Did NMFS follow all the procedures for issuing a guideline harvest level, published in the 2003 **Federal Register** on the GHL?

Response: All procedures described in the GHL regulations at 50 CFR 300.65(c) are being carried out as required, including the requirement at paragraph (c)(2) to publish a notice in the **Federal Register** on an annual basis establishing the GHL for Areas 2C and 3A for that calendar year based on the CEY set by the IPHC. The most recent such notice was published February 24, 2009 at 74 FR 8232. Also, the requirement at paragraph (c)(3) to notify the Council in writing that the GHL has been exceeded has occurred annually since 2004 with respect to Area 2C. Typically, in October each year, the Council receives a report from ADF&G on its estimate of the harvest of halibut by the guided and non-guided sport fisheries during the preceding year. The Council and NMFS officially receive this information at the same time. NMFS subsequently sends a letter to the Council informing it of whether the Area 2C GHL or Area 3A GHL has been exceeded.

Changes From the Proposed Rule

This action was proposed and public comments were solicited for 30 days beginning on December 22, 2008 (73 FR 78276). 179 public submissions were received by the comment ending date of January 21, 2009. All comments received by the comment ending date are summarized and responded to above under the heading ''comments and responses.'' No changes from the proposed rule are made in this final rule.

Classification

This final rule has been determined to be not significant for purposes of Executive Order 12866. This final rule complies with the Halibut Act and the Secretary's authority to implement harvesting controls for the management of the halibut fishery.

Halibut Act

Regulations governing the U.S. fisheries for Pacific halibut are developed by the International Pacific Halibut Commission (IPHC), the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c) authorizes the Secretary of Commerce (and NMFS, through delegation of authority) to adopt regulations that are necessary to carry out the purposes and objectives of the Convention between the U.S. and Canada on the Pacific Halibut Fishery and the Halibut Act. NMFS has determined that this action meets those requirements.

Regulatory Flexibility Act

A Final Regulatory Flexibility Analysis (FRFA) was prepared as required by section 604 of the Regulatory Flexibility Act. The FRFA describes the impact of this rule on directly regulated small entities and compares that impact to the impacts of other alternatives that were considered. A copy of this analysis is available from NMFS (see **ADDRESSES**). A description of this action, an explanation for why it was considered, the legal basis for this action, and changes made to the rule in response to public comments are discussed above. Comments on the economic impacts of this action are addressed in responses to comments 53 through 73 above. A summary of the analysis follows.

In 2007, 403 businesses operated 724 state-licensed active charter vessels in Area 2C. The largest companies involved in the fishery, lodges or resorts that offer accommodations as well as an assortment of visitor activities, may be large entities under the Small Business Administration size standard of $7.0 million, but it is also possible that all the entities involved in the harvest of halibut from charter vessels have grossed less than this amount. Since it is not possible to estimate the number of large entities, and since in any event these would be a small proportion of the total, all of these operations are assumed to be small entities. The number of small entities may be overestimated because of the limited information on vessel ownership and operator revenues and operational affiliations. However, it is likely that nearly all entities qualify as small businesses and for purposes of this analysis, all entities were assumed to be small entities.

This analysis examined two alternatives, the status quo and the preferred alternative. The objective of this action is to reduce the guided sport harvest of halibut in Area 2C as described in the preamble above under the heading ''Objective of this Action.'' The status quo alternative was introduced in 2007 with the intent of reducing halibut harvest in the charter vessel sector while minimizing negative impacts on the charter vessel sector, its charter vessel anglers, and the coastal communities that serve as home ports for the charter vessel sector. The status quo would retain the two-fish bag limit with one of the two fish less than or equal to 32 inches (83.1 cm) in length, without changes. Under the status quo, both the number of charter customers and the volume of fish harvested rose to their highest recorded levels. In 2007, the GHL for Area 2C was 1,432,000 lbs (649.6 mt). Since that time reductions in the Total CEY in Area 2C have led to a reduction in the GHL to 931,000 lbs (422.3 mt) in 2008 and to 788,000 lbs (357.4 mt) in 2009. The 2007 guided sport harvest in Area 2C was 1,918,000 lbs (870.0 mt), exceeding the GHL for that area by 486,000 lbs (220.4 mt) or 34 percent of the GHL. The best available data from ADF&G indicate that the 2008 guided sport harvest in Area 2C also substantially exceeded the 2008 GHL for that area. Thus, the status quo alternative would not achieve the objective of this action.

Seven management measures, combined into 11 specific options, were considered for this analysis, but were ultimately rejected without being subjected to detailed analysis. These measures were analyzed for the final rule published by NMFS on May 28, 2008 (73 FR 30504), but prevented from taking effect in 2008 by an injunction. These alternatives were thoroughly analyzed at that time, and were rejected by the Council and NMFS for a number of reasons; primarily because none of these alternatives would achieve the stated objective. Additional reasons for rejecting these alternatives included: (1) The economic effect of an option falling on too few businesses; (2) the option being easily diluted by changes in angler behavior; and (3) the difficulty in measuring large fish before bringing them onboard vessels.

The preferred alternative would implement a one-fish daily bag limit for charter vessel anglers, a prohibition on harvest by charter vessel guides, operators, and crew, and a maximum six-line limit. A range of harvest results are possible under the preferred alternative. Assuming a range of possible demand reductions from zero to 50 percent, the preferred alternative is estimated to reduce the halibut harvest in the guided sport fishery to between 1,495,000 lbs (678.1 mt) to 602,000 lbs (273.1 mt). The GHL levels for Area 2C recently have been 1,432,000 lbs (649.5 mt) in 2007, 931,000 lbs (422.3 mt) in 2008, and 788,000 lbs (357.4 mt) in 2009. Hence, under the assumptions outlined in the analysis about changes in demand, the preferred alternative may reduce the harvest to the GHL and achieve the objective of this action. Although the status quo would have a smaller impact on directly regulated small entities, it would not achieve the objectives of this action. The preferred alternative would minimize the impacts on small entities and best meet the management objective. NMFS considered additional alternatives to achieve the objectives of this action in 2007 and 2008. These alternatives were analyzed in the April 2008 Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis for a Regulatory Amendment to Implement Guideline Harvest Level Measures in the Halibut Charter Fisheries in International Pacific Halibut IPHC Regulatory Area 2C (see **ADDRESSES** for availability). The 2008 analysis found that only the preferred alternative, the one-halibut bag limit, was capable of achieving the objectives of the 2008 action. The current analysis reached a similar conclusion.

