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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, September 11, 2007
9:00 a.m.–Noon

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

RESERVATIONS: (202) 741–6008

Contents

Federal Register

Vol. 72, No. 156

Tuesday, August 14, 2007

Separate Parts In This Issue

Reader Aids

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

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

CFR PARTS AFFECTED IN THIS ISSUE

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

5 CFR
Proposed Rules:
1830.....45388

12 CFR
Proposed Rules:
620.....45390

14 CFR
39 (5 documents) 45305, 45308, 45311, 45312, 45314
71 (4 documents) 45316, 45317, 45318, 45319

15 CFR
922.....45320

17 CFR
242.....45542
Proposed Rules:
3.....45392
210.....45600
228.....45600
229.....45600
230.....45600
239.....45600
240.....45600
242.....45558
249.....45600

18 CFR
2.....45320
3c.....45320
4.....45320
5.....45320
6.....45320
8.....45320
11.....45320
16.....45320
33.....45320
35.....45320
131.....45320
153.....45320
154.....45320
157.....45320
292.....45320
300.....45320
366.....45320
375.....45320
376.....45320
380.....45320
385.....45320

21 CFR
74.....45328

23 CFR
630.....45329
635.....45329
636.....45329

26 CFR
1 (2 documents) 45338, 45346
602 (2 documents) 45338, 45346
Proposed Rules:
301.....45394

30 CFR
75.....45358
Proposed Rules:
740.....45592
905.....45592
910.....45592
912.....45592
921.....45592
922.....45592
933.....45592
937.....45592
939.....45592
941.....45592
942.....45592
947.....45592

32 CFR
199.....45359

40 CFR
52.....45378
300.....45381
Proposed Rules:
49.....45397
300.....45404

48 CFR
Proposed Rules:
232.....45405
252.....45405

49 CFR
1243.....45384

50 CFR
660.....45320
Proposed Rules:
17.....45407

Rules and Regulations

Federal Register
Vol. 72, No. 156
Tuesday, August 14, 2007

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28159; Directorate Identifier 2006–NM–257–AD; Amendment 39–15156; AD 2007–16–17]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A300–600 Series Airplanes and Model A310 Series Airplanes

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

ACTION: Final rule.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD), which applies to certain Airbus Model A300–600, A310–200, and A310–300 series airplanes. That AD currently requires inspecting for certain serial numbers on elevators, and doing a detailed inspection, visual inspection with a low-angle light, and tap-test inspection of the upper and lower surfaces of the external skins on certain identified elevators for any damage (i.e., debonding of the graphite fiber reinforced plastic/Tedlar film protection, bulges, debonding of the honeycomb core to the carbon fiber reinforced plastic, abnormal surface reflections, and torn-out plies), and doing corrective actions if necessary. This new AD also requires inspecting for damage of the identified elevators in accordance with a new repetitive inspection program, at new repetitive intervals; and would provide an optional terminating action for the repetitive inspections. This AD results from reports of damage caused by moisture/water inside the elevator. We are issuing this AD to detect and correct debonding of the skins on the elevators, which could cause reduced structural integrity of an elevator and reduced controllability of the airplane.

DATES: This AD becomes effective September 18, 2007.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of September 18, 2007.

On February 3, 2006 (70 FR 77301, December 30, 2005), the Director of the Federal Register approved the incorporation by reference of Airbus All Operators Telex A300–600–55A6032, dated June 23, 2004; and Airbus All Operators Telex A310–55A2033, dated June 23, 2004.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located on the ground floor of the West Building at the DOT street address stated in the **ADDRESSES** section.

Discussion

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that supersedes AD 2005–26–17, amendment 39–14438 (70 FR 77301, December 30, 2005). The existing AD applies to certain Airbus Model A300–600, A310–200, and A310–300 series airplanes. That NPRM was published in the **Federal Register** on May 16, 2007 (72 FR 27493). That NPRM proposed to continue to require inspecting for certain serial numbers on elevators, and doing a detailed inspection, visual inspection with a low-angle light, and tap-test inspection of the upper and lower surfaces of the external skins on certain identified elevators for any damage (i.e., debonding of the graphite fiber reinforced plastic (GFRP)/Tedlar film protection, bulges, debonding of the honeycomb core to the carbon fiber reinforced plastic, abnormal surface reflections, and torn-out plies), and doing corrective actions if necessary. That NPRM also proposed to require inspecting for damage of the identified elevators in accordance with a new repetitive inspection program, at new repetitive intervals; and would provide an optional terminating action for the repetitive inspections.

Comments

We provided the public the opportunity to participate in the development of this AD. No comments have been received on the NPRM or on the determination of the cost to the public.

Clarification of Alternative Method of Compliance (AMOC) Paragraph

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD with the change described previously. We have determined that this change will neither increase the economic burden on any operator nor increase the scope of the AD.

Interim Action

We consider this AD interim action. We are currently considering requiring the optional terminating action of replacing the external GFRP/Tedlar film with an application of pore filler on the whole elevator external surface, which would constitute terminating action for the repetitive inspections required by this AD.

Costs of Compliance

This AD affects about 142 airplanes of U.S. registry. The following table provides the estimated costs for U.S.

operators to comply with this AD. The average labor rate is $80 per work hour.

Action	Work hours	Parts	Cost per airplane	Fleet cost
Inspection for serial number (required by AD 2005–26–17).	1	$0	$80	$11,360.
Repetitive inspections (required by AD 2005–26–17)	3	0	$240, per inspection cycle.	$34,080, per inspection cycle.
New repetitive inspection program (new action)	Between 8 and 12	0	Between $640 and $960, per inspection cycle.	Between $90,880 and $136,320, per inspection cycle.
Replacement (optional terminating/new action)	48	90	$3,930	$558,060.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by removing amendment 39–14438 (70 FR 77301, December 30, 2005) and by adding the following new airworthiness directive (AD):

2007–16–17 Airbus: Amendment 39–15156. Docket No. FAA–2007–28159; Directorate Identifier 2006–NM–257–AD.

Effective Date

(a) This AD becomes effective September 18, 2007.

Affected ADs

(b) This AD supersedes AD 2005–26–17.

Applicability

(c) This AD applies to Airbus Model A300–600 series airplanes and Model A310 series airplanes, certificated in any category, equipped with carbon fiber reinforced plastic (CFRP) elevator skin panels, modified in accordance with Airbus Service Bulletin A310–55–2019 or A300–55–6016 (Airbus Modification 10861) with graphite fiber reinforced plastic (GFRP)/Tedlar film as external protection, with part numbers (P/Ns) and serial numbers (S/Ns) identified in Airbus Service Bulletin A300–55–6039 or A310–55–2040, both dated June 7, 2006.

Unsafe Condition

(d) This AD results from reports of damage caused by moisture/water inside the elevator. We are issuing this AD to detect and correct debonding of the skins on the elevators, which could cause reduced structural integrity of an elevator and reduced controllability of the airplane.

Compliance

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

Restatement of the Requirements of AD 2005–26–17

Inspection for Serial Number, Repetitive Inspections, and Corrective Actions

(f) Within 600 flight hours after February 3, 2006 (the effective date of AD 2005–26–17), inspect to determine if the S/N of the elevator is listed in Airbus All Operators Telex (AOT) A300–600–55A6032, dated June 23, 2004, or Airbus Service Bulletin A300–55–6039, dated June 7, 2006 (for Model A300–600 series airplanes); or in Airbus AOT A310–55A2033, dated June 23, 2004, or Airbus Service Bulletin A310–55–2040, dated June 7, 2006 (for Model A310 series airplanes).

(1) If the S/N does not match any S/N on either AOT or service bulletin S/N list, no further action is required by this paragraph.

(2) If the S/N matches a S/N listed in an AOT or service bulletin, before further flight, do the actions listed in Table 1 of this AD, and any corrective action as applicable, in accordance with Airbus AOT A300–600–55A6032, dated June 23, 2004; or Airbus AOT A310–55A2033, dated June 23, 2004; as applicable. Repeat the inspections thereafter at intervals not to exceed 600 flight hours until the inspection required by paragraph (j) of this AD is accomplished. Do applicable corrective actions before further flight.

TABLE 1.—REPETITIVE INSPECTIONS

Do a—	Of the—	For any—
Detailed inspection	Elevator upper and lower external skin surfaces.	Damage (i.e., breaks in the graphite fiber reinforced plastic (GFRP)/Tedlar film protection, debonded GFRP/Tedlar film protection, bulges, torn-out plies).
Visual inspection with a low-angle light	Elevator upper and lower external skin surfaces.	Differences in the surface reflection.
Tap-test inspection	Upper and lower external skin surfaces of the honeycomb core panels in the elevator.	Honeycomb core that has debonded from the carbon fiber reinforced plastic (CFRP).

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

Repair Approval

(g) Where the AOTs specified in paragraph (f) of this AD say to contact the manufacturer for repair instructions, or an alternative inspection method: Before further flight, repair or do the alternative inspection method according to a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Gonorale de l'Aviation Civile (DGAC) (or its delegated agent), or the European Aviation Safety Agency (EASA) (or its delegated agent).

Parts Installation

(h) As of February 3, 2006, no carbon fiber elevator having part number (P/N) A55276055000 (left-hand side) or P/N A55276056000 (right-hand side) may be installed on any airplane unless it is inspected according to paragraph (f) of this AD; or according to paragraph (j) of this AD.

No Reporting Required for AOT Inspections

(i) Although the AOTs referenced in paragraph (f) of this AD specify to submit inspection reports to the manufacturer, this AD does not include that requirement.

New Requirements of This AD

Revised Inspection Program

(j) For airplanes with affected serial numbers identified in paragraph (f) of this AD: Except as provided by paragraph (k) of this AD, within 2,000 flight cycles or 18 months after the effective date of this AD, whichever occurs earlier, do a detailed inspection of the external surfaces of the GFRP/Tedlar film protection on the upper and lower skin panels to detect damage of the film, and a thermographic inspection of the upper and lower skin panels to detect any potential water indication inside the panel's honeycomb core; do all applicable related investigative/corrective actions before further flight; and repair the external GFRP/Tedlar film with pore filler. Do all actions in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–55–6039 (for Model A300–600 series airplanes), or Airbus Service Bulletin A310–55–2040 (for Model A310 series airplanes); both including Appendix 01, both dated June 7, 2006. Repeat the inspections thereafter at intervals not to exceed 2,000 flight cycles or 18 months, whichever occurs earlier. Where the service bulletin says to contact the manufacturer for repair instructions: Before further flight, repair or do the alternative inspection method according to a method approved by either the Manager, International Branch, ANM–116; or the EASA (or its delegated agent). Doing the inspections in accordance with this paragraph terminates the repetitive inspection requirements of paragraph (f) of this AD.

(k) The maximum time between the inspection required by paragraph (f) of this AD and the first inspection done in accordance with paragraph (j) of this AD must be no greater than: For the thermographic inspection, 2,500 flight hours after the last thermographic inspection done in accordance with the applicable AOT specified in paragraph (f) of this AD; and for the tap test, 600 flight hours after the last tap test inspection done in accordance with the applicable AOT specified in paragraph (f) of this AD.

Report

(l) Submit a report of the findings (both positive and negative) of the inspections required by paragraph (j) of this AD to Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, at the applicable time specified in paragraph (l)(1) or (l)(2) of this AD. The report must include the information in Appendix 01 of Airbus Service Bulletin A300–55–6039 or Airbus Service Bulletin A310–55–2040, both dated June 7, 2006, as applicable. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

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

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

Optional Terminating Action

(m) Replacing the external GFRP/Tedlar film with an application of pore filler on the whole elevator external surface in accordance with Airbus Service Bulletin A300–55–6040 (for Model A300–600 series airplanes), or Airbus Service Bulletin A310–55–2041 (for Model A310 series airplanes), both dated June 5, 2006, terminates the repetitive inspection requirements of paragraph (j) of this AD, provided the replacement is done before further flight after accomplishment of Airbus Service Bulletins A310–55–2040 and A300–55–6039, both dated June 7, 2006.

Alternative Methods of Compliance (AMOCs)

(n)(1) The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(3) AMOCs approved previously in accordance with AD 2005–26–17 are approved as AMOCs with the corresponding provisions of this AD.

Related Information

(o) EASA airworthiness directive 2006–0289, dated November 2, 2006, also addresses the subject of this AD.

Material Incorporated by Reference

(p) You must use the service documents identified in Table 2 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise.

TABLE 2.—REQUIRED MATERIAL INCORPORATED BY REFERENCE

Airbus service information	Date
All Operators Telex A300–600–55A6032	June 23, 2004.
All Operators Telex A310–55A2033	June 23, 2004.
Service Bulletin A300–55–6039, including Appendix 01	June 7, 2006.
Service Bulletin A310–55–2040, including Appendix 01	June 7, 2006.

If you accomplish the optional actions specified in this AD, you must use the service documents identified in Table 3 of this AD to perform those actions, unless the AD specifies otherwise.

TABLE 3.—OPTIONAL MATERIAL INCORPORATED BY REFERENCE

Airbus service information	Date
Service Bulletin A300–55–6040	June 5, 2006.
Service Bulletin A310–55–2041	June 5, 2006.

(1) The Director of the Federal Register approved the incorporation by reference of the documents identified in Table 4 of this AD in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

TABLE 4.—NEW MATERIAL INCORPORATED BY REFERENCE

Airbus service information	Date
Service Bulletin A300–55–6039, including Appendix 01	June 7, 2006.
Service Bulletin A300–55–6040	June 5, 2006.
Service Bulletin A310–55–2040, including Appendix 01	June 7, 2006.
Service Bulletin A310–55–2041	June 5, 2006.

(2) On February 3, 2006 (70 FR 77301, December 30, 2005), the Director of the Federal Register approved the incorporation by reference of the service documents identified in Table 5 of this AD.

TABLE 5.—MATERIAL PREVIOUSLY INCORPORATED BY REFERENCE

Airbus service information	Date
All Operators Telex A300–600–55A6032	June 23, 2004.
All Operators Telex A310–55A2033	June 23, 2004.