Collection of Information

This rule contains a collection of information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648–0575. The public reporting burden for charter vessel guide respondents to fill out and submit logbook data sheets is estimated to average four minutes per response.

The public reporting burden for charter vessel anglers to sign the logbook is estimated to be one minute per response. These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule, or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule and shall designate such publications as ''small entity compliance guides.'' The agency shall explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, NMFS Alaska Region has developed an Internet site that provides easy access to details of this final rule, including links to the final rule. In addition, NMFS is collaborating with IPHC to develop a brief summary of sport fishing regulations for halibut. These Small Entity Compliance Guide materials are available on the Internet at *http://www.alaskafisheries.noaa.gov.* Copies of this final rule are available upon request from the NMFS, Alaska Regional Office (see **ADDRESSES**).

Executive Order 12962

This action is consistent with E.O. 12962 which directs Federal agencies to improve the quantity, function, sustainable productivity, and distribution of aquatic resources for increased recreational fishing opportunities ''to the extent permitted by law and where practicable.'' This E.O. does not diminish NMFS's responsibility to address allocation issues, nor does it require NMFS or the Council to limit their ability to manage recreational fisheries. E.O. 12962 provides guidance to NMFS to improve the potential productivity of aquatic resources for recreational fisheries. This rule does not diminish that productivity or countermand the intent of E.O. 12962.

List of Subjects in 50 CFR Part 300

Fisheries, Fishing, Treaties.

Dated: April 29, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, NMFS amends 50 CFR part 300 as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for 50 CFR part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 2. In § 300.61, add definitions in alphabetical order for ''Area 3A'', ''Charter vessel angler'', ''Charter vessel fishing trip'', ''Charter vessel guide'', ''Charter vessel operator'', ''Crew member'', and ''Sport fishing guide services'', and revise the definition for ''Guideline harvest level (GHL)'' to read as follows:

§ 300.61 Definitions.

* * * * *

Area 3A means all waters between Area 2C and a line extending from the most northerly point on Cape Aklek (57°41′15″ N. latitude, 155°35′00″ W. longitude) to Cape Ikolik (57°17′17″ N. latitude, 154°47′18″ W. longitude), then along the Kodiak Island coastline to Cape Trinity (56°44′50″ N. latitude, 154°08′44″ W. longitude), then 140° true.

* * * * *

Charter vessel angler, for purposes of § 300.65(d), means a person, paying or nonpaying, using the services of a charter vessel guide.

Charter vessel fishing trip, for purposes of § 300.65(d), means the time period between the first deployment of fishing gear into the water from a vessel after any charter vessel angler is onboard and the offloading of one or more charter vessel anglers or any halibut from that vessel.

Charter vessel guide, for purposes of § 300.65(d), means a person who is required to have an annual sport guide license issued by the Alaska Department of Fish and Game, or a person who provides sport fishing guide services.

Charter vessel operator, for purposes of § 300.65(d), means the person in control of the vessel during a charter vessel fishing trip.

* * * * *

Crew member, for purposes of § 300.65(d), means an assistant, deckhand, or similar person who works directly under the supervision of and on the same vessel as a charter vessel guide.

* * * * *

Guideline harvest level (GHL) means the level of allowable halibut harvest by the charter vessel fishery.

* * * * *

Sport fishing guide services, for purposes of § 300.65(d), means assistance, for compensation, to a person who is sport fishing, to take or attempt to take fish by being onboard a vessel with such person during any part of a charter vessel fishing trip. Sport fishing guide services do not include services provided by a crew member.

* * * * *

■ 3. In § 300.65, revise paragraphs (c)(2) and (3) and paragraph (d) to read as follows:

§ 300.65 Catch sharing plan and domestic management measures in waters in and off Alaska.

* * * * *

(c) * * *

(2) NMFS will publish a notice in the **Federal Register** on an annual basis announcing the GHL based on the table in paragraph (c)(1) of this section for Area 2C and Area 3A for that calendar year after the IPHC establishes the constant exploitation yield for that year.

(3) The announced GHLs for Area 2C and 3A are intended to be the benchmarks for charter halibut harvest in those areas for the year in which it is announced pursuant to paragraph (c)(2) of this section. NMFS may take action at any time to limit the charter halibut harvest to as close to the GHL as practicable.

(d) *Charter vessels in Area 2C and Area 3A*—(1) *General requirements*—(i) *Logbook submission.* Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook data sheets must be submitted to the Alaska Department of Fish and Game, Division of Sport Fish, 333 Raspberry Road, Anchorage, AK 99518–1599, and postmarked no more than seven calendar days after the end of a charter vessel fishing trip.

(ii) The charter vessel guide is responsible for complying with the reporting requirements of this paragraph (d). The employer of the charter vessel guide is responsible for ensuring that the charter vessel guide complies with the reporting requirements of this paragraph (d).

(2) *Charter vessels in Area 2C*—(i) *Daily bag limit.* The number of halibut caught and retained by each charter vessel angler in Area 2C is limited to no more than one halibut per calendar day.

(ii) *Charter vessel guide and crew restriction.* A charter vessel guide, a charter vessel operator, and any crew member of a charter vessel must not catch and retain halibut during a charter fishing trip.

(iii) *Line limit.* The number of lines used to fish for halibut onboard a vessel must not exceed six or the number of charter vessel anglers, whichever is less.

(iv) *Recordkeeping and reporting requirements in Area 2C.* Each charter vessel angler and charter vessel guide onboard a vessel in Area 2C must comply with the following recordkeeping and reporting requirements (see paragraphs (d)(2)(iv)(A) and (B) of this section):

(A) *Charter vessel angler signature requirement.* At the end of a charter vessel fishing trip, each charter vessel angler who retains halibut caught in Area 2C must acknowledge that his or her information and the number of halibut retained (kept) are recorded correctly by signing the back of the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook data sheet on the line number that corresponds to the angler's information on the front of the logbook data sheet.

(B) *Charter vessel guide requirements.* For each charter vessel fishing trip in Area 2C, the charter vessel guide must record the following information (see paragraphs (d)(2)(iv)(B)(*1*) through (*8*) of this section) in the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook:

(*1*) *Business owner license number.* The sport fishing operator business license number issued by the Alaska Department of Fish and Game to the charter vessel guide or the charter vessel guide's employer.

(*2*) *Guide license number.* The Alaska Department of Fish and Game sport fishing guide license number held by charter vessel guide who certified the logbook data sheet.

(*3*) *Date.* Month and day for each charter vessel fishing trip taken. A separate logbook data sheet is required for each charter vessel fishing trip if two or more trips were taken on the same day. A separate logbook data sheet is required for each calendar day that halibut are caught and retained during a multi-day trip.

(*4*) *Regulatory area fished.* Circle the regulatory area (Area 2C or Area 3A) where halibut were caught and retained during each charter vessel fishing trip. If halibut were caught and retained in Area 2C and Area 3A during the same charter vessel fishing trip, then a separate logbook data sheet must be used to record halibut caught and retained for each regulatory area.

(*5*) *Angler sport fishing license number and printed name.* Before a charter vessel fishing trip begins, record for each charter vessel angler the Alaska Sport Fishing License number for the current year, resident permanent license number, or disabled veteran license number, and print the name of each paying and nonpaying charter vessel angler onboard that will fish for halibut. Record the name of each angler not required to have an Alaska Sport Fishing License or its equivalent.

(*6*) *Number of halibut retained.* For each charter vessel angler, record the number of halibut caught and retained during the charter vessel fishing trip.

(*7*) *Signature.* At the end of a charter vessel fishing trip, acknowledge that the recorded information is correct by signing the logbook data sheet.

(*8*) *Angler signature.* The charter vessel guide is responsible for ensuring that charter vessel anglers comply with the signature requirements at paragraph (d)(2)(iv)(A) of this section.

(3) *Recordkeeping and reporting requirements in Area 3A.* For each charter vessel fishing trip in Area 3A, the charter vessel guide must record the regulatory area (Area 2C or Area 3A) where halibut were caught and retained by circling the appropriate area in the Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip Logbook. If halibut were caught and retained in Area 2C and Area 3A during the same charter vessel fishing trip, then a separate logbook data sheet must be used to record halibut caught and retained for each regulatory area.

* * * * *

■ 4. In § 300.66, revise paragraph (m) and add paragraphs (o), (p), and (q) to read as follows:

§ 300.66 Prohibitions.

* * * * *

(m) Exceed any of the harvest or gear limitations specified at § 300.65(d).

* * * * *

(o) Fail to comply with the requirements at § 300.65(d).

(p) Fail to submit or submit inaccurate information on any report, license, catch card, application or statement required under § 300.65.

(q) Refuse to present valid identification, U.S. Coast Guard operator's license, permit, license, or Alaska Department of Fish and Game Saltwater Sport Fishing Charter Trip logbook upon the request of an authorized officer.

[FR Doc. E9–10337 Filed 5–5–09; 8:45 am]

BILLING CODE 3510–22–P

Federal Register

Wednesday,
May 6, 2009

Part V

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 431, 433, 440, et al.

Medicaid Program; Health Care-Related Taxes; Medicaid Program: Rescission of School-Based Services Final Rule, Outpatient Services Definition Final Rule, and Partial Rescission of Case Management Services Interim Final Rule; Proposed Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 433

[CMS–2275–P2]

RIN 0938–AP74

Medicaid Program; Health Care-Related Taxes

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule; delay of enforcement.

SUMMARY: This proposed rule would delay enforcement of certain portions of the final rule entitled ''Medicaid Program; Health Care-Related Taxes'' from the expiration of a Congressional moratorium on enforcement on July 1, 2009 until June 30, 2010. That final rule revised the threshold levels under the regulatory indirect guarantee hold harmless arrangement test to reflect the provisions of the Tax Relief and Health Care Act of 2006, amended the definition of the ''class of managed care organization services,'' and removed obsolete transition period regulatory language. These changes would not be affected by this delay of enforcement. The final rule also clarified the standard for determining the existence of a hold harmless arrangement under the positive correlation test, Medicaid payment test, and the guarantee test. This proposed rule would delay enforcement of these latter provisions, concerning hold harmless arrangements, for 1 year.

DATES: *Comment Period.* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 1, 2009.

ADDRESSES: In commenting, please refer to file code CMS–2275–P2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' and enter the file code to find the document accepting comments.

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2275–P2, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2275–P2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–8010.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to either of the following addresses:

a. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. (Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. 7500 Security Boulevard, Baltimore, MD 21244–1850. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Lisa Parker, (410) 786–4665.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1903(w) of the Social Security Act (the Act) provides for a reduction of federal Medicaid funding based on State health care-related taxes unless those taxes are imposed on a permissible class of health care services; broad based, applying to all providers within a class; uniform, such that all providers within a class must be taxed at the same rate; and are not part of hold harmless arrangements in which collected taxes are returned, whether directly or indirectly. A similar hold harmless restriction applies to provider-related donations. Section 1903(w)(3)(E) of the Act specifies that the Secretary shall approve broad based (and uniformity) waiver applications if the net impact of the health care-related tax is generally redistributive and the amount of the tax is not directly correlated to Medicaid payments. The broad based and uniformity requirements are waivable through a statistical test that measures the degree to which the Medicaid program incurs a greater tax burden than if these requirements were met. The permissible class of health care services and hold harmless requirements cannot be waived. The statute and Federal regulation identify 19 permissible classes of health care items or services that States can tax without triggering a penalty against Medicaid expenditures.

On February 22, 2008 we published a final rule entitled, ''Medicaid Program; Health Care-Related Taxes'' (73 FR 9685). This final rule amended provisions governing the determination of whether health care provider taxes or donations constitute ''hold harmless'' arrangements under which provider tax revenues are repaid, altered the indirect guarantee threshold test, revised the definition of the ''class of managed care provider,'' and deleted certain obsolete provisions. The rule reduced the indirect guarantee threshold test in order to reduce the threshold level of permissible taxes on health care providers for the period of January 1, 2008, through September 30, 2011, as required by the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432).