(3) Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on August 2, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–15589 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21238; Directorate Identifier 2005–NE–12–AD; Amendment 39–15159; AD 2007–17–01]

RIN 2120–AA64

Airworthiness Directives; General Electric (GE) CF6–80E1 Series Turbofan Engines

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

ACTION: Final rule; request for comments.

SUMMARY: The FAA is superseding an existing airworthiness directive (AD) for General Electric (GE) CF6–80E1 series turbofan engines. That AD currently requires removing electronic control unit (ECU) software version E.1.M. or earlier installed software, and installing improved software for the ECU. This AD requires removing software version E.1.N or earlier from the engine ECU. Engines with the new version software will have increased margin to flameout. This AD results from reports of engine flameout events during flight, including reports of events where all engines simultaneously experienced a flameout or other adverse operation. Although the root cause investigation is not yet complete, we believe that exposure to ice crystals during flight is associated with these flameout events. We are issuing this AD to minimize the potential of an all-engine flameout event caused by ice accretion and shedding during flight.

DATES: Effective August 29, 2007.

We must receive any comments on this AD by October 15, 2007.

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

- *DOT Docket Web site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact General Electric Company via Lockheed Martin Technology Services, 10525 Chester Road, Suite C, Cincinnati, Ohio 45215, telephone (513) 672–8400, fax (513) 672–8422, for the service information identified in this AD.

FOR FURTHER INFORMATION CONTACT: John Golinski, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *john.golinski@faa.gov;* telephone: (781) 238–7135, fax: (781) 238–7199.

SUPPLEMENTARY INFORMATION: The FAA amends 14 CFR part 39 by superseding AD 2005–10–16, Amendment 39–14093 (70 FR 28806, May 19, 2005). That AD requires improved software version E.1.N to be installed into the ECU. That AD was the result of an uncommanded engine acceleration event caused by a failure of the ECU digital interface unit. That condition, if not corrected, could result in an undetected failure of the ECU digital interface unit, leading to uncommanded acceleration to the overspeed limit without response to throttle commands. The airplane could then experience asymmetric thrust.

Actions Since AD 2005–10–16 Was Issued

Since AD 2005–10–16 was issued, GE CF6–80E1 and CF6–80C2 series turbofan engines continue to experience flameout events that are due to ice accretion and shedding into the engine during flight. Although the investigation is not yet complete, we believe that the ice accretion is caused by exposure to ice crystals during flight. Industry reports 35 airplane flameout events, including reports of multi-engine events where all engines on the airplane simultaneously experienced a flameout. Some of these events had high pressure compressor blade damage that may have been caused by impact with shedding ice. In all events, the engines restarted and continued to operate normally for the remainder of the flight.

This AD addresses only the CF6–80E1 series turbofan engines, installed on Airbus Industrie A330 series airplanes. We believe the CF6–80E1 series turbofan engines are susceptible to flameouts caused by ice accretion and shedding into the engine during flight. Similar AD actions for CF6–80C2 series engines may be forthcoming.

We view an all-engine flameout event as an unsafe condition particularly for low-altitude events, or other factors that might result in the inability to restart the engines and regain control of the airplane. Since some aspects of this problem are not completely understood, this proposed AD is considered an interim action due to GE's on-going investigation. Future AD action might become necessary based on the results of the investigation and field experience. This condition of insufficient margin to engine flameout due to ice accretion and shedding during flight, if not addressed, could result in an all-engine flameout event during flight.

Relevant Service Information

We have reviewed and approved the technical contents of GE Service Bulletin (SB) No. CF6–80E1 S/B 73–0091, Revision 1, dated June 26, 2007. That SB describes procedures for removing certain software versions from the ECU, and installing a software version that is FAA-approved. The new FAA-approved software version described in the SB modifies the variable bleed valve schedule, which will provide an increased margin to flameout. This increased margin is expected to reduce the rate of flameout occurrences due to ice accretion and shedding during flight. The new FAA-approved software version incorporates the software improvements required by AD 2005–10–16, which prevent failure of the ECU digital interface unit.

FAA's Determination and Requirements of This AD

Although no airplanes that are registered in the United States use these CF6–80E1 series turbofan engines, the possibility exists that the engines could be used on airplanes that are registered in the United States in the future. The unsafe condition described previously is likely to exist or develop on other CF6–80E1 series turbofan engines of the same type design. We are issuing this AD to minimize the potential of an all-engine flameout event caused by ice accretion and shedding during flight. This AD requires removing certain software versions from the engine ECU.

FAA's Determination of the Effective Date

Since there are currently no domestic operators of this engine model, notice and opportunity for public comment before issuing this AD are unnecessary. A situation exists that allows the immediate adoption of this regulation.

Interim Action

These actions are interim actions due to the on-going investigation. We may take further rulemaking actions in the future, based on the results of the investigation and field experience.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to send us any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES**. Include ''AD Docket No. FAA–2005–21238; Directorate Identifier 2005–NE–12–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it.

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

Examining the AD Docket

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

provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary at the address listed under **ADDRESSES**.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Amendment 39–14093 (70 FR 28806, May 19, 2005), and by adding a new airworthiness directive, Amendment 39–15159, to read as follows:

2007–17–01 General Electric Company: Amendment 39–15159. Docket No. FAA–2005–21238; Directorate Identifier 2005–NE–12–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective August 29, 2007.

Affected ADs

(b) This AD supersedes AD 2005–10–16.

Applicability

(c) This AD applies to General Electric Company (GE) CF6–80E1A1, CF6–80E1A2, CF6–80E1A3, CF6–80E1A4, and CF6–80E1A4/B turbofan engines, installed on Airbus Industrie A330 series airplanes.

Unsafe Condition

(d) This AD results from reports of engine flameout events during flight, including reports of events where all engines simultaneously experienced a flameout or other adverse operation. We are issuing this AD to minimize the potential of an all-engine flameout event caused by ice accretion and shedding during flight. Exposure to ice crystals during flight is believed to be associated with these flameout events.

Compliance

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

Interim Action

(f) These actions are interim actions due to the on-going investigation, and we may take further rulemaking actions in the future based on the results of the investigation and field experience.

Engine Electronic Control Unit (ECU) Software Removal

(g) Before January 31, 2008, remove the following software versions from the ECUs:

TABLE 1.—REMOVAL OF ECU SOFTWARE VERSIONS

Software version	Installed in ECU part No.
(1) E.1.D	1799M99P01
(2) E.1.F	1799M99P03
(3) E.1.G	1799M99P04
(4) E.1.H	1799M99P05
(5) E.1.I	1799M99P06, 1799M99P07, 1851M74P01, 1851M80P01
(6) E.1.J	1799M99P08, 1799M99P09, 1851M74P02, 1851M80P02
(7) E.1.K	1799M99P10, 1851M74P03, 1851M80P03, 1960M84P01
(8) E.1.L	1799M99P11, 1851M74P04, 1851M80P04, 1960M84P02
(9) E.1.M	1799M99P12, 1851M74P05, 1851M80P05, 1960M84P03
(10) E.1.N	1799M99P13, 1851M74P06, 1851M80P06, 1960M84P04, 2043M29P01, 2043M29P02

Previous Software Versions of ECU Software

(h) Until January 31, 2008, once an ECU containing a software version not listed in Table 1 of this AD is installed on an engine, that ECU can be replaced with an ECU containing a previous version of software listed in Table 1.

(i) Once the software version listed in Table 1 of this AD has been removed and new FAA-approved software version is installed in an ECU, reverting to those older software versions in that ECU is prohibited.

(j) After January 31, 2008, use of an ECU with a software version listed in Table 1 of this AD is prohibited.

Alternative Methods of Compliance

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

Special Flight Permits

(l) Special flight permits are not authorized.

Related Information

(m) Information on removing ECU software and installing new software, which provides increased margin to flameout, can be found in GE Service Bulletin No. CF6–80E1 S/B 73–0091, Revision 1, dated June 26, 2007.

(n) Contact John Golinski, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *john.golinski@faa.gov;* telephone: (781) 238–7135, fax: (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on August 6, 2007.

Francis A. Favara,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. E7–15701 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28259; Directorate Identifier 2007–NM–024–AD; Amendment 39–15154; AD 2007–16–15]

RIN 2120–AA64

Airworthiness Directives; Aerospatiale Model SN–601 (Corvette) Airplanes

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

ACTION: Final rule.

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

> Cracks have been evidenced on the nose landing gear LH (left-hand) and RH (right-hand) hinge fittings due to stress corrosion on in-service aircraft. If undetected, they could lead to complete rupture of one or two of the fittings.

The unsafe condition is collapse of the nose landing gear. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective September 18, 2007.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 18, 2007.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mike Borfitz, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2677; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 24, 2007 (72 FR 29086). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

> Cracks have been evidenced on the nose landing gear LH (left-hand) and RH (right-hand) hinge fittings due to stress corrosion on in-service aircraft. If undetected, they could lead to complete rupture of one or two of the fittings.

The unsafe condition is collapse of the nose landing gear. The MCAI requires repetitive inspections of the nose landing gear LH and RH hinge fittings for cracking, and replacing the hinge fitting with a new fitting if any cracking is found. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

We estimate that this AD will affect 3 products of U.S. registry. We also estimate that it will take about 7 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $1,680, or $560 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator,

the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2007–16–15 Aerospatiale: Amendment 39–15154. Docket No. FAA–2007–28259; Directorate Identifier 2007–NM–024–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 18, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Aerospatiale Model SN–601 (Corvette) airplanes, all serial numbers; certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 32: Landing gear.

Reason

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

Cracks have been evidenced on the nose landing gear LH (left-hand) and RH (right-hand) hinge fittings due to stress corrosion on in-service aircraft. If undetected, they could lead to complete rupture of one or two of the fittings.

The unsafe condition is collapse of the nose landing gear. The MCAI requires repetitive inspections of the nose landing gear LH and RH hinge fittings for cracking, and replacing the hinge fitting with a new fitting if any cracking is found.

Actions and Compliance

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

(1) Within 200 flight hours or 6 months after the effective date of this AD, whichever occurs first: Inspect the nose landing gear LH (left-hand) and RH (right-hand) hinge fittings for cracking, in accordance with the instructions of Airbus SN–601 Corvette Service Bulletin 32–17, dated September 23, 2004.

(2) In case of finding one or several cracks, before further flight, replace the hinge fitting with a new hinge fitting in accordance with the instructions of Airbus SN–601 Corvette Service Bulletin 32–17, dated September 23, 2004. Repeat the requirements of paragraph (f)(1) of this AD thereafter at intervals not to exceed 3,600 flight hours or 36 months, whichever occurs first.

(3) If no crack is detected, repeat the requirements of paragraph (f)(1) of this AD thereafter at intervals not to exceed 3,600 flight hours or 36 months, whichever occurs first.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: Although the MCAI or service information allows further flight after cracks are found during compliance with the required action, paragraph (f)(2) of this AD requires that you repair the cracks before further flight.

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Mike Borfitz, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–2677; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI French Airworthiness Directive F–2004–169, dated October 27, 2004; and Airbus SN–601 Corvette Service Bulletin 32–17, dated September 23, 2004; for related information.

Material Incorporated by Reference

(i) You must use Airbus SN–601 Corvette Service Bulletin 32–17, dated September 23, 2004, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on August 2, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–15586 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–27860; Directorate Identifier 2007–CE–034–AD; Amendment 39–15160; AD 2007–17–02]

RIN 2120–AA64

Airworthiness Directives; Allied Ag Cat Productions, Inc. (Type Certificate No. 1A16 Formerly Held by Schweizer Aircraft Corp.) G–164 Series Airplanes

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

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) to supersede AD 82–07–04, which applies to certain Allied Ag Cat Productions, Inc. (Ag Cat) G–164 series airplanes. AD 82–07–04 currently requires you to modify the fuel shut-off valve control by installing a new stop-plate. Since we issued AD 82–07–04, we have determined the need to add airplane models and serial numbers that were not previously included in the Applicability section. Consequently, this AD retains the actions of AD 82–07–04 and adds airplane models and serial numbers to the Applicability section. We are issuing this AD to prevent turning the fuel shut-off valve clockwise past the ''ON'' position stop which, if not corrected, could allow the fuel valve to be rotated to an unplacarded ''OFF'' position. This condition could lead to reduced fuel flow and consequent loss of engine power.

DATES: This AD becomes effective on September 18, 2007.

On September 18, 2007, the Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD.

ADDRESSES: For service information identified in this AD, contact Allied Ag Cat Productions, Inc., 301 West Walnut Street, P.O. Box 482, Walnut Ridge, Arkansas 72479; telephone: (870) 866–2111.

To view the AD docket, go to U.S. Department of Transportation, Docket

Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or on the Internet at *http://dms.dot.gov.* The docket number is FAA–2007–27860; Directorate Identifier 2007–CE–034–AD.

FOR FURTHER INFORMATION CONTACT: Matt Wilbanks, Aerospace Engineer, FAA, Fort Worth Airplane Certification Office, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5051; fax: (817) 222–5960.

SUPPLEMENTARY INFORMATION:

Discussion

On May 9, 2007, we issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Ag Cat G–164 series airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on May 16, 2007 (72 FR 27489). The NPRM proposed to retain the actions of AD 82–07–04 and add airplane models and serial numbers to the applicability.

Comments

We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

- Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM.

Differences Between This AD and the Service Information

This AD affects additional models and serial numbers airplanes compared to the list in the applicability section of the service information. The requirements of this AD take precedence over the provisions in the service information.

Costs of Compliance

We estimate that this AD affects 1,400 airplanes in the U.S. registry, including those airplanes affected by AD 82–07–04.

We estimate the following costs to do the modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2.5 work-hours × $80 per hour = $200	$500	$700	$980,000

We based our fleet cost estimate on all airplanes needing the modification. We have no way of knowing which airplanes already have modified the fuel shut-off control per AD 82–07–04. We also have no way of knowing how many airplanes have been retrofitted with the Gemini fuel shut-off valve part number 3/4–86–6–RT–6 (A3580–1) without incorporating AD 82–07–04.

The estimated total cost on U.S. operators includes the cumulative costs associated with those airplanes affected by AD 82–07–04 and those airplanes being added in this AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a summary of the costs to comply with this AD (and other information as included in the Regulatory Evaluation) and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES**. Include ''Docket No. FAA–2007–27860; Directorate Identifier 2007–CE–034–AD'' in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the Federal Aviation Administration amends part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD) 82–07–04, Amendment 39–4355, and adding the following new AD:

2007–17–02 Allied Ag Cat Productions, Inc. (Type Certificate No. 1A16 formerly held by Schweizer Aircraft Corp.): Amendment 39–15160; Docket No. FAA–2007–27860; Directorate Identifier 2007–CE–034–AD.

Effective Date

(a) This AD becomes effective on September 18, 2007.

Affected ADs

(b) This AD supersedes AD 82–07–04, Amendment 39–4355.

Applicability

(c) This AD applies to the following model and serial number airplanes that are certificated in any category and have Gemini fuel shut-off valve part number (P/N) 3/4–86–6–RT–6 (A3580–1) installed:

(1) *Group 1 (maintains the actions from AD 82–07–04):*

Model	Serial Nos.
(i) G–164A ...	1726A through 1730A.
(ii) G–164B ..	335B through 659B.
(iii) G–164C	1C through 44C.
(iv) G–164D	1D through 22D.

(2) *Group 2:*

Model	Serial Nos.
(i) G–164	All.
(ii) G–164A	All except 1726A through 1730A.
(iii) G–164B and G–164B with 73″ wing gap.	All except 335B through 659B.
(iv) G–164B–15T	All.
(v) G–164B–20T	All.
(vi) G–164B–34T	All.
(vii) G–164C	All except 1C through 44C.
(iv) G–164D and G–164D with 73″ wing gap.	All except 1D through 22D.

Unsafe Condition

(d) This AD results from our determination to add airplane models and serial numbers that were not previously included in the applicability. We are issuing this AD to prevent turning the fuel shut-off valve clockwise past the ''ON'' position which, if not corrected, could allow the fuel valve to be rotated to an unplacarded ''OFF'' position.

Compliance

(e) To address this problem, you must do the following, unless already done:

Actions	Compliance	Procedures
(1) Modify the fuel shut-off valve control by installation of a new stop-plate, P/N A1552–71 (or FAA-approved equivalent).	*(i) For Group 1 Airplanes:* Within the next 100 hours time-in-service (TIS) after April 6, 1982 (the effective date of AD 82–07–04). *(ii) For Group 2 Airplanes:* Within the next 100 hours TIS after September 18, 2007 (the effective date of this AD).	Follow Schweizer Aircraft Corp. Ag-Cat Service Bulletin No. 78, dated January 26, 1982.
(2) Do not install any Gemini fuel shut-off valve P/N 3/4–86–6–RT–6 (A3580-1) on any airplane unless the stop-plate is installed per paragraph (e)(1) of this AD.	*For all Airplanes:* As of the next 100 hours TIS after September 18, 2007 (the effective date of this AD).	Follow Schweizer Aircraft Corp. Ag-Cat Service Bulletin No. 78, dated January 26, 1982.

Alternative Methods of Compliance (AMOCs)

(f) The Manager, Fort Worth Airplane Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Matt Wilbanks, Aerospace Engineer, Fort Worth ACO, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone: (817) 222–5051; fax: (817) 222–5960. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(g) AMOCs approved for AD 82–07–04 are approved for this AD.

Material Incorporated by Reference

(h) You must use Schweizer Aircraft Corp. Ag–Cat Service Bulletin No. 78, dated January 26, 1982, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Allied Ag Cat Productions, Inc., 301 West Walnut Street, P.O. Box 482, Walnut Ridge, Arkansas 72479; telephone: (870) 866–2111.

(3) You may review copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Kansas City, Missouri, on August 6, 2007.

Kim Smith,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–15793 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28256; Directorate Identifier 2007–NM–041–AD; Amendment 39–15155; AD 2007–16–16]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ Airplanes

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

ACTION: Final rule.

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

It has been found the occurrence of smoke on the passenger cabin originated from the valance panel lighting system wiring.

We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective September 18, 2007.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of September 18, 2007.

ADDRESSES: You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on May 24, 2007 (72 FR 29091). That NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

It has been found the occurrence of smoke on the passenger cabin originated from the valance panel lighting system wiring.

The corrective action is replacement of the valance panel lighting system wiring. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed.

Differences Between This AD and the MCAI or Service Information

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

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

Costs of Compliance

Based on the service information, we estimate that this AD affects about 15 products of U.S. registry. We also estimate that it takes about 36 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $80 per work-hour. Required parts cost between $7,900 and $8,610 per product, depending on the airplane configuration. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the AD on U.S. operators to be between $161,700 and $172,350 for the fleet, or between $10,780 and $11,490 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this AD:

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

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

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

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

Examining the AD Docket

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2007–16–16 Empresa Brasileira de Aeronautica S.A. (EMBRAER): Amendment 39–15155. Docket No. FAA–2007–28256; Directorate Identifier 2007–NM–041–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective September 18, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ airplanes, certificated in any category, serial numbers 145412, 145462, 145484, 145495, 145505, 145516, 145528, 145540, 145549, 145555, 145586, 145625, 145637, 145642, 145644, and 145678.

Subject

(d) Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

Reason

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

It has been found the occurrence of smoke on the passenger cabin originated from the valance panel lighting system wiring.

The corrective action is replacement of the valance panel lighting system wiring.

Actions and Compliance

(f) Within 48 months after the effective date of this AD, unless already done, replace the wiring of the valance panel lighting system by another one that complies with the current inverter specifications, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 145LEG–25–0070, dated October 11, 2006.

FAA AD Differences

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

Other FAA AD Provisions

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

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested

using the procedures found in 14 CFR 39.19. Send information to ATTN: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1175; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

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

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

Related Information

(h) Refer to MCAI Brazilian Airworthiness Directive 2007–01–03, effective January 22, 2007, and EMBRAER Service Bulletin 145LEG–25–0070, dated October 11, 2006, for related information.

Material Incorporated by Reference

(i) You must use EMBRAER Service Bulletin 145LEG–25–0070, dated October 11, 2006, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

(3) You may review copies at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Renton, Washington, on August 2, 2007.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–15588 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28145; Airspace Docket No. 07–AAL–06]

Revision of Class E Airspace; Fort Yukon, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revises Class E airspace at Fort Yukon, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). One Standard Instrument Approach Procedure (SIAP) is being amended and three new SIAPs are being developed for the Fort Yukon Airport. A Departure Procedure (DP) and a Direction Finding (DF) procedure (used by Flight Service Station personnel) is also being amended. This action revises existing Class E airspace upward from the surface, from 700 feet (ft.) and 1,200 ft. above the surface at the Fort Yukon Airport, Fort Yukon, AK.

DATES: *Effective Date:* 0901 UTC, October 25, 2007. 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: Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; email: *gary.ctr.rolf@faa.gov*. Internet address: *http://www.alaska.faa.gov/at*.

SUPPLEMENTARY INFORMATION:

History

On Tuesday, May 22, 2007, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise Class E airspace upward from the surface, from 700 ft. above the surface and from 1,200 ft. above the surface at Fort Yukon, AK (72 FR 28626). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing SIAPs for the Fort Yukon Airport. Class E controlled airspace extending upward from the surface, from 700 ft. above the surface and from 1,200 ft. above the surface, in the Fort Yukon Airport area is revised by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as surface areas are published in paragraph 6002 of FAA Order 7400.9P, *Airspace Designations and Reporting Points*, dated September 1, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9P, *Airspace Designations and Reporting Points*, dated September 1, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 revises Class E airspace at the Fort Yukon Airport, Alaska. This Class E airspace is revised to accommodate aircraft executing new and amended DPs and SIAPs, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Fort Yukon Airport, Fort Yukon, Alaska.

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. 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 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 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs,

describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Fort Yukon Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9P, *Airspace Designations and Reporting Points*, dated September 1, 2006, and effective September 15, 2006, is amended as follows:

* * * * *

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

AAL AK E2 Fort Yukon, AK [Revised]

Fort Yukon Airport, AK
(Lat. 66°34′17″ N., long. 145°15′02″ W.)

Within a 4.7-mile radius of the Fort Yukon Airport. This Class E 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 Supplement Alaska Airport/Facility Directory.

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

* * * * *

AAL AK E5 Fort Yukon, AK [Revised]

Fort Yukon Airport, AK
(Lat. 66°34′17″ N., long. 145°15′02″ W.)
Fort Yukon VORTAC
(Lat. 66°34′28″ N., long. 145°16′36″ W.)

That airspace extending upward from 700 feet above the surface within a 7.2-mile radius of the Fort Yukon VORTAC, and within 4 miles either side of the 076° bearing from the Fort Yukon VORTAC, extending from the 7.2-mile radius of the Fort Yukon VORTAC, to 21 miles east of the Fort Yukon VORTAC; and that airspace extending upward from 1,200 feet above the surface within a 71-mile radius of the Fort Yukon VORTAC.

* * * * *

Issued in Anchorage, AK, on July 27, 2007.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E7–15720 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28146; Airspace Docket No. 07–AAL–07]

Revision of Class E Airspace; Kotzebue, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revises Class E airspace at Kotzebue, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). Eight (8) Standard Instrument Approach Procedures (SIAPs) are being amended for the Ralph Wien Memorial Airport at Kotzebue, AK. A Departure Procedure (DP) is also being amended. This action revises existing Class E airspace upward from the surface, from 700 feet (ft.) and 1,200 ft. above the surface at the Ralph Wien Memorial Airport, Kotzebue, AK.

DATES: *Effective Date:* 0901 UTC, October 25, 2007. 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: Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov*. Internet address: *http://www.alaska.faa.gov/at*.

SUPPLEMENTARY INFORMATION:

History

On Tuesday, May 22, 2007, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise Class E airspace upward from the surface, from 700 ft. above the surface and from 1,200 ft. above the surface at Kotzebue, AK (72 FR 28624). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing SIAPs for the Ralph Wien Memorial Airport. The Kotzebue VOR/DME location has also been updated to reflect the current location. Class E controlled airspace extending upward from the surface, from 700 ft. above the surface and from 1,200 ft. above the surface, in the Ralph Wien Memorial Airport area is revised by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as surface areas are published in paragraph 6002 of FAA Order 7400.9P, *Airspace Designations and Reporting Points*, dated September 1, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9P, *Airspace Designations and Reporting Points*, dated September 1, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 revises Class E airspace at the Ralph Wien Memorial Airport, Alaska. This Class E airspace is revised to accommodate aircraft executing amended DPs and SIAPs, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Ralph Wien Memorial Airport, Kotzebue, Alaska.

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. 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 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 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Ralph Wien Memorial Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9P, *Airspace Designations and Reporting Points*, dated September 1, 2006, and effective September 15, 2006, is amended as follows:

* * * * *

Paragraph 6002 Class E Airspace Designated as Surface Areas.

* * * * *

AAL AK E2 Kotzebue, AK [Revised]

Kotzebue, Ralph Wien Memorial Airport, AK
(Lat. 66°53′05″ N., long. 162°35′55″ W.)
Kotzebue VOR/DME, AK
(Lat. 66°53′09″ N., long. 162°32′24″ W.)

Within a 4.3-mile radius of the Ralph Wien Memorial Airport, and within 2.4 miles each side of the 278° radial of the Kotzebue VOR/DME, extending from the 4.3-mile radius of the Ralph Wien Memorial Airport to 8.7 miles west of the Kotzebue VOR/DME, and within 2.4 miles each side of the 092° radial of the Kotzebue VOR/DME extending from the 4.3-mile radius of the Ralph Wien Memorial Airport to 7 miles east of the Kotzebue VOR/DME. This Class E 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 Supplement Alaska Airport/Facility Directory.

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

* * * * *

AAL AK E5 Kotzebue, AK [Revised]

Kotzebue, Ralph Wien Memorial Airport, AK
(Lat. 66°53′05″ N., long. 162°35′55″ W.)
Kotzebue VOR/DME, AK
(Lat. 66°53′08″ N., long. 162°32′24″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of the Ralph Wien Memorial Airport, and within 4 miles north and 8.2 miles south of the 278° radial of the Kotzebue VOR/DME extending from the 6.8-mile radius of the Ralph Wien Memorial Airport to 16.4 miles west of the Kotzebue VOR/DME; and within 8 miles north of the 092° radial of the Kotzebue VOR/DME, extending from the 6.8-mile radius of the Ralph Wien Memorial Airport to 16 miles west of the Kotzebue VOR/DME, and from the 063 radial of the Kotzebue VOR/DME clockwise to the 130° of the Kotzebue VOR/DME within 18 miles of the Kotzebue VOR/DME; and that airspace extending upward from 1,200 feet above the surface within a 74-mile radius of the Kotzebue VOR/DME.

* * * * *

Issued in Anchorage, AK, on July 27, 2007.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E7–15717 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28147; Airspace Docket No. 07–AAL–08]

Revision of Class E Airspace; Noatak, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revises Class E airspace at Noatak, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). One Standard Instrument Approach Procedures (SIAP) is being amended for the Noatak Airport. A Departure Procedure (DP) is also being amended. This action revises existing Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Noatak Airport, Noatak, AK.

DATES: *Effective Date:* 0901 UTC, October 25, 2007. 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: Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

History

On Tuesday, May 22, 2007, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise Class E airspace upward from 700 ft. above the surface and from 1,200 ft. above the surface at Noatak, AK (72 FR 28627). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing SIAPs for the Noatak Airport. Class E controlled airspace extending upward from 700 ft. above the surface and from 1,200 ft. above the surface in the Noatak Airport area is revised by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9P, *Airspace Designations and Reporting Points,* dated September 1, 2006, and effective September 15, 2006, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 revises Class E airspace at the Noatak Airport, Alaska. This Class E airspace is revised to accommodate aircraft executing amended DPs and SIAPs, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Noatak Airport, Noatak, Alaska.