The February 22, 2008 final rule was scheduled to become effective on April 22, 2008. However, section 7001(a)(3)(C) of the Supplemental Appropriations Act of 2008, Public Law No. 110–252, imposed a partial moratorium until April 1, 2009, prohibiting CMS from taking any action to implement any provisions of the final rule that are more restrictive than the provisions in effect on February 21, 2008, with the exception of the change in the definition of the class of managed care provider and the statutorily-required change to the indirect guarantee threshold test. This moratorium was extended by section 5003(a) of the American Recovery and Reinvestment Act of 2009, Public Law No. 111–5, until July 1, 2009. Although not subject to the moratorium, the change in the definition of the ''class of managed care provider'' is subject to a delayed compliance date of October 1, 2009, in order to permit States time to implement necessary changes.

II. Provisions of the Proposed Rule

We propose to delay the enforcement of the changes made in the February 22, 2008 final rule to the hold harmless

tests under §§ 433.54(c) and 433.68(f), other than the statutorily-required change to the indirect guarantee threshold level, until June 30, 2010. As discussed above, this portion of the regulation has been the subject of Congressional moratoria and has not yet been implemented by CMS. This additional time is necessary to determine whether additional clarification or guidance would be necessary or helpful to our State partners. It is our understanding that certain States are concerned that the regulatory language is overbroad or unclear. We believe the delay will permit more time to obtain information about the potential impact of the rule and alternative approaches, and to ensure appropriate implementation of the statutory restrictions on provider taxes and donations.

III. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

V. Regulatory Impact Analysis

A. Overall Impact

We have examined the impact of this proposed rule as required by Executive Order 12866, the Congressional Review Act, the Regulatory Flexibility Act (RFA), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism. Executive Order 12866 (as amended) directs agencies to assess all costs and benefits of all available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

The final rule on health-care related taxes was estimated to result in savings to the Federal government, by reducing its financial participation in the Medicaid program for amounts in excess of the tax-related threshold, with corresponding responses by States that would partially offset these savings. Specifically, the RIA for the final rule estimated that Federal Medicaid outlays would be reduced by $85 million in FY 2008, and $115 million in FY 2009 through FY 2011. These savings resulted directly from applying the language in the Tax Relief and Health Care Act of 2006 to reduce the maximum threshold on exclusion of health care related taxes from 6 percent to 5.5 percent of net patient revenue. We do not propose to delay application of this reduced threshold, which is already in effect. Accordingly, we believe that the proposed delay would not have any substantial economic effect, and that this proposed rule is not ''economically significant'' under E.O. 12866 or ''major'' under the Congressional Review Act.

The RFA requires agencies to analyze options for regulatory relief of small entities if proposed or final rules have a ''significant economic impact on a substantial number of small entities.'' For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions, including school districts. ''Small'' governmental jurisdictions are defined as having a population of less than fifty thousand. Individuals and States are not included in the definition of a small entity. In the final rule on health care related taxes, we analyzed potential impacts on small entities that might result from the change in the exclusion threshold. Some effects (reduced tax burden) were likely to be positive and some (reductions in State reimbursement rates) could be either positive or negative. All of these effects would depend on future State decisions on taxation and reimbursement that could not be predicted and would in any event be indirect effects rather than the direct result of that rule. Regardless, because this rule does not propose to delay the change in the exclusion threshold, we conclude, and the Secretary certifies, that this proposed rule would not have a significant effect on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. Our analysis of the final rule concluded that it would have had no significant direct effect on a substantial number of these hospitals. This proposed rule does not impose any new requirements. Accordingly, we are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would not have a direct impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $130 million. This proposed rule contains no mandates that will impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $130 million.

Executive Order 13132 on Federalism establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirements on State and local governments, preempts State law, or otherwise has Federalism implications. EO 13132 focuses on the roles and responsibilities of different levels of government, and requires Federal deference to State policy-making discretion when States make decisions about the uses of their own funds or otherwise make State-level decisions. The original final rule, while limiting Federal funding, did not circumscribe the States' authority to make policy decisions regarding taxes and reimbursement. This proposed rule will likewise not have a substantial effect on State or local government policy discretion.

B. Anticipated Effects

As discussed in the final rule published February 22, 2008, States had a number of options open to them in addressing any reduction in Federal Financial Participation (FFP). They could restructure State spending and shift funds among programs, raise funds through increases in other forms of generally applicable tax revenue increases, or reduce reimbursement to the tax-paying health care providers.

Presumably most of those States have already made those decisions. Although the delay proposed in this rule will not affect the tax threshold, it will provide some relief to States in making other adjustments.

C. Alternatives

We welcome comments not only on the proposed delay in enforcement, but also on alternatives that may more constructively address the underlying problems and their likely impacts on States and other stakeholders.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: April 30, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 1, 2009.

Kathleen Sebelius,

Secretary.

[FR Doc. E9–10460 Filed 5–1–09; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 431, 433, 440 and 441

[CMS–2287–P2; CMS–2213–P2; CMS 2237–P]

RIN 0938–AP75

Medicaid Program: Rescission of School-Based Services Final Rule, Outpatient Services Definition Final Rule, and Partial Rescission of Case Management Services Interim Final Rule

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This rule proposes to rescind the December 28, 2007 final rule entitled ''Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School''; the November 7, 2008 final rule entitled ''Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition''; and certain provisions of the December 4, 2007 interim final rule with comment period entitled ''Optional State Plan Case Management Services.'' These regulations have been the subject of Congressional moratoria and have not yet been implemented (or, with respect to case management interim final rule, have only been partially implemented) by CMS. In light of concerns raised about the adverse effects that could result from these regulations, in particular the potential restrictions on services available to beneficiaries, potential deleterious effect on state partners in the economic downturn, and the lack of clear evidence demonstrating that the approaches taken in the regulations are warranted, CMS is proposing to rescind the two final rules in full, and to partially rescind the interim final rule. Rescinding these provisions will permit further opportunity to determine the best approach to further the objectives of the Medicaid program in providing necessary health benefits coverage to needy individuals.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 1, 2009.

ADDRESSES: In commenting, please refer to file code CMS–2287–P2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the ''More Search Options'' tab.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2287–P2, P.O. Box 8010, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2287–P2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Lisa Parker, (410) 786–4665.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

A. Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School

Under the Medicaid program, Federal payment is available for the costs of administrative activities as found

necessary by the Secretary for the proper and efficient administration of the State plan. On December 28, 2007, we published a final rule to eliminate Federal Medicaid payment for the costs of certain school-based administrative and transportation activities based on a Secretarial finding that these activities are not necessary for the proper and efficient administration of the Medicaid State plan and are not within the definition of the optional transportation benefit (72 FR 73635). Under the final rule, Federal Medicaid payments were not available for administrative activities performed by school employees or contractors, or anyone under the control of a public or private educational institution, and for transportation between home and school. Federal financial participation (FFP) remained available for covered services furnished at or through a school that are included in a child's individualized education plan (IEP), and for transportation from school to a provider in the community for a covered service. FFP also remained available for the costs of school-based Medicaid administrative activities conducted by employees of the State or local Medicaid agency, and for transportation to and from a school for children who are not yet school age but are receiving covered direct medical services at the school.

The December 28, 2007, final rule became effective on February 26, 2008. Subsequent to publication of the final rule, section 206 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. No. 110–173) imposed a moratorium until June 30, 2008, that precluded CMS from imposing any restrictions contained in the rule that are more stringent than those applied as of July 1, 2007. Section 7001(a)(2) of the Supplemental Appropriations Act of 2008 (Pub. L. No. 110–252) extended this moratorium until April 1, 2009 and section 5003(b) of the American Recovery and Reinvestment Act (ARRA) further extended the moratorium until July 1, 2009.

B. Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition

Outpatient hospital services are a required service under Medicaid. On November 7, 2008, we published a final rule to introduce new limitations on which treatments could be billed and paid as an outpatient hospital service, thereby altering the pre-existing definition of ''outpatient hospital services.'' The final rule became effective on December 8, 2008. Section 5003(c) of ARRA precludes CMS from taking any action to implement the final rule with respect to services furnished between December 8, 2008 and June 30, 2009.

C. Optional State Plan Case Management Services

On December 4, 2007, we published an interim final rule with comment period that revised current Medicaid regulations to incorporate changes made by section 6052 of the Deficit Reduction Act of 2005 (DRA) (72 FR 68077). In addition, we placed new limitations on the services and activities that could be covered and paid as an optional targeted case management service or optional case management service.

The interim final rule became effective on March 3, 2008. Section 7001(a)(3)(B)(I) of the Supplemental Appropriations Act imposed a partial moratorium until April 1, 2009, precluding CMS from taking any action to impose restrictions on case management services that were more restrictive than those in effect on December 3, 2007. The law contained an exception for the portion of the regulation as it related directly to implementing the definition of case management services and targeted case management services. That partial moratorium was extended by section 5003(a) of ARRA until July 1, 2009.

II. Provisions of the Proposed Regulation

Since the publication of these final regulations, we have received additional public input about the adverse effects that could result from these regulations. In addition, the statutory moratoria indicate strong concern in Congress about the effects of these regulations. In particular, we have become aware that the provisions of these rules could result in restrictions on services available to beneficiaries and there is a lack of clear evidence demonstrating that the approaches taken in the regulations are warranted at this time. In order to ensure that beneficiaries are not harmed while we reconsider the approaches taken in these rules, as discussed in detail below, we propose to rescind the November 7, 2008 final rule entitled ''Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition''; the December 28, 2007 final rule entitled ''Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School''; and certain provisions of the December 4, 2007 interim final rule with comment period entitled ''Optional State Plan Case Management Services.''

We are soliciting public comments on the proposal to rescind these rules and to aid our consideration of the many complex questions surrounding these issues and the need for regulation in these areas. In particular, we seek the following:

- Information, including specific examples where feasible, of problems that would result from rescission of these final rules, and potential approaches to resolve those problems if these final rules are rescinded;
- Information, including specific examples where feasible, addressing the scope and nature of problems that would result if these final rules were implemented;
- Information, including specific examples, and the scope and nature of the potential problem where feasible, on whether implementation of these final rules would reduce beneficiary access to program information and covered health care services;
- Comment on whether these final rules provide sufficient clarity to ensure sound Medicaid program operation; and
- Comment on whether the objectives of the rules might also be accomplished through alternative approaches, such as program guidance and technical support, to ensure valid Medicaid claiming procedures.

A. Elimination of Reimbursement Under Medicaid for School Administration Expenditures and Costs Related to Transportation of School-Age Children Between Home and School

We propose to rescind the December 28, 2007 final rule in its entirety. We have become aware that the adverse consequences of the final rule may be more significant than previously assumed, and that the consideration of alternative approaches may be warranted. These concerns were suggested by the public comments submitted in response to the September 7, 2007 proposed rule (72 FR 51397), but we may not have been fully aware of the magnitude of the potential adverse consequences. Since issuing the final rule, we have become aware that the limitations on Federal Medicaid funding under the final rule could substantively affect State outreach efforts in schools, and the availability of Medicaid services for eligible beneficiaries. We previously assumed that, since such activities were within the scope of the overall mission of the schools, the activities would continue with funding from other sources available for educational activities. Because this assumption may be invalid, we are concerned that implementation of the rule could

adversely affect Medicaid beneficiaries. We are requesting comments on this issue.

Moreover, we are concerned that there is insufficient evidence on the need for the particular approach taken by the final rule. The oversight reviews that we cited in issuing the final rule, indicating some deficiencies in procedures for claiming school-based administrative expenditures and necessary transportation, were several years old and based on data collected more than 5 years ago. These claims did not reflect CMS guidance issued after the review data was collected; nor did they reflect the greater administrative oversight and technical assistance that we have made available more recently. Moreover, CMS has tools at its disposal to address inappropriate claiming that could arise in any setting, so we will continue to evaluate the efficacy of these tools in addressing any claiming issues.

In light of these concerns, we propose to rescind the provisions of the final rule while we further review the underlying issues and determine whether a different approach is necessary, and revise the regulations to remove the regulatory provisions added by the December 28, 2007 final rule. We would instead apply the policies in effect before the December 28, 2007 final rule became effective, as set forth in guidance on school-based administrative claiming and school transportation.