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. 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 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 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Noatak Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9P, *Airspace Designations and Reporting Points,* dated September 1, 2006, and effective September 15, 2006, is amended as follows:

* * * * *

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

* * * * *

AAL AK E5 Noatak, AK [Revised]

Noatak Airport, AK
(Lat. 67°33′58″ N., long. 162°58′30″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Noatak Airport; and that airspace extending upward from 1,200 feet above the surface within a 73-mile radius of the Noatak Airport.

* * * * *

Issued in Anchorage, AK, on July 27, 2007.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E7–15718 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2007–28148; Airspace Docket No. 07–AAL–09]

Revision of Class E Airspace; Ruby, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revises Class E airspace at Ruby, AK to provide adequate controlled airspace to contain aircraft executing Standard Instrument Approach Procedures (SIAPs). Two new Standard Instrument Approach Procedures (SIAPs) are being developed for the Ruby Airport. This action revises existing Class E airspace upward from 700 feet (ft.) and 1,200 ft. above the surface at Ruby Airport, Ruby, AK.

DATES: *Effective Date:* 0901 UTC, October 25, 2007. 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: Gary Rolf, AAL–538G, Federal Aviation Administration, 222 West 7th Avenue, Box 14, Anchorage, AK 99513–7587; telephone number (907) 271–5898; fax: (907) 271–2850; e-mail: *gary.ctr.rolf@faa.gov.* Internet address: *http://www.alaska.faa.gov/at.*

SUPPLEMENTARY INFORMATION:

History

On Tuesday, May 22, 2007, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) to revise Class E airspace upward from 700 ft. above the surface and from 1,200 ft. above the surface at Ruby, AK (72 FR 28629). The action was proposed in order to create Class E airspace sufficient in size to contain aircraft while executing SIAPs for the Ruby Airport. The Notice of Proposed Rulemaking contained airport location data, which has since been updated. The revised airport location coordinates are listed in this rule. Class E controlled airspace extending upward from 700 ft. above the surface and from 1,200 ft. above the surface, in the Ruby Airport area is revised by this action.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments were received. The rule is adopted as proposed.

The area will be depicted on aeronautical charts for pilot reference. The coordinates for this airspace docket are based on North American Datum 83. The Class E airspace areas designated as 700/1,200 ft. transition areas are published in paragraph 6005 of FAA Order 7400.9P, *Airspace Designations and Reporting Points,* dated September 1, 2006, and effective September 15, 2006, which is incorporated by

reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

The Rule

This amendment to 14 CFR part 71 revises Class E airspace at the Ruby Airport, Alaska. This Class E airspace is revised to accommodate aircraft executing new SIAPs, and will be depicted on aeronautical charts for pilot reference. The intended effect of this rule is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at the Ruby Airport, Ruby, Alaska.

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. 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 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 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart 1, Section 40103, Sovereignty and use of airspace. Under that section, the FAA is charged with prescribing regulations to ensure the safe and efficient use of the navigable airspace. This regulation is within the scope of that authority because it creates Class E airspace sufficient in size to contain aircraft executing instrument procedures for the Ruby Airport and represents the FAA's continuing effort to safely and efficiently use the navigable airspace.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9P, *Airspace Designations and Reporting Points,* dated September 1, 2006, and effective September 15, 2006, is amended as follows:

* * * * *

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

* * * * *

AAL AK E5 Ruby, AK [Revised]

Ruby, Ruby Airport, AK
(Lat. 64°43′38″ N., long. 155°28′12″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of the Ruby Airport, and within 4.8 miles either side of the 051° bearing from the Ruby Airport extending from the 6.4-mile radius of the Ruby Airport to 17.4 miles northeast of the Ruby Airport; and that airspace extending upward from 1,200 feet above the surface within a 70-mile radius of the Ruby Airport.

* * * * *

Issued in Anchorage, AK, on July 27, 2007.

Anthony M. Wylie,

Manager, Alaska Flight Services Information Area Group.

[FR Doc. E7–15719 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

50 CFR Part 660

[Docket No. 0612242956–7411–02]

RIN 0648–AT18

Establishment of Marine Reserves and a Marine Conservation Area Within the Channel Islands National Marine Sanctuary; Announcement of Effective Date

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Announcement of effective date.

SUMMARY: NOAA published a final rule on May 24, 2007 (72 FR 29208) that established marine reserves and a marine conservation area in the Channel Islands National Marine Sanctuary. Under the National Marine Sanctuaries Act, the final regulations would automatically take effect at the end of 45 days of continuous session of Congress beginning on May 24, 2007. The 45-day review period ended on Sunday, July 29, 2007. This document confirms the effective date as July 29, 2007.

DATES: *Effective Date:* The final rule published on May 24, 2007 (72 FR 29208) took effect on July 29, 2007.

FOR FURTHER INFORMATION CONTACT: Sean Hastings, (805) 884–1472; e-mail: *Sean.Hastings@noaa.gov.*

Dated: August 3, 2007.

William Corso,

Deputy Assistant Administrator for Ocean Services and Coastal Zone Management.

[FR Doc. 07–3915 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 2, 3c, 4, 5, 6, 8, 11, 16, 33, 35, 131, 153, 154, 157, 292, 300, 366, 375, 376, 380, and 385

[Docket No. RM07–7–000; Order No. 699]

Conforming Changes

Issued August 6, 2007.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Commission is issuing this Final Rule to make minor changes to its regulations. This Final Rule revises a number of references that have become outdated for various reasons. It also updates several provisions to conform to recent legislation and revises the Commission's delegations of authority both to allow the Secretary to refer complaint proceedings to the Commission's Dispute Resolution Service, and to organize better and clarify other delegations.

DATES: *Effective Date:* The rule will become effective August 14, 2007.

FOR FURTHER INFORMATION CONTACT: Wilbur Miller, Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8953.

SUPPLEMENTARY INFORMATION: Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellinghoff.

Final Rule

I. Discussion

1. This Final Rule amends a number of sections of the Commission's regulations to revise outdated references to various Commission offices. An internal reorganization in 2003 resulted in functions previously carried out by the Offices of Pipeline Regulation and Electric Power Regulation being distributed between the Offices of Markets, Tariffs and Rates (OMTR) and Energy Projects (OEP). In addition, the functions of the Office of Hydropower Licensing were moved to OEP. Since then, OMTR has been renamed the Office of Energy Markets and Reliability (OEMR). The Commission's regulations currently contain references to the three former offices, as well as several references to OMTR. This rulemaking changes these references to OEMR or OEP, as appropriate.

2. This Final Rule also revises the delegations to the Director of OEMR [1] contained in 18 CFR 375.307. The majority of these revisions are intended to organize better and to clarify those delegations rather than modify them. The revisions delete redundant language; revise language concerning electric, gas and oil filings to better ensure consistency in the delegations of authority; and reorganize the language by program.

3. In a few instances, OEMR's delegated authority has been expanded. In such cases, these authorities are intended to assist the Commission in processing routine, noncontroversial matters in an efficient manner. New section 375.307(a)(2) includes delegated authority to assist OEMR in implementing certain reliability provisions of Federal Power Act section 215, which were enacted by the Energy Policy Act of 2005.[2] New sections 375.307(a)(4)(iii) and (a)(6) also delegate to the Director of OEMR authority to assist in implementing the provisions of the Energy Policy Act of 2005.[3] New sections 375.307(a)(10)(iii) and (iv) add delegated authority to act in routine matters involving natural gas pipeline rates and charges under section 311 of the Natural Gas Policy Act of 1978 [4] that is similar to the authority delegated to the Director of OEMR to act on natural gas pipeline rates and charges under section 4 of the Natural Gas Act. New section 375.307(b)(2)(i) delegates authority to act on waiver requests for various forms, while new section 375.307(b)(3)(ii) delegates to the Director of OEMR authority to request further information relating to matters processed by OEMR. Finally, because new section 375.307(a)(4) includes authority to act on uncontested FERC–65A and FERC–65B filings, overlapping authority is being deleted from section 366.4.

4. The rule updates one of the standards of conduct for Commission employees to include a reference to a relevant provision in the Energy Policy Act of 2005. Current 18 CFR 3c.2(a), which prohibits Commission employees from disclosing nonpublic information, contains references to relevant provisions of the Federal Power Act and Natural Gas Act. The revision adds a reference to a similar statutory provision, section 1264(d) of the new Public Utility Holding Company Act of 2005, added by the Energy Policy Act, Pub. L. No. 109–58, § 1264(d), 119 Stat. 594, 974 (2005).

5. This rule also makes two changes to the delegations to the Secretary of the Commission contained in 18 CFR 375.302. The first amends § 375.302 to add a new paragraph (y), which delegates to the Secretary the authority to refer complaint proceedings to the Commission's Dispute Resolution Service (DRS). Under the new provision, the Secretary is authorized to direct DRS staff to contact the parties in any complaint proceeding subject to the Commission's jurisdiction so that DRS can assist the parties in determining whether use of an alternative dispute resolution (ADR) process is appropriate to address matters raised in the complaint.[5] The Secretary is also authorized to establish a date by which DRS must report to the Commission whether an ADR process will be pursued by the parties.

6. The second change to the Secretary's delegations, new paragraph (z), allows the Secretary to specify formatting requirements for documents submitted to the Commission on electronic media. Allowing the Secretary to do so, through instructions issued to the public and posted on the Commission's Web site, is more efficient and thus preferable to specifying formats in a regulation. Technological needs and capabilities change frequently. This revision will allow Commission staff to update formats without delay.

7. A minor change is being made to the Commission's regulations on recreational opportunities and development at licensed hydroelectric projects. The provision governing filing of Form No. 80 [6] is being revised to require filing with the Commission rather than with a Regional Office. This will facilitate electronic filing of the form, which the Commission expects to implement in the near future. In addition, we are eliminating section 8.11(a)(3), which provides that the filer need only update a previously filed form rather than file a completely new form. This change similarly anticipates electronic filing, which will allow prior forms to be easily saved, stored and edited for resubmittal.

8. The delegation to the Director of External Affairs to take necessary actions in connection with requests under the Freedom of Information Act (FOIA) [7] is being deleted. The delegation is unnecessary because the Commission's regulations implementing FOIA afford the Director the needed authority.[8]

9. A minor clarification is being made to allow the rejection of applications for certificates of public convenience and necessity within ten business days

[1] The Director's delegations were recently revised to reflect the transfer of some functions to the Office of Enforcement. *Delegations of Authority*, 118 FERC ¶ 61,060 (2007). This Final Rule makes additional revisions.

[2] Pub. L. No. 109–58, 1211, 119 Stat. 594, 982–83 (2005).

[3] Id., 1253, 1275(b).

[4] *See* 18 CFR 284.123.

[5] Under the Commission's existing regulations, complainants are required to state, among other things, whether DRS, the Enforcement Hotline, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures have been used prior to the filing of the complaint and whether the complainant believes that use of an ADR process could successfully resolve the complaint. *See* 18 CFR 385.206(b)(9).

[6] 18 CFR 8.11.

[7] 5 U.S.C. 552 (2006).

[8] 18 CFR 388.108.

rather than ten calendar days.[9] This parallels similar language in the provision regarding notice of acceptance of an application.[10]

10. Finally, the Commission's regulations are being revised to correct erroneous or outdated references or language in the following sections: 2.9, 4.30, 4.32, 4.33, 4.41, 4.71, 4.81, 4.92, 4.107, 5.9, 5.18, 6.1, 11.10, 16.12, 16.16, 16.19, 16.22, 131.20, 157.14, 157.209, 375.308, and 388.2201.

II. Information Collection Statement

11. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rule.[11] This Final Rule does not contain information reporting requirements and is not subject to OMB approval.

III. Environmental Analysis

12. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the quality of the human environment.[12] Issuance of this Final Rule does not represent a major federal action having a significant adverse effect on the quality of the human environment under the Commission's regulations implementing the National Environmental Policy Act. Part 380 of the Commission's regulations lists exemptions to the requirement to draft an Environmental Analysis or Environmental Impact Statement. Included is an exemption for procedural, ministerial or internal administrative actions.[13] This rulemaking is exempt under that provision.

IV. Regulatory Flexibility Act

13. The Regulatory Flexibility Act of 1980 (RFA)[14] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This Final Rule concerns matters of internal agency procedure and the Commission therefore certifies that it will not have such an impact. An analysis under the RFA is not required.

V. Document Availability

14. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

15. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

16. User assistance is available for eLibrary and the FERC's Web site during normal business hours. For assistance, please contact FERC Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *ferconlinesupport@ferc.gov*), or the Public Reference Room at (202) 502–8371 Press 0, TTY (202) 502–8659. (e-mail at *public.referenceroom@ferc.gov*).

VI. Effective Date and Congressional Notification

17. These regulations are effective immediately upon publication in the **Federal Register**. In accordance with 5 U.S.C. 553(d)(3), the Commission finds that good cause exists to make this Final Rule effective immediately. It concerns only matters of internal operations or is ministerial in nature and will not affect the rights of persons appearing before the Commission. There is, therefore no reason to make this rule effective at a later time.

18. The provisions of 5 U.S.C. 801 regarding Congressional review of Final Rules do not apply to this Final Rule, because this Final Rule concerns agency procedure and practice and will not substantially affect the rights of non-agency parties.

19. The Commission is issuing this as a Final Rule without a period for public comment. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment is unnecessary. This Final Rule concerns only matters of agency procedure and will not significantly affect regulated entities or the general public.

List of Subjects

18 CFR Part 2

Administrative practice and procedure, Electric power, Natural gas, Pipelines, Reporting and recordkeeping requirements.

18 CFR Part 3c

Government employees, Standards of conduct.

18 CFR Part 4

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 5

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 6

Electric power.

18 CFR Part 8

Electric power, Recreation and recreation areas, Reporting and recordkeeping requirements.

18 CFR Part 11

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 16

Administrative practice and procedure, Electric power, Reporting and recordkeeping requirements.

18 CFR Part 33

Electric utilities, Reporting and recordkeeping requirements, Securities.

18 CFR Part 35

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 131

Electric power, Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 153

Exports, Imports, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 154

Alaska, Natural gas, Natural gas companies, Pipelines, Rate schedules and tariffs, Reporting and recordkeeping requirements.

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 292

Electric power, Reporting and recordkeeping requirements.

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[9] 18 CFR 157.8(a).

[10] 18 CFR 157.9.

[11] 5 CFR Part 1320.

[12] *Regulations Implementing the National Environmental Policy Act*, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[13] 18 CFR 380.4(1) and (5).

[14] 5 U.S.C. 601–12.

18 CFR Part 300

Electric power, Reporting and recordkeeping requirements.

18 CFR Part 366

Electric power, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 375

Authority delegations (Government agencies), Seals and insignia, Sunshine Act.

18 CFR Part 376

Civil defense, Organization and functions (Government agencies).

18 CFR Part 380

Environmental impact statements, Reporting and recordkeeping requirements.

18 CFR Part 385

Administrative practice and procedure, Electric utilities, Penalties, Pipelines, Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,

Acting Deputy Secretary.

■ In consideration of the foregoing, the Commission amends parts 2, 3c, 4, 5, 6, 8, 11, 16, 33, 35, 131, 153, 154, 157, 292, 300, 366, 375, 376, 380 and 385, Chapter I, Title 18, *Code of Federal Regulations,* as follows.

PART 2—GENERAL POLICY AND INTERPRETATIONS

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 792–825y, 2601–2645; 42 U.S.C. 4321–4361, 7101–7352; Pub. L. No. 109–58, 119 Stat. 594.2.

■ 2. Section 2.9 is amended by revising the list following paragraph (c) to read as follows:

§ 2.9 Conditions in preliminary permits and licenses—list of and citations to ''P–'' and ''L–'' forms.

* * * * *

(c) * * *

P–1: Preliminary Permit, 11 F.P.C. 699 (December 2, 1952), 16 F.P.C. 1303 (December 4, 1956), 54 F.P.C. 1797 (October 31, 1975).

L–1: Constructed Major Project Affecting Lands of the United States, 12 F.P.C. 1262 (September 25, 1953), 32 F.P.C. 71 (July 8, 1964), 54 F.P.C. 1799 (October 31, 1975).

L–2: Unconstructed Major Project Affecting Lands of the United States, 12 F.P.C. 1137 (August 7, 1953), 17 F.P.C. 62 (January 18, 1957), 31 F.P.C. 528 (March 10, 1964), 54 F.P.C. 1808 (October 31, 1975).

L–3: Constructed Major Project Affecting Navigable Waters of the United States, 12 F.P.C. 836 (February 6, 1953), 17 F.P.C. 385 (March 4, 1957), 30 F.P.C. 1658 (November 21, 1963), 32 F.P.C. 1114 (October 15, 1964), 36 F.P.C. 971 (December 6, 1966), 40 F.P.C. 1136 (October 29, 1968), 54 F.P.C. 1817 (October 31, 1975).

L–4: Unconstructed Major Project Affecting Navigable Waters of the United States, 16 F.P.C. 1284 (November 29, 1956), 32 F.P.C. 839 (September 21, 1964), 42 F.P.C. 280 (July 30, 1969), 54 F.P.C. 1824 (October 31, 1975).

L–5: Constructed Major Project Affecting Navigable Waters and Lands of the United States, 12 F.P.C. 1329 (October 23, 1953), 17 F.P.C. 110 (January 13, 1957), 38 F.P.C. 203 (July 26, 1967), 54 F.P.C. 1832 (October 31, 1975).

L–6: Unconstructed Major Project Affecting Navigable Waters and Lands of the United States, 12 F.P.C. 1271 (September 29, 1953), 16 F.P.C. 1127 (October 29, 1956), 31 F.P.C. 284 (February 5, 1964), 34 F.P.C. 1114 (October 7, 1965), 54 F.P.C. 1842 (October 31, 1975).

L–7 (retired): Minor Project Affecting Lands of the United States, 12 F.P.C. 911 (March 30, 1953), 17 F.P.C. 486 (April 2, 1957).

L–8 (retired): Minor-Part Project (Transmission Line), 12 F.P.C. 1017 (June 12, 1953), 41 F.P.C. 217 (March 5, 1969).

L–9: Constructed Minor Project Affecting Navigable Waters of the United States, 32 F.P.C. 577 (August 10, 1964), 54 F.P.C. 1852 (October 31, 1975).

L–10: Constructed Major Project Affecting the Interests of Interstate or Foreign Commerce, 37 F.P.C. 860 (May 9, 1967), 40 F.P.C. 1489 (December 20, 1968), 54 F.P.C. 1858 (October 31, 1975).

L–11: Unconstructed Major Project Affecting the Interests of Interstate or Foreign Commerce, 34 F.P.C. 602 (August 26, 1965), 36 F.P.C. 687 (September 26, 1966), 41 F.P.C. 719 (June 6, 1969), 54 F.P.C. 1864 (October 31, 1975).

L–12: Constructed Minor Project Affecting the Interests of Interstate or Foreign Commerce, 35 F.P.C. 875 (June 3, 1966), 40 F.P.C. 1447 (December 10, 1968), 54 F.P.C. 1871 (October 31, 1975).

L–13: (retired): Unconstructed Major Project Affecting the Interests of Interstate or Foreign Commerce and Affecting Lands of the United States, 42 F.P.C. 367 (August 6, 1969).

L–14: Unconstructed Minor Project Affecting Navigable Waters of the United States, 54 F.P.C. 1876 (October 31, 1975).

L–15: Unconstructed Minor Project Affecting the Interests of Interstate or Foreign Commerce, 54 F.P.C. 1883 (October 31, 1975).

L–16: Constructed Minor Project Affecting Lands of the United States, 54 F.P.C. 1888 (October 31, 1975).

L–17: Unconstructed Minor Project Affecting Lands of the United States, 54 F.P.C. 1896 (October 31, 1975).

L–18: Constructed Minor Project Affecting Navigable Waters and Lands of the United States, 54 F.P.C. 1903 (October 31, 1975).

L–19: Unconstructed Minor Project Affecting Navigable Waters and Lands of the United States, 54 F.P.C. 1911 (October 31, 1975).

L–20: Constructed Transmission Line Project, 54 F.P.C. 1919 (October 31, 1975).

L–21: Unconstructed Transmission Line Project, 54 F.P.C. 1923 (October 31, 1975).

PART 3c—STANDARDS OF CONDUCT

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

Authority: 15 U.S.C. 717g; 16 U.S.C. 825(b); 42 U.S.C. 7171, 7172.

■ 4. Section 3c.2 is amended by revising paragraph (a) to read as follows:

§ 3c.2 Nonpublic information.

(a) Section 1264(d) (42 U.S.C. 16452(d)) of the Public Utility Holding Company Act of 2005, section 301(b) (16 U.S.C. 825(b)) of the Federal Power Act, and section 8(b) (15 U.S.C. 717g) of the Natural Gas Act prohibit any employee, in the absence of Commission or court direction, from divulging any fact or information which may come to his or her knowledge during the course of examination of books or other accounts.

* * * * *

PART 4—LICENSES, PERMITS, EXEMPTIONS AND DETERMINATION OF PROJECT COSTS

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

Authority: 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

§ 4.30 [Amended]

■ 6. Section 4.30 is amended by amending paragraph (b)(6)(ii) to remove the phrase ''April 20, 1977'' and add in its place the phrase ''July 22, 2005,'' and by amending paragraph (b)(28)(iii) to add the phrase ''(40 MW in the case of

a municipal water supply project)'' before the semi-colon.

§ 4.32 [Amended]

■ 7. Section 4.32 is amended by amending paragraph (h) to remove the phrase ''Hydropower, Environment and Engineering'' and add in its place the phrase ''Hydropower Licensing.''

§ 4.33 [Amended]

■ 8. Section 4.33 is amended by amending paragraph (b)(2) to add the word ''except'' before the phrase ''as provided.''

§ 4.41 [Amended]

■ 9. Section 4.41 is amended by amending paragraph (f)(4)(vii) to remove the phrase ''fourteen copies'' and add in its place the phrase ''eight copies,'' and by amending paragraph (f)(6)(v) to remove the phrase ''measures of facilities'' and add in its place the phrase ''measures or facilities.''

§ 4.71 [Amended]

■ 10. Section 4.71 is amended by amending paragraph (a)(6)(i) to remove the phrase ''and distribution power'' and add in its place the phrase ''and distributing power.''

§ 4.81 [Amended]

■ 11. Section 4.81 is amended by amending paragraph (d) to remove the phrase ''Exhibit 4'' and add in its place the phrase ''Exhibit 3.''

§ 4.92 [Amended]

■ 12. Section 4.92 is amended by amending the text following paragraph (b) to remove the phrase ''paragraph (b)(26)(v)'' and add in its place the phrase ''paragraph (b)(28)(v).''

§ 4.96 [Amended]

■ 13. Section 4.96 is amended by amending paragraph (c) to remove the phrase ''Hydropower Licensing'' and add in its place the phrase ''Energy Projects.''

§ 4.104 [Amended]

■ 14. Section 4.104 is amended by amending paragraph (c) to remove the phrase ''Hydropower Licensing'' and add in its place the phrase ''Energy Projects.''

§ 4.107 [Amended]

■ 15. Section 4.107 is amended by amending paragraph (a) to remove the phrase ''the fee prescribed in § 381.601 of this chapter.''

PART 5—INTEGRATED LICENSE APPLICATION PROCESS

■ 16. The authority citation for part 5 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 42 U.S.C. 7101–7352.

§ 5.9 [Amended]

■ 17. Section 5.9 is amended by amending paragraph (b)(3) to remove the phrase ''is a not resource agency'' and add in its place the phrase ''is not a resource agency'' and by amending paragraph (b)(6) to remove the word ''filed'' and add in its place the word ''field.''

§ 5.18 [Amended]

■ 18. Section 5.18 is amended by amending paragraph (a)(5)(i) to remove the phrase ''Exhibits A, B, C, D, F, and G'' and add in its place the phrase ''Exhibits A, F, and G.''

PART 6—SURRENDER OR TERMINATION OF LICENSE

■ 19. The authority citation for part 6 continues to read as follows:

Authority: Secs. 6, 10(i), 13, 41 Stat. 1067, 1068, 1071, as amended, sec. 309, 49 Stat. 858; 16 U.S.C. 799, 803(i), 806, 825h; Pub. L. 96–511, 94 Stat. 2812 (44 U.S.C. 3501 *et seq.*), unless otherwise noted.

§ 6.1 [Amended]

■ 20. Section 6.1 is amended by amending the cross references to remove the phrase ''§§ 4.40 to 4.42'' and add in its place the phrase ''§§ 4.40 to 4.41,'' and to remove the last sentence.

PART 8—RECREATIONAL OPPORTUNITIES AND DEVELOPMENT AT LICENSED PROJECTS

■ 21. The authority citation for part 8 continues to read as follows:

Authority: 5 U.S.C. 551–557; 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

§ 8.11 [Amended]

■ 22. Section 8.11 is amended by amending paragraph (a)(1) to remove the phrase ''a Commission Regional Office'' and replace it with the phrase ''the Commission''; by amending paragraph (a)(2) to remove the phrase ''April 1, 1991'' and replace it with the phrase ''April 1, 2009,'' and to remove the phrase ''December 31, 1990'' and replace it with the phrase ''December 31, 2008''; by removing paragraph (a)(3); and by redesignating paragraph (a)(4) as new paragraph (a)(3).

PART 11—ANNUAL CHARGES UNDER PART 1 OF THE FEDERAL POWER ACT

■ 23. The authority citation for part 11 continues to read as follows:

Authority: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

§ 11.10 [Amended]

■ 24. Section 11.10 is amended by amending paragraph (c)(5) to remove the phrase ''the lesser or'' and add in its place the phrase ''the lesser of.''

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

■ 25. The authority citation for part 16 continues to read as follows:

Authority: 16 U.S.C. 791a–825r; 42 U.S.C. 7101–7352.

§ 16.12 [Amended]

■ 26. Section 16.12 is amended by amending paragraph (b) to remove the phrase ''16.10(d), and 16.10(e)'' and add in its place the phrase ''and 16.10(d).''

§ 16.16 [Amended]

■ 27. Section 16.16 is amended by amending paragraph (a) to remove the phrase ''§ 385.2010'' and add in its place the phrase ''§ 385.212.''

§ 16.19 [Amended]

■ 28. Section 16.19 is amended by amending paragraph (c)(2) to remove the phrase ''[insert the effective date of the rule]'' and add in its place the phrase ''July 3, 1989.''

§ 16.22 [Amended]

■ 29. Section 16.22 is amended by amending paragraph (b) to remove the phrase ''16.9(d), and 16.20(c)'' and add in its place the phrase ''and 16.9(d).''

PART 33—APPLICATIONS UNDER FEDERAL POWER ACT SECTION 203

■ 30. The authority citation for part 33 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; Pub. L. No. 109–58, 119 Stat. 594.

§ 33.10 [Amended]

■ 31. Section 33.10 is amended by removing the phrase ''Markets, Tariffs and Rates'' and adding in its place the phrase ''Energy Markets and Reliability.''

PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 32. The authority citation for part 35 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 35.2 [Amended]

■ 33. Section 35.2 is amended by amending paragraph (c) to remove the phrase ''Electric Power Regulation'' and add in its place the phrase ''Energy Markets and Reliability.''

§ 35.5 [Amended]

■ 34. Section 35.5 is amended by amending paragraph (b) to remove the phrase ''Markets, Tariffs and Rates'' and add in its place the phrase ''Energy Markets and Reliability'' and to remove the phrase ''§ 375.307(k)(3)'' and add in its place the phrase ''§ 375.307(a)(1)(ii).''