Specifically, we propose to revise §§ 431.53(a) and 440.170(a) to remove language indicating that, for purposes of Medicaid reimbursement, transportation does not include transportation of school-age children from home to school and back when a child is receiving a Medicaid-covered service at school. In addition, we propose to remove § 433.20, which provides that Federal financial participation under Medicaid is not available for expenditures for administrative activities by school employees, school contractors, or anyone under the control of a public or private educational institution.

B. Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition

We propose to rescind the November 7, 2008 final rule in its entirety. While we previously perceived the rule as having little impact (because it affected only the categorization of covered services), we have become aware that this perception may have been based on inaccurate assumptions. In particular, we assumed that, to the extent that covered services were no longer within the outpatient hospital benefit category, those services could be easily shifted to other benefit categories. We have received input indicating that such shifts may be difficult in light of the complexity of State funding and payment methodologies and health care service State licensure and certification limits. As a result, the November 7, 2008 final rule could have an adverse impact on the availability of covered services for beneficiaries.

Therefore, we propose to rescind the November 7, 2008 final rule in its entirety and reinstate the regulatory definition of ''outpatient hospital services'' at 42 CFR 440.20 that existed before the final rule became effective. Specifically, we propose to remove the provisions at § 440.20(a)(4)(i), which define Medicaid outpatient hospital services to include those services recognized under the Medicare outpatient prospective payment system (defined under 42 CFR 419.2(b)) and those services paid by Medicare as an outpatient hospital service under an alternate payment methodology. We would also remove the requirement at § 440.20(a)(4)(ii) that services be furnished by an outpatient hospital facility or a department of an outpatient hospital as described at § 413.65. Finally, we propose to remove the provision at § 440.20(a)(4)(iii) that limits the definition of outpatient services to exclude services that are covered and reimbursed under the scope of another Medicaid service category under the Medicaid State plan.

In addition, we are proposing to withdraw § 447.321 of the proposed rule published on September 28, 2007 (72 FR 55158) upon which we reserved action in the final rule. These provisions contained regulatory guidance on the calculation of the outpatient hospital and clinic services upper payment limit (UPL).

C. Optional State Plan Case Management Services

We propose to rescind certain provisions of the December 4, 2007 interim final rule with comment period. In discussions with States about the implementation of case management requirements, we have become concerned that certain provisions of the interim final rule may unduly restrict beneficiary access to needed covered case management services, and limit State flexibility in determining efficient and effective delivery systems for case management services. In particular, we are concerned that the interim final rule may be overly narrow in defining individuals transitioning to community settings, and we are concerned that beneficiary access to services may be affected by the limitations in the interim final rule on payment methodologies, on provision of case management services by other agencies or programs, on qualified providers, on administrative case management activities, and on coverage of services furnished in different settings.

Many of these same concerns were expressed by public commenters and we are concerned that adverse consequences may occur for beneficiaries and the program as a whole if these provisions were implemented. We believe that these same concerns were also reflected by the Congressional moratorium on the implementation of this rule. That moratorium indicated a particular concern with administrative requirements and limitations included in the interim final rule. Therefore, we propose to rescind certain provisions of the December 4, 2007 interim final rule.

Specifically, we propose to remove §§ 440.169(c) and 441.18(a)(8)(viii), because we believe that these provisions may be overly restrictive in defining ''individuals transitioning to a community setting,'' for whom case management services may be covered under § 440.169(a). Until we address the comments submitted on the interim final rule, we believe that States should have additional flexibility to provide coverage using a reasonable definition of this term. We are also proposing to remove §§ 441.18(a)(5) and (a)(6). We believe that these provisions may unduly limit States' delivery systems for case management services. We further propose to remove § 441.18(a)(8)(vi) because the requirement for payment methodologies in this provision may be administratively burdensome, may result in restrictions on available providers of case management services, and generally may limit beneficiary access to services. For similar reasons, in § 441.18, we propose to rescind paragraphs (c)(1), (c)(4), and (c)(5) that limit the provision of case management activities that are an integral component of another covered Medicaid service, another non-medical program, or an administrative activity. On the issues addressed by these rescinded provisions, we will continue to apply the interpretive policies in force prior to issuance of the interim final rule.

We propose to rescind parts of § 441.18(c)(2) and (c)(3) to remove references to programs other than the foster care program, because we are concerned that these provisions may be overly restrictive in narrowing State options for delivery of case management services. We propose to consolidate the

remaining provisions of these paragraphs as paragraph (c) to read as follows:

''(c) Case management does not include, and FFP is not available in expenditures for, services defined in § 441.169 of this chapter when the case management activities constitute the direct delivery of underlying medical, educational, social, or other services to which an eligible individual has been referred, including for foster care programs, services such as, but not limited to, the following:

(1) Research gathering and completion of documentation required by the foster care program.

(2) Assessing adoption placements.

(3) Recruiting or interviewing potential foster care parents.

(4) Serving legal papers.

(5) Home investigations.

(6) Providing transportation.

(7) Administering foster care subsidies.

(8) Making placement arrangements.''

We would retain the remaining provisions of the interim final rule with comment period, and finalize those provisions in a future rulemaking.

III. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact Analysis

A. Overall Impact

We have examined the impact of this proposed rule as required by Executive Order 12866, the Congressional Review Act, the Regulatory Flexibility Act (RFA), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism. Executive Order 12866 (as amended) directs agencies to assess all costs and benefits of all available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

One of the three rules we propose to rescind was estimated to save the Federal government, by reducing its financial participation in the Medicaid program, amounts in excess of this threshold, with corresponding increases in costs to States (or in some cases to local entities or to other Federal programs) that would essentially offset these savings. That is, the primary economic effect predicted under this rule was to change the sources of ''transfer payments'' among government entities rather than the levels of actual services delivered. For example, the RIA for the final rule regarding Medicaid reimbursement for school administration and transportation of school-aged children assumed that localities would continue to provide such transportation even though one source of funding was reduced. Rescission of these rules would simply restore the *status quo ante.* That is, the Medicaid program would not gain these savings and other Federal, State, or local programs would not lose the Medicaid funding. (We acknowledge that many commenters were concerned that these three rules would have additional and substantial adverse effects on service provision and that the conclusions of the original RIAs did not reflect on this point. As explained earlier in this preamble, we share some of those concerns.) Except for portions of the case management interim final rule, these rules have not yet taken ''real world'' effect because of the moratoriums on enforcement. Accordingly, we believe that the proposed rescissions would have no economic effect, assuming that the situation before July 1, 2009 is taken as the ''counterfactual'' case.