§ 35.13 [Amended]

■ 35. Section 35.13 is amended by amending paragraph (a)(3) to remove the phrase ''Electric Power Regulation'' and add in its place the phrase ''Energy Markets and Reliability.''

PART 131—FORMS

■ 36. The authority citation for part 131 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 131.20 [Amended]

■ 37. Section 131.20 is amended by amending the text at paragraph (5) to remove the phrase ''section 9(b)'' and add in its place the phrase ''section 9(a)(2).''

PART 153—APPLICATIONS FOR AUTHORIZATION TO CONSTRUCT, OPERATE OR MODIFY FACILITIES USED FOR THE EXPORT OR IMPORT OF NATURAL GAS

■ 38. The authority citation for part 153 continues to read as follows:

Authority: 15 U.S.C. 717b, 717o; E.O. 10485, 3 CFR, 1949–1953 Comp., p. 970, as amended by E.O. 12038, 3 CFR, 1978 Comp., p. 136, DOE Delegation Order No. 0204–112, 49 FR 6684 (February 22, 1984).

§ 153.8 [Amended]

■ 39. Section 153.8 is amended by amending paragraphs (a)(5) and (a)(6) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects.''

§ 153.21 [Amended]

■ 40. Section 153.21 is amended by amending paragraph (b) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects.''

PART 154—RATE SCHEDULES AND TARIFFS

■ 41. The authority citation for part 154 continues to read as follows:

Authority: 15 U.S.C. 717–717w; 31 U.S.C. 9701; 42 U.S.C. 7102–7352.

§ 154.5 [Amended]

■ 42. Section 154.5 is amended by removing the phrase ''Pipeline Regulation'' and adding in its place the phrase ''Energy Markets and Reliability'' and by removing the phrase ''§ 375.307(b)(2)'' and adding in its place the phrase ''§ 375.307(a)(8)(iii).''

§ 154.302 [Amended]

■ 43. Section 154.302 is amended by amending paragraph (b) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Markets and Reliability.''

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

■ 44. The authority citation for part 157 continues to read as follows:

Authority: 15 U.S.C. 717–717w.

§ 157.8 [Amended]

■ 45. Section 157.8 is amended by amending paragraph (a) to remove the phrase ''Pipeline Regulation may reject the application within 10 days'' and add in its place the phrase ''Energy Projects or the Director of the Office of Energy Markets and Reliability may reject the application within 10 business days,'' and by amending paragraph (c) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects or the Director of the Office of Energy Markets and Reliability.''

§ 157.14 [Amended]

■ 46. Section 157.14 is amended by amending paragraph (a) to remove the phrase ''G–I, G–II, and H(iv)'' and add in its place the phrase ''G–I, and G–II.''

§ 157.205 [Amended]

■ 47. Section 157.205 is amended by amending paragraphs (c), (f), and (g) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects.''

§ 157.206 [Amended]

■ 48. Section 157.206 is amended by amending paragraph (c) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects.''

§ 157.208 [Amended]

■ 49. Section 157.208 is amended by amending paragraphs (d) and (g) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects'' and by amending paragraph (d) to remove the phrase ''375.307(d)'' and add in its place the phrase ''375.308(x)(1).''

§ 157.209 [Amended]

■ 50. Section 157.209 is amended by amending paragraph (a) to remove the phrase ''§ 158.208(d)'' and add in its place the phrase ''§ 157.208(d).''

Appendix II to Subpart F [Amended]

■ 51. Appendix II to subpart F is amended by amending paragraph (1)(b) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects.''

PART 292—REGULATIONS UNDER SECTIONS 201 AND 210 OF THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978 WITH REGARD TO SMALL POWER PRODUCTION AND COGENERATION

■ 52. The authority citation for part 292 continues to read as follows:

Authority: 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 292.210 [Amended]

■ 53. Section 292.210 is amended by amending paragraph (e)(3) to remove the phrase ''Hydropower Licensing'' and add in its place the phrase ''Energy Projects.''

§ 292.211 [Amended]

■ 54. Section 292.211 is amended by amending paragraphs (f) and (g) to remove the phrase ''Hydropower Licensing'' and add in its place the phrase ''Energy Projects.''

PART 300—CONFIRMATION AND APPROVAL OF THE RATES OF FEDERAL POWER MARKETING ADMINISTRATIONS

■ 55. The authority citation for part 300 continues to read as follows:

Authority: 16 U.S.C. 825s, 832–832l, 838–838k, 839–839h; 42 U.S.C. 7101–7352; 43 U.S.C. 485–485k.

§ 300.10 [Amended]

■ 56. Section 300.10 is amended by amending paragraph (h)(2) to remove the phrase ''Electric Power Regulation'' and add in its place the phrase ''Energy Markets and Reliability.''

§ 300.20 [Amended]

■ 57. Section 300.20 is amended by amending paragraph (b)(1)(i) to remove the phrase ''Electric Power Regulation'' and add in its place the phrase ''Energy Markets and Reliability.''

PART 366—PUBLIC UTILITY HOLDING COMPANY ACT OF 2005

■ 58. The authority citation for part 366 continues to read as follows:

Authority: 42 U.S.C. 16451–16463.

■ 59. Section 366.4 is amended by revising paragraphs (b)(1) and (c)(1) to read as follows:

§ 366.4 FERC–65, notification of holding company status, FERC–65A, exemption notification, and FERC–65B, waiver notification.

* * * * *

(b) *FERC–65A (exemption notification) and petitions for exemption.* (1) Persons who, pursuant to § 366.3(b)(2), seek exemption from the requirements of § 366.2 and the accounting, record-retention, and reporting requirements of §§ 366.21, 366.22, and 366.23, may seek such exemption by filing FERC–65A (exemption notification); FERC–65A must be subscribed, consistent with § 385.2005(a) of this chapter, but need not be verified. These filings will be noticed in the **Federal Register**; persons who file FERC–65A must include a form of notice suitable for publication in the **Federal Register** in accordance with the specifications in § 385.203(d) of this chapter. Persons who file FERC–65A in good faith shall be deemed to have a temporary exemption upon filing. If the Commission has taken no action within 60 days after the date of filing FERC–65A, the exemption shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the temporary exemption will remain in effect until such time as the Commission has determined whether to grant or deny the exemption. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee.

* * * * *

(c) *FERC–65B (waiver notification) and petitions for waiver.* (1) Persons who, pursuant to § 366.3(c), seek waiver of the accounting, record-retention, and reporting requirements of §§ 366.21, 366.22, and 366.23, may seek such waiver by filing FERC–65B (waiver notification); FERC–65B must be subscribed, consistent with § 385.2005(a) of this chapter, but need not be verified. FERC–65B will be noticed in the **Federal Register**; persons who file FERC–65B must include a form of notice suitable for publication in the **Federal Register** in accordance with the specifications in § 385.203(d) of this chapter. Persons who file FERC–65B in good faith shall be deemed to have a temporary exemption upon filing. If the Commission has taken no action within 60 days after the date of filing of FERC–65B, the waiver shall be deemed to have been granted. The Commission may toll the 60-day period to request additional information or for further consideration of the request; in such case, the temporary waiver will remain in effect until such time as the Commission has determined whether to grant or deny the waiver. Authority to toll the 60-day period is delegated to the Secretary or the Secretary's designee.

* * * * *

PART 375—THE COMMISSION

■ 60. The authority citation for part 375 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 42 U.S.C. 7101–7352.

■ 61. Section 375.302 is amended by adding paragraphs (y) and (z) as follows:

§ 375.302 Delegations to the Secretary.

* * * * *

(y) Direct the staff of the Dispute Resolution Service (DRS) to contact the parties in a complaint proceeding and establish a date by which DRS must report to the Commission whether a dispute resolution process to address the complaint will be pursued by the parties.

(z) Specify file format requirements for submissions on electronic media or via electronic means.

■ 62. Section 375.307 is revised to read as follows:

§ 375.307 Delegations to the Director of the Office of Energy Markets and Reliability.

The Commission authorizes the Director or the Director's designee to:

(a) *Program-Specific Delegated Authority:* Take the following actions with respect to the following programs:

(1) *Sections 205 and 206 of the Federal Power Act.* (i) Accept for filing all uncontested tariffs or rate schedules and uncontested tariff or rate schedule changes submitted by public utilities, including changes that would result in rate increases, if they comply with all applicable statutory requirements, and with all applicable Commission rules, regulations and orders for which waivers have not been granted, or if waivers have been granted by the Commission, if the filings comply with the terms of the waivers;

(ii) Reject a tariff or rate schedule filing, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements and with all applicable Commission rules, regulations and orders;

(iii) Take appropriate action on requests or petitions for waivers of notice as provided in section 205(d) of the Federal Power Act, provided the requests conform to the requirements of § 385.2001 of this chapter;

(iv) Refer to the Chief Administrative Law Judge (Chief ALJ) for action by the Chief ALJ, with the Chief ALJ's concurrence, uncontested motions that would result in lower interim settlement rates, pending Commission action on settlement agreements;

(v) Sign and issue deficiency letters; and

(vi) Act on requests for authorization for a designated representative to post and file rate schedules of public utilities which are parties to the same rate schedules.

(2) *Section 215 of the Federal Power Act.* (i) Approve uncontested applications, including uncontested revisions to Electric Reliability Organization or Regional Entity rules or procedures;

(ii) Reject an application, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or with all applicable Commission rules, regulations or orders;

(iii) Act on any request or petition for waiver, consistent with Commission policy;

(iv) Sign and issue deficiency letters; and

(v) Direct the Electric Reliability Organization, regional entities, or users, owners, and operators of the Bulk-Power system within the United States (not including Alaska and Hawaii) to provide such information as is necessary to implement section 215 of the FPA pursuant to §§ 39.2(d) and 39.11 of this chapter.

(3) *Other sections of the Federal Power Act.* (i) Pass upon any uncontested application for authorization to issue securities or to assume obligations and liabilities filed by public utilities and licensees pursuant to Part 34 of this chapter;

(ii) Take appropriate action on uncontested applications for the sale or lease or other disposition of facilities, merger or consolidation of facilities, purchase or acquisition or taking of

securities of a public utility, or purchase or lease or acquisition of an existing generation facility under section 203 of the Federal Power Act;

(iii) Take appropriate action on uncontested applications for interlocking positions under section 305(b) of the Federal Power Act; and

(iv) Sign and issue deficiency letters for filings under Federal Power Act sections 203, 204, and 305(b).

(4) *Public Utility Holding Company Act of 2005.* Take appropriate action on:

(i) Uncontested FERC–65A (exemption notification) filings;

(ii) Uncontested FERC–65B (waiver notification) filings; and

(iii) Uncontested applications under section 1275(b) of the Energy Policy Act of 2005 and/or the Federal Power Act to allocate service company costs to members of a holding company system.

(5) *Federal Power Marketing Administration Filings.* Approve uncontested rates and rate schedules filed by the Secretary of Energy or his designee, for power developed at projects owned and operated by the federal government and for services provided by federal power marketing agencies.

(6) *Section 210(m) of the Public Utility Regulatory Policies Act of 1978.* (i) Approve uncontested applications;

(ii) Reject an application, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or with all applicable Commission rules, regulations and orders;

(iii) Act on any request or petition for waiver, consistent with Commission policy; and

(iv) Sign and issue deficiency letters.

(7) *Other sections of the Public Utility Regulatory Policies Act of 1978.* Take appropriate action on:

(i) Filings related to uncontested nonexempt qualifying small power production facilities;

(ii) Uncontested applications for certification of qualifying status for small power production and cogeneration facilities under § 292.207 of this chapter;

(iii) Requests or petitions for waivers of the requirements of subpart C of Part 292 of this chapter governing cogeneration and small power production facilities made by any state regulatory authority or nonregulated electric utility pursuant to § 292.402 of this chapter;

(iv) Requests or petitions for waivers of the Commission's regulations under the Federal Power Act related to nonexempt qualifying small power production facilities and related authorizations consistent with *Massachusetts Refusetech, Inc.,* 31 FERC ¶ 61,048 (1985), and the orders cited therein without limitation as to whether qualifying status is by Commission certification or notice of qualifying status, provided that, in the case of a notice of qualifying status, any waiver is granted on condition that the filing party has correctly noticed the facility as a qualifying facility; and

(v) Requests or petitions for waivers of the technical requirements applicable to qualifying small power production facilities and qualifying cogeneration facilities.

(8) *Sections 4 and 5 of the Natural Gas Act.* (i) Accept for filing all uncontested tariffs or rate schedules and uncontested tariff or rate schedule changes, except major pipeline rate increases under section 4(e) of the Natural Gas Act and under subpart D of Part 154 of this chapter, if they comply with all applicable statutory requirements, and with all applicable Commission rules, regulations and orders for which waivers have not been granted, or if waivers have been granted by the Commission, if the filings comply with the terms of the waivers;

(ii) Accept for filing all uncontested tariff or rate schedules changes made in compliance with Commission orders;

(iii) Reject a tariff or rate schedule filing, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, if it patently fails to comply with applicable statutory requirements and with all applicable Commission rules, regulations and orders;

(iv) Take appropriate action on requests or petitions for waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of § 385.2001 of this chapter; and

(v) Refer to the Chief Administrative Law Judge (Chief ALJ) for action by the Chief ALJ, with the Chief ALJ's concurrence, uncontested motions that would result in lower interim settlement rates, pending Commission action on settlement agreements.

(9) *Section 7 of the Natural Gas Act.* Take appropriate action on the following types of uncontested applications for authorizations and uncontested amendments to applications and authorizations filed pursuant to section 7 of the Natural Gas Act and impose appropriate conditions:

(i) Applications by a pipeline for the deletion of delivery points but not facilities;

(ii) Applications to abandon pipeline services, but not facilities, involving a specific customer or customers, if such customer or customers have agreed to the abandonment;

(iii) Applications for temporary or permanent certificates (and for amendments thereto) for services, but not facilities, in connection with the transportation;

(iv) Blanket certificate applications by interstate pipelines and local distribution companies served by interstate pipelines filed pursuant to §§ 284.221 and 284.224 of this chapter;

(v) Applications for temporary certificates involving transportation service or sales, but not facilities, pursuant to § 157.17 of this chapter;

(vi) Dismiss any protest to prior notice filings involving existing service, made pursuant to § 157.205 of this chapter, that does not raise a substantive issue and fails to provide any specific detailed reason or rationale for the objection;

(vii) Applications pertaining to approval of changes in customer names where there is no change in rate schedule, rate, or other incident of service;

(viii) Applications for approval of customer rate schedule shifts;

(ix) Applications filed under section 1(c) of the Natural Gas Act and Part 152 of this chapter, for declaration of exemption from the provisions of the Natural Gas Act and certificates held by the applicant;

(x) Applications and amendments requesting authorizations filed pursuant to section 7(c) of the Natural Gas Act for new or additional service through existing facilities to right-of-way grantors either directly or through distributors, where partial consideration for the granting of the rights-of-way was the receipt of gas service pursuant to section 7(c) of the Natural Gas Act;

(xi) An uncontested request from the holder of an authorization, granted pursuant to the Director's delegated authority, to vacate all or part of such authorization; and

(xii) Sign and issue deficiency letters.

(10) *Natural Gas Policy Act of 1978.* (i) Notify jurisdictional agencies within 45 days after the date on which the Commission receives notice of a determination pursuant to § 270.502(b) of this chapter that the notice is incomplete under § 270.204 of this chapter;

(ii) Issue preliminary findings under § 270.502(a)(1) of this chapter;

(iii) Accept any uncontested item that has been filed under § 284.123 of this chapter consistent with Commission regulations and policy;

(iv) Reject an application filed pursuant to § 284.123 of this chapter, unless accompanied by a request for

waiver in conformity with § 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or Commission rules, regulations and orders; and

(v) Take appropriate action on petitions to permit after an initial 60-day period one additional 60-day period of exemption pursuant to § 284.264(b) of this chapter where the application for extension arrives at the Commission no later than 45 days after the commencement of the initial period of exemption and where only services are involved.

(11) *Regulation of Oil Pipelines Under the Interstate Commerce Act.* (i) Accept any uncontested item that has been filed consistent with Commission regulations and policy;

(ii) Reject any filing, unless accompanied by a request for waiver in conformity with § 385.2001 of this chapter, that patently fails to comply with applicable statutory requirements and with all applicable Commission rules, regulations and orders; and

(iii) Prescribe for carriers the classes of property for which depreciation charges may be properly included under operating expenses, review the fully documented depreciation studies filed by the carriers, and authorize or revise the depreciation rates reflected in the depreciation study with respect to each of the designated classes of property.

(b) *General, Non-Program-Specific Delegated Authority.* (1) Take appropriate action on:

(i) Any notice of intervention or motion to intervene, filed in an uncontested proceeding processed by the Office of Energy Markets and Reliability; and

(ii) Applications for extensions of time to file required filings, reports, data and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order by the Commission.

(2) Take appropriate action on requests or petitions for waivers of:

(i) Filing requirements for the appropriate statements and reports processed by the Office of Energy Markets and Reliability under Parts 46, 141, 260 and 357 of this chapter, §§ 284.13 and 284.126 of this chapter, and other relevant Commission orders; and

(ii) Fees prescribed in §§ 381.403 and 381.505 of this chapter in accordance with § 381.106(b) of this chapter.

(3) Undertake the following actions:

(i) Issue reports for public information purposes. Any report issued without Commission approval must:

(A) Be of a noncontroversial nature, and

(B) Contain the statement, ''This report does not necessarily reflect the views of the Commission,'' in bold face type on the cover;

(ii) Issue and sign requests for additional information regarding applications, filings, reports and data processed by the Office of Energy Markets and Reliability; and

(iii) Accept for filing, data and reports required by Commission regulations, rules or orders, or presiding officers' initial decisions upon which the Commission has taken no further action, if such filings are in compliance with such regulations, rules, orders or decisions and, when appropriate, notify the filing party of such acceptance.

§ 375.308 [Amended]

■ 63. Section 375.308 is amended by amending paragraph (a) to add the phrase ''in opposition'' following the phrase ''motion or notice of intervention.''

§ 375.311 [Removed and Redesignated]

■ 64. Remove § 375.311 and redesignate § 375.314 as new § 375.311.

PART 376—ORGANIZATION, MISSION, AND FUNCTIONS; OPERATIONS DURING EMERGENCY CONDITIONS

■ 65. The authority citation for part 376 continues to read as follows:

Authority: 5 U.S.C. 553; 42 U.S.C. 7101–7352; E.O. 12009; 3 CFR 1978 Comp., p. 142.

§ 376.204 [Amended]

■ 66. Section 376.204 is amended by amending paragraph (b)(2)(x) to remove the phrase ''Assistant General Counsels'' and add in its place the phrase ''Deputy Associate General Counsels.''

§ 376.207 [Amended]

■ 67. Section 376.207 is amended by removing the phrase ''Director of the Office of Finance, Accounting and Operations'' and adding in its place the phrase ''Executive Director.''

PART 380—REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

■ 68. The authority citation for part 380 continues to read as follows:

Authority: 42 U.S.C. 4321–4370a, 7101–7352; E.O. 12009, 3 CFR, 1978 Comp., p. 142.

§ 380.12 [Amended]

■ 69. Section 380.12 is amended by amending paragraph (a)(3) to remove the phrase ''OPR'' and add in its place the phrase ''the Office of Energy Projects,'' by amending paragraphs (c)(3)(ii), (c)(3)(iii), and (f)(5) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects,'' and by amending paragraph (f) to remove the phrase ''*OPR's*'' and add in its place the phrase ''*Office of Energy Projects' (OEP).*''

§ 380.13 [Amended]

■ 70. Section 380.13 is amended by amending paragraphs (b)(2)(iii), (b)(5)(iv), and (c) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects'' and by amending paragraph (b)(5)(iv) to remove the phrase ''OPR'' and add in its place the phrase ''OEP.''

§ 380.14 [Amended]

■ 71. Section 380.14 is amended by amending paragraph (a)(3) to remove the phrase ''Pipeline Regulation'' and add in its place the phrase ''Energy Projects.''

PART 385—RULES OF PRACTICE AND PROCEDURE

■ 72. The authority citation for part 385 continues to read as follows:

Authority: 5 U.S.C. 551–557; 15 U.S.C. 717–717z, 3301–3432; 16 U.S.C. 791a–825v, 2601–2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101–7352, 16441, 16451–16463; 49 U.S.C. 60502; 49 App. U.S.C. 1–85 (1988).

§ 385.2201 [Amended]

■ 73. Section 385.2201 is amended by amending paragraph (h)(1) to remove the phrase ''paragraph (f)(1)'' and add in its place the phrase ''paragraph (f)(2).''

[FR Doc. E7–15664 Filed 8–13–07; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 74

[Docket No. 1995C–0286] (formerly Docket No. 95C–0286)

Listing of Color Additives Subject to Certification; D&C Black No. 3; Confirmation of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; confirmation of effective date.

SUMMARY: The Food and Drug Administration (FDA) is confirming the effective date of July 20, 2007, for the final rule that appeared in the **Federal Register** of June 19, 2007 (72 FR 33664). The final rule amended the color

additive regulations to provide for the safe use of D&C Black No. 3 (bone black, subject to FDA batch certification) as a color additive in the following cosmetics: Eyeliner, eye shadow, mascara, and face powder.

DATES: Effective date confirmed: July 20, 2007.

FOR FURTHER INFORMATION CONTACT: Judith Kidwell, Center for Food Safety and Applied Nutrition (HFS–265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740–3835, 301–436–1071.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of June 19, 2007 (72 FR 33664), FDA amended the color additive regulations to add § 74.2053 (21 CFR 74.2053) to provide for the safe use of D&C Black No. 3 as a color additive in the following cosmetics: Eyeliner, eye shadow, mascara, and face powder.

FDA gave interested persons until July 19, 2007, to file objections or requests for a hearing. The agency received no objections or requests for a hearing on the final rule. Therefore, FDA finds that the effective date of the final rule that published in the **Federal Register** of June 19, 2007, should be confirmed.

List of Subjects in 21 CFR Part 74

Color additives, Cosmetics, Drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 341, 342, 343, 348, 351, 352, 355, 361, 362, 371, 379e) and under authority delegated to the Commissioner of Food and Drugs (1410.10 of the FDA Staff Manual Guide), notice is given that no objections or requests for a hearing were filed in response to the June 19, 2007, final rule. Accordingly, the amendments issued thereby became effective July 20, 2007.

Dated: August 7, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–15831 Filed 8–13–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 630, 635, and 636

[FHWA Docket No. FHWA–2006–22477]

RIN 2125–AF12

Design-Build Contracting

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is amending its regulations for design-build contracting as mandated by section 1503 of the ''Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users' (SAFETEA–LU). This rule will allow State transportation departments or local transportation agencies to issue request-for-proposal documents, award contracts, and issue notices-to-proceed for preliminary design work prior to the conclusion of the National Environmental Policy Act (NEPA) process.

EFFECTIVE DATE: September 13, 2007.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Gerald Yakowenko, Office of Program Administration (HIPA), (202) 366–1562. For legal information: Mr. Michael Harkins, Office of the Chief Counsel (HCC–30), (202) 366–4928, Federal Highway Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

This document and all comments received by the DOT Dockets, Room PL–401, may be viewed through the Docket Management System (DMS) at *http://dms.dot.gov.* It is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of this Web site.

An electronic copy of this document may be downloaded from the **Federal Register**'s home page at *http://www.archives.gov* and the Government Printing Office's Web page at *http://www.access.gpo.gov/nara.*

Background

Section 1503 of the SAFETEA–LU (Pub. L. 109–59; August 10, 2005, 119 Stat. 1144) revises the definition of a design-build ''qualified project'' (23 U.S.C. 112(b)(3)). This change removes a previous monetary threshold for design-build projects, thus eliminating the requirement to approve Federal-aid design-build projects exceeding certain dollar thresholds under Special Experimental Project No. 14 (SEP–14).[1] When appropriate, the FHWA will continue to make SEP–14 available for projects that do not conform to the requirements of 23 CFR part 636.

Section 1503 also requires the Secretary of Transportation to make certain changes to the design-build regulations at 23 CFR part 636. Generally, section 1503 requires the Secretary to amend the design-build rule to permit a State transportation department to release requests for proposals and award design-build contracts prior to the completion of the NEPA process, but preclude a contractor from proceeding with final design or construction before NEPA is complete.

Notice of Proposed Rulemaking (NPRM)

The FHWA published a NPRM on May 25, 2006, (71 FR 30100) proposing certain changes to comply with section 1503 of SAFETEA–LU. All comments received in response to the NPRM have been considered in drafting this final rule. We received 36 comments. The commenters include: one private individual, one Federal agency, the Governor of the State of Indiana, 18 State departments of transportation (State DOTs), 3 local public agencies, 8 industry organizations, and 4 firms that provide engineering and construction services. We classified the American Association of State Highway and Transportation Officials (AASHTO) as a State DOT, because it represents State DOT interests. It is noted that the State DOTs of Idaho, Montana, North Dakota, and South Dakota submitted a combined comment. It is also noted that these State DOTs, as well as the Wyoming Department of Transportation, simply commented that they support the comments submitted by AASHTO. Additionally, an organization known as the E–470 Public Highway Authority simply commented that it supports the comments submitted by the Texas Department of Transportation (TxDOT). Lastly, the FHWA notes that the Southern California Association of Governments (SCAG) submitted its comments on the design-build NPRM to the docket for the FHWA's planning NPRM (Docket No. FHWA–2005–22986). The FHWA considered SCAG's comments along with all other comments submitted to the rulemaking docket for the design-build NPRM in developing this final rule.

General

The following discussion summarizes the major comments submitted to the docket by the commenters on the NPRM, notes where and why changes have been made to the rule, and, where relevant, states why particular recommendations or suggestions have

[1] Information concerning Special Experimental Project No. 14 (SEP–14), ''Innovative Contracting Practices,'' is available on FHWA's home page: *http://www.fhwa.dot.gov.* Additional information may be obtained from the FHWA Division Administrator in each State.

not been incorporated into the final rule.

Analysis of NPRM Comments and FHWA Response by Section

Section 630.106 Authorization to proceed

The Virginia Department of Transportation (VDOT), Utah Department of Transportation (UDOT), TxDOT, Associated General Contractors (AGC) of America, Design-Build Institute of America (DBIA), and Bechtel Infrastructure Corporation (Bechtel) each commented on the changes proposed for this section. Bechtel commented that the project agreement for a design-build project should be executed prior to the completion of the NEPA process. The FHWA disagrees with this comment to the extent that Bechtel is requesting that the project agreement cover final design and physical construction. The execution of the project agreement for a project constitutes an obligation of Federal funds to the project, and the FHWA is precluded under 40 CFR 1508.18 and 23 CFR 771.109 and 771.113 from funding final design or physical construction. However, the FHWA agrees that project agreements may be executed for preliminary engineering, preliminary design, and other preconstruction activities for design-build projects. Accordingly, we have amended the final regulatory text in section 630.106(a)(3) to clarify that only project agreements for final design and physical construction must wait until the conclusion of the NEPA process.

AGC of America commented that there is no definition of preliminary engineering, while preliminary design is defined in section 636.103. Preliminary design is defined because the amendments to 23 U.S.C. 112(b)(3) in section 1503 of SAFETEA–LU make a distinction between preliminary design and final design. Under these amendments, a design-builder may proceed to conduct preliminary design, but not final design. There is nothing in the SAFETEA–LU amendments to preclude preliminary engineering, which generally consists of those activities necessary for the analysis of a project or project alternatives, including environmental impacts, as necessary to complete the NEPA process. As such, preliminary engineering may continue to be authorized prior to the completion of the NEPA process as it has been prior to the SAFETEA–LU amendments. Thus, the FHWA does not believe that a separate definition of preliminary engineering is necessary.