In the alternative, it might be argued that the appropriate counterfactual is that rescinding these rules would create ''economically significant'' benefits and costs of the same magnitude but exactly the opposite of those analyzed in the original RIAs. For example, the final rule regarding school administration expenditures and costs related to transportation was estimated to reduce Federal Medicaid outlays by $635 million in FY 2009 and by a total of $3.6 billion over the first 5 years (FY 2009–2013). The proposed rescission would eliminate these Federal savings with a corresponding offset in State, local, and Federal funding increases that would otherwise be needed to maintain existing services.

In the current economic climate, and with the drastic budgetary reductions being made in most States, the assumption of an essentially offsetting change in spending responsibilities that leaves service provision unchanged is completely unrealistic. However, because these rules are being proposed for rescission without ever having been enforced, no purpose would be served in re-estimating hypothetically the effects of the original rules, or in estimating hypothetically the potential effects of more realistically estimated current responses.

Accordingly, we have decided for purposes of this rulemaking that the most straightforward assumption to make is that we are preserving the status quo, and that under the criteria of EO 12866 and the Congressional Review Act this is not an economically significant (or ''major'') rule. However, we welcome comments on this conclusion. We also welcome comments on an alternative that the original final rules did not specifically address, namely rescinding these final rules without prejudicing future promulgation of rules that might restrict Federal spending (though perhaps not as substantially).

The RFA requires agencies to analyze options for regulatory relief of small entities if final rules have a ''significant economic impact on a substantial number of small entities.'' For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions, including school districts. ''Small'' governmental jurisdictions are defined as having a population of less than fifty thousand. Individuals and States are not included in the definition of a small entity. Although many school districts have populations below this threshold and are therefore considered small entities for purposes of the RFA, we originally determined that the impact on local school districts as a result of the final rule on School Administration Expenditures and Costs Related to Transportation of School-Age Children would not exceed the threshold of ''significant'' economic impact under the RFA, for a number of reasons. Most simply, the estimated annual Federal savings under this final rule were only about one eighth of one percent of total annual spending on elementary and secondary schools, far below the threshold of 3 to 5 percent of annual revenues or costs used by HHS in determining whether a proposed or final

rule has a ''significant'' economic impact on small entities. Accordingly, regardless of the counterfactual, rescission of this rule would not have a ''significant'' impact on a substantial number of small entities. Our analyses of the final rules regarding Case Management and Outpatient Hospital Facilities concluded that neither rule would have a significant impact on a substantial number of small entities. Accordingly, rescinding those final rules in whole or in part and preserving the *status quo ante* would likewise fail to trigger the ''significant'' impact threshold. We further note that in all three cases any impact of this rulemaking would be positive rather than negative on affected entities. Accordingly, the Secretary certifies that this proposed rule would not have a significant impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. Of the three final rules we propose to rescind in whole or in part, only the Outpatient Hospital Facility rule would have had any possible effect on small rural hospitals. Our analysis of that rule concluded that it would have had no direct effect on these hospitals, and that any indirect effect as a result of State adjustments could not be predicted. Regardless, any effects of this proposed rescission on small rural hospitals would be positive, not negative. Accordingly, we are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would not have a direct impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $130 million. This proposed rule contains no mandates that will impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $130 million. Our analyses of all three final rules concluded that they would impose no mandates of this magnitude, and these proposed rescissions create no mandates of any kind.

Executive Order 13132 on Federalism establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirements on State and local governments, preempts State law, or otherwise has Federalism implications. EO 13132 focuses on the roles and responsibilities of different levels of government, and requires Federal deference to State policy-making discretion when States make decisions about the uses of their own funds or otherwise make State-level decisions. The original final rules, however much they might have limited Federal funding, did not circumscribe States' authority to make policy decisions regarding transportation, case management, or hospital outpatient services. This proposed rule will likewise not have a substantial effect on State or local government policy discretion.

B. Anticipated Effects

As discussed above, one of the three final rules was predicted to have substantial effects on the use of Federal Medicaid funds for services that were arguably not the responsibility of Medicaid to fund. While rescission of this rule will have little or no immediate fiscal effect since the projected changes never occurred, other important effects will remain. For one thing, continuing controversy and uncertainty over the proper boundaries between Medicaid and other funding sources will remain, particularly for services that are not medical and for services that are also the primary responsibility of other programs.

C. Alternatives

We welcome comments not only on the proposed rescission of each rule, in whole or in part, but also on alternatives that may more constructively address the underlying problems and their likely impacts on State beneficiaries of the Medicaid program.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 431

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 433

Administrative practice and procedure, Child support claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 440

Grant programs—health, Medicaid.

42 CFR Part 441

Family planning, Grant programs—health, Infants and children, Medicaid, Penalties, Prescription drugs, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services would amend 42 CFR chapter IV as set forth below:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

Subpart B—General Administrative Requirements

1. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. Section 431.53 is revised to read as follows:

§ 431.53 Assurance of transportation.

A State plan must—

(a) Specify that the Medicaid agency will ensure necessary transportation for recipients to and from providers; and

(b) Describe the methods that the agency will use to meet this requirement.

PART 433—STATE FISCAL ADMINISTRATION

3. The authority citation for part 433 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§ 433.20 [Removed]

4. Part 433 is amended by removing § 433.20

PART 440 SERVICES: GENERAL PROVISIONS

5. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

6. Section 440.20 is amended by revising the section heading and paragraph (a) to read as follows:

§ 440.20 Outpatient hospital services and rural health clinic services.

(a) Outpatient hospital services means preventive, diagnostic, therapeutic, rehabilitative, or palliative services that—

(1) Are furnished to outpatients;

(2) Are furnished by or under the direction of a physician or dentist; and

(3) Are furnished by an institution that—

(i) Is licensed or formally approved as a hospital by an officially designated authority for State standard-setting; and

(ii) Meets the requirements for participation in Medicare as a hospital;

(4) May be limited by a Medicaid agency in the following manner: A Medicaid agency may exclude from the definition of ''outpatient hospital services'' those types of items and services that are not generally furnished by most hospitals in the State.

* * * * *

§ 440.169 [Amended]

7. Section 440.169 is amended by removing and reserving paragraph (c).

8. Section 440.170(a)(1) is revised to read as follows:

§ 440.170 Any other medical care or remedial care recognized under State law and specified by the Secretary.

(a) *Transportation.* (1) ''Transportation'' includes expenses for transportation and other related travel expenses determined to be necessary by the agency to secure medical examinations and treatment for a recipient.

* * * * *

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

9. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

10. Section 441.18 is amended by removing and reserving paragraphs (a)(4), (a)(5), and (a)(8)(vi); removing (a)(8)(viii); and revising paragraph (c) to read as follows:

§ 441.18 Case management services.

* * * * *

(c) Case management does not include, and FFP is not available in expenditures for, services defined in § 441.169 of this chapter when the case management activities constitute the direct delivery of underlying medical, educational, social, or other services to which an eligible individual has been referred, including for foster care programs, services such as, but not limited to, the following:

(1) Research gathering and completion of documentation required by the foster care program.

(2) Assessing adoption placements.

(3) Recruiting or interviewing potential foster care parents.

(4) Serving legal papers.

(5) Home investigations.

(6) Providing transportation.

(7) Administering foster care subsidies.

(8) Making placement arrangements.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medical Assistance Program)

Dated: April 30, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: May 1, 2009.

Kathleen Sebelius,

Secretary.

[FR Doc. E9–10494 Filed 5–1–09; 4:15 pm]

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Federal Register

Wednesday,
May 6, 2009

Part VI

The President

Proclamation 8369—Asian American and Pacific Islander Heritage Month, 2009

Proclamation 8370—National Physical Fitness and Sports Month, 2009

Federal Register
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Wednesday, May 6, 2009

Presidential Documents

Title 3—

The President

Proclamation 8369 of May 1, 2009

Asian American and Pacific Islander Heritage Month, 2009

By the President of the United States of America

A Proclamation

The vast diversity of languages, religions, and cultural traditions of Asian Americans and Pacific Islanders continues to strengthen the fabric of American society. From the arrival of the first Asian American and Pacific Islander immigrants 150 years ago to those who arrive today, as well as those native to the Hawaiian Islands and to our Pacific Island territories, all possess the common purpose of the fulfilling the American dream and leading a life bound by the American ideals of life, liberty, and the pursuit of happiness.

During Asian American and Pacific Islander Heritage Month, we remember the challenges and celebrate the achievements that define our history.

Asian Americans and Pacific Islanders have endured and overcome hardship and heartache. In the earliest years, tens of thousands of Gold Rush pioneers, coal miners, transcontinental railroad builders, as well as farm and orchard laborers, were subject to unjust working conditions, prejudice, and discrimination——yet they excelled. Even in the darkness of the Exclusion Act and Japanese internment, Asian Americans and Pacific Islanders have persevered, providing for their families and creating opportunities for their children.

Amidst these struggles, Asian Americans and Pacific Islanders have contributed in great and significant ways to all aspects of society. They have created works of literature and art, thrived as American athletes, and prospered in the world of academia. Asian Americans and Pacific Islanders have played a vital role in our Nation's economic and technological growth by establishing successful enterprises and pushing the limits of science. They are serving in positions of leadership within the government more now than ever before. And along with all of our great service men and women, they have defended the United States from threats at home and abroad, serving our Nation with valor.

From the beaches of the Pacific islands and the California coast, the grasslands of Central Asia and the bluegrass of Kentucky, and from the summits of the Himalayas and the Rocky Mountains, the Asian American and Pacific Islander community hails from near and far. This is the story of our more perfect union: that it is diversity itself that enriches, and is fundamental to, the American story.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2009, as Asian American and Pacific Islander Heritage Month. I call upon the people of the United States to learn more about the history of Asian Americans and Pacific Islanders and to observe this month with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of May, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E9–10710
Filed 5–5–09; 11:15 am]
Billing code 3195–W9–P

Presidential Documents

Proclamation 8370 of May 1, 2009

National Physical Fitness and Sports Month, 2009

By the President of the United States of America

A Proclamation

A morning walk in the neighborhood or Saturday game of catch with a child can brighten the day. Simple activities like these also contribute to our physical fitness. As the weather warms and invites us outside, I encourage Americans to consider the many simple ways to add physical fitness activities to our lives. Incorporating these habits can put a smile on your face, and it can also improve your long-term health and well-being.

This issue deserves our attention because physical activity can help curtail the rise in chronic diseases facing our Nation today. Among children and adolescents, regular physical activity can improve bone health and muscular fitness. Physical activity also helps prevent childhood obesity, which is a serious threat to our Nation's health. Among adults young and old, physical activity has been shown to combat obesity, while reducing the risk of heart disease, stroke, and certain cancers. Even moderate amounts of physical activity can reduce the risk of premature death. All Americans should understand the significant benefits physical activity provides.

Individuals, employers, and communities can take steps to promote physical fitness. Depending on his or her ability, every American can try to be healthier by, for example, walking or biking to work if it is nearby, being active during free time, and eating healthier meals. Employers can raise awareness and incorporate physical activity in the workplace, and communities can promote access to recreational activities and parks.

The Department of Health and Human Services' Physical Activity Guidelines for Americans are designed to help Americans of various ages and abilities engage in physical activity that can be incorporated easily into their daily lives. More information about the Guidelines is available at: www.health.gov/paguidelines.

To encourage attention to physical fitness, the President's Council on Physical Fitness and Sports sponsors the National President's Challenge, a six-week competition to determine America's most active State. The Challenge extends from May 1 through July 24 this year. I encourage Americans to register for the Challenge at www.presidentschallenge.org and to begin recording activity to help their State win this year's competition.

By learning about the benefits of physical fitness, staying motivated, and being active and eating healthy, more Americans can live healthier, longer, and happier lives.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim May 2009, as National Physical Fitness and Sports Month. I call upon the American people to take control of their health and wellness by making physical activity, fitness, and sports participation an important part of their daily lives. I encourage individuals, businesses, and community organizations to renew their commitment to personal fitness and health by celebrating this month with appropriate events and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this first day of May, in the year of our Lord two thousand nine, and of the Independence of the United States of America the two hundred and thirty-third.

[FR Doc. E9–10713
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