TxDOT, UDOT, and DBIA were each concerned that the language would preclude authorization for activities which may be carried out prior to the completion of the NEPA process other than preliminary engineering. Similarly, VDOT commented that the proposed regulatory change would preclude authorization for preconstruction activities that may not necessarily be preliminary engineering. The FHWA agrees with these comments and has amended the final regulation to include the term ''preliminary design'' as defined in section 636.103. It is not FHWA's intent to preclude Federal participation in preliminary engineering or other activities that can be carried out consistent with NEPA.

Section 635.112 Advertising for bids and proposals

Bechtel and the National Council for Public Private Partnerships (NCPPP) both commented on the proposed changes to this section. In general, both suggested that the FHWA should extend the FHWA's concurrence to the selection of the proposer and execute a project agreement. The FHWA disagrees with these comments. First, the FHWA cannot commit funds to a project before the NEPA process is complete. The execution of a project agreement for a design-build project would result in the obligation of Federal funds for the construction of the project prior to the completion of the NEPA process. Second, section 1503 of SAFETEA–LU amended 23 U.S.C. 112(b)(3) to expressly require the Secretary's concurrence prior to issuing a request for proposals (RFP), awarding a design-build contract, and issuing notices to proceed with preliminary design. Bechtel and NCPPP's comments would result in the Secretary only concurring in the RFP.

Section 635.309 Authorization

The FHWA is making a technical, conforming amendment to the regulation at section 635.309(p)(1). Specifically, the FHWA is deleting the parenthetical providing that the States' authority to advertise or release a request for proposals document may not be granted until the NEPA review process has been concluded. In place of the parenthetical, the FHWA has inserted the words ''for final design and physical construction.'' This amendment is necessary to ensure that there is no confusion in the regulations concerning whether an request for proposals document may be released, or a design-build contract may be awarded, in accordance with 23 U.S.C. 112(b)(3)(D). However, this section would continue to preclude project authorization for final design and physical construction of a design-build project until after the NEPA review process is complete.

The substance of this amendment, which is to allow the release of a request for proposals document prior to the completion of the NEPA process, was addressed in the NPRM. Specifically, the proposed changes to sections 635.112 and 636.109 both expressly dealt with the advertising and release of a request for proposals document for a design-build project prior to the conclusion of the NEPA process. Additionally, the decision to prohibit project authorization for the final design and physical construction of a design-build project were proposed in sections 630.106 and 636.109 of the NPRM.

Section 635.413 Guaranty and warranty clauses

Bechtel and NCPPP commented on the proposed amendments to this section. In general, Bechtel and NCPPP commented that this section should be revised to allow for additional warranties beyond the normal construction/contractor warranties of 1–2 years. The FHWA disagrees with these comments. The FHWA's funding authority is generally limited to participation in construction and preventive maintenance. The FHWA will authorize the use of Federal funding to procure a warranty, if the warranty is for a construction or preventative maintenance project. The proposed regulatory language does not preclude the contracting agency from procuring warranties for projects other than construction and preventative maintenance with its own funds.

Section 636.103 What are the definitions of terms used in this part?

We received several comments on the proposed definitions under this section in the NPRM. These comments are discussed under each respective definition below.

''Developer''

VDOT, UDOT, TxDOT, AASHTO, and DBIA each commented on the proposed definition of ''developer.'' These comments generally stated that the distinction between developer and design-builder is unclear and that the definition duplicates the language in the proposed definition of public-private agreement. The FHWA agrees with these comments and has decided to strike the definition of developer from the final rule. Since the FHWA has struck the changes to 636.119, as discussed below,

the term developer no longer has any significance to the regulations.

''Final Design''

TxDOT, UDOT, Maryland State Highway Administration (MdSHA), Pennsylvania Department of Transportation (PennDOT), Missouri Department of Transportation (MoDOT), New Jersey Department of Transportation (NJDOT), Louisiana Department of Transportation and Development (LDOTD), Indiana Governor Mitch Daniels, AASHTO, AGC of America, DBIA, Jacobs Civil, Inc. (JCI), and the Nossaman, Guthner, Knox, and Elliott LLP law firm/The Ferguson Group LLC (Nossaman) each commented on this proposed definition. In general, the comments stated that the definition is too restrictive and that the definition should be limited to work directly associated with the preparation of final construction plans and detailed technical specifications. The comments arguing that the definition is too restrictive are based on the comments to the proposed definition of preliminary design, which are discussed below. As explained below, the proposed definition of preliminary design has been broadened in the final rule. Thus, the language in the definition of final design stating that final design includes any design activities following preliminary design has been retained and the language concerning any design activities not necessary to complete the NEPA process has been stricken. Moreover, since a number of commenters stated that final design includes work directly related to the preparation of final construction plans and detailed specifications, these activities have been expressly included in the definition of final design.

''Preliminary Design''

All of the commenters substantially commented on the proposed definition of ''preliminary design.'' Specifically, LDOTD, Georgia Department of Transportation (GDOT), Indiana Governor Mitch Daniels, NJDOT, MoDOT, PennDOT, Knik Arm Bridge and Toll Authority (KABATA), California Department of Transportation (Caltrans), VDOT, Ohio Department of Transportation (OhDOT), Oregon Department of Transportation (OrDOT), UDOT, Minnesota Department of Transportation (Mn/DOT), Florida Department of Transportation (FDOT), MdSHA, TxDOT, AASHTO, AGC of America, American Council of Engineering Companies (ACEC), NCPPP, Nossaman, Bechtel, Washington Group International (WGI), JCI, Michael T. McGuire, Professional Engineers in California Government, and SCAG all commented on this proposed definition.

Michael T. McGuire commented that allowing a design-builder to proceed with preliminary design prior to NEPA is a conflict of interest. The FHWA disagrees with this comment. So long as the design-builder does not prepare the NEPA documents, the conflict of interest provision in the Council on Environmental Quality (CEQ) regulation, 40 CFR 1506.5(c), is met.

The Professional Engineers in California Government commented that they agreed with the proposed definition of ''preliminary design.'' All other commenters felt that the proposed definition is too narrow. In general, these commenters were concerned that the definition would exclude activities needed to comply with other environmental laws and omit activities that have been traditionally considered preliminary engineering, that do not materially affect the consideration of alternatives in the NEPA analysis, and that work to advance the design of the preferred alternative as permitted in 23 U.S.C. 139(f)(4)(D), which was added by section 6002 of SAFETEA–LU. Several commenters also listed specific activities that have traditionally been allowed to proceed during the NEPA review process. After considering these comments, the FHWA agrees that the proposed definition is too narrow. It is not the FHWA's intent to preclude the States from conducting preliminary engineering and other pre-decisional project-related activities consistent with NEPA when a request for proposals is issued or design-build contract is awarded, prior to the completion of the NEPA process. Accordingly, the FHWA has revised the definition of preliminary design to mean activities undertaken to define the general project location and design concepts. The FHWA has also specified some general activities that may be conducted as preliminary design that typically do not compromise the objectivity of the NEPA process. These activities were specifically identified by VDOT, OhDOT, MdSHA, TxDOT, UDOT, AASHTO, DBIA, and Nossaman. The activities specified in this definition are not intended to be an exhaustive list of activities that may be considered preliminary design. However, any activity, regardless of its inclusion in the definition of preliminary design, must not materially affect the object consideration of alternatives in the NEPA review process.

''Public-Private Agreement''

UDOT, TxDOT, AASHTO, and DBIA each submitted comments on the proposed definition of ''public-private agreement.'' In general, these comments stated that the definition is overly broad and makes the distinction between design-build contracts and public-private agreements unclear. The FHWA agrees with these comments and has adopted a modified version of the language suggested by UDOT, TxDOT, and DBIA to the definition of public-private agreement in the final rule.

''Qualified Project''

The AGC of Texas, NJDOT, and GDOT each commented on the proposed definition of ''qualified project.'' GDOT commented that it agrees with the definition. NJDOT asked whether FHWA approval is needed to award any design-build contract, even if it has limited scope and low total project cost. Pursuant to 23 CFR 636.109(c), FHWA approval is needed before awarding any design-build contract funded under title 23, United States Code. AGC of Texas commented that the regulation should retain the $50 million general project and $5 million Intelligent Transportation System (ITS) project thresholds in the final rule. Since Congress specifically amended 23 U.S.C. 112(b)(3)(C) in section 1503 of SAFETEA–LU to abolish these monetary thresholds, the FHWA does not believe that retaining them in the final rule is appropriate.

Section 636.106 Is the FHWA's Special Experimental Project No. 14—''Innovative Contracting'' (SEP–14) approval necessary for a design-build project?

MoDOT, PennDOT, and Mn/DOT each commented on the changes proposed for this section. MoDOT pointed out that the preamble to the NPRM mentioned a monetary threshold while the proposed regulation did not. To clarify this apparent inconsistency, the proposed regulation was intended to abolish the monetary threshold for SEP–14 approval. Since Congress amended 23 U.S.C.112 to eliminate the design-build contracting monetary thresholds, SEP–14 approval is no longer needed for design-build projects below a certain monetary threshold. After considering this comment, the FHWA has decided that it is not necessary to expressly include SEP–14 as part of the final regulations, since it appears that SEP–14 is no longer needed. However, SEP–14 will continue to be available on a case-by-case basis as new innovative approaches to delivering design-build projects are proposed.

PennDOT requested clarification that the reporting requirements are no longer necessary. To answer this question,

there are no reporting requirements contained in this final rule. Mn/DOT asked whether this rule replaces the SEP–15 program. The answer to the question is ''no.'' SEP–15 continues to be available on a case-by-case basis consistent with the parameters of the program. (For more information, see 69 FR 59983, October 6, 2004.)

Section 636.107 May contracting agencies use geographic preference in Federal-aid design-build or public-private partnership projects?

TxDOT, UDOT, MoDOT, DBIA, and AGC of America each commented on the proposed changes to this section. AGC of America supports the prohibition on geographic preferences. MoDOT suggested deleting the parenthetical contained in the proposed language in order to avoid future misinterpretation that would exclude non-geographic based incentives. This section only applies to geographic preferences and the parenthetical is merely intended to clarify that all means of such preferences are prohibited. Thus, the FHWA has retained the parenthetical in the final language.

TxDOT, UDOT, and DBIA suggested eliminating the word ''prohibit'' and making other minor revisions because they felt that this language implies that the contract documents must affirmatively address these issues. The FHWA agrees with these comments and has revised the final rule to incorporate the suggested language.

Section 636.109 How does the NEPA process relate to the design-build procurement process?

There were several comments on the changes to this proposed section in the NPRM. These comments are discussed under each respective subsection below.

Section 636.109(a)

PennDOT, UDOT, TxDOT, DBIA, and WGI each commented on the proposed changes to section 636.109(a). WGI commented that it supports these changes. PennDOT commented that it needs clarification that the FHWA will grant concurrence to proceed with the activities outlined in section 636.109(a), so long as the conditions outlined in the proposed rule are met. The FHWA assumes that PennDOT's comments are based on the preamble to the NPRM, where the FHWA stated that contracting agencies need FHWA concurrence prior to proceeding with any of the activities specified in the proposed subsection. To clarify this issue, a contracting agency does not need FHWA concurrence to issue a request for qualifications at any point in the process. However, FHWA concurrence for the other activities specified in this subsection is required. FHWA intends to concur with the activities outlined in section 636.109(a), (such as issuing an RFP, awarding a contract, proceeding with preliminary design, etc.), provided all applicable Federal requirements are met.

UDOT, TxDOT, and DBIA stated that some minor changes are needed in order to clarify the intent in the first paragraph under section 636.109 as well as section 636.109(a)(1). The FHWA agrees to add the language suggested by UDOT, TxDOT, and DBIA in section 636.109(a)(1) concerning the protection of contracting agencies in the first paragraph of section 636.109, but does not agree to strike the language concerning the protection of design-build proposers in the first paragraph. The FHWA believes that this section protects the interests of both contracting agencies and design-build proposers. Additionally, UDOT, TxDOT, and DBIA requested that language be added to clarify that a design-builder can proceed with final design and construction for projects that have already obtained final NEPA approval. An example to amplify these comments would be a project that is being conducted under a tiered NEPA analysis. At any given point, tier 2 NEPA approvals could be given at different times for any portions with independent utility and logical termini within the tier 1 NEPA document. The FHWA agrees with these comments and has added a new paragraph (6) to section 636.109(a) to clarify this issue.

Section 636.109(b)

MdSHA, FDOT, Mn/DOT, UDOT, VDOT, TxDOT, Caltrans, MoDOT, Indiana Governor Mitch Daniels, AASHTO, DBIA, ACEC, NCPPP, Bechtel, Wilbur Smith Associates, Nossaman, and the Environmental Protection Agency (EPA) each commented on proposed 636.109(b). First, UDOT, TxDOT, and DBIA commented that the language should be clarified to ensure that a design-builder can proceed with final design and construction on projects that have already obtained NEPA approval. The FHWA agrees that a design-builder should be allowed to proceed with such work on projects for which NEPA approval has been obtained and intends that design-builders be allowed to do so under these regulations. However, the FHWA does not believe that additional language is needed to clarify this intent.

Second, MdSHA, FDOT, Mn/DOT, UDOT, Indiana Governor Mitch Daniels, AASHTO, ACEC, NCPPP, and Nossaman each commented that the contracting agencies and design-builders should be allowed to proceed with final design activities at risk. In general, States can proceed with final design activities under the design-bid-build method of contracting so long as those activities include no Federal funding and the State understands that its preferred alternative could ultimately be rejected by the FHWA. *See, e.g., Burkholder* v. *Wykle*, 268 F. Supp. 2d 835 (N.D. Ohio 2002). However, the amendment to 23 U.S.C. 112(b)(3)(D)(iii) in section 1503 of SAFETEA-LU expressly requires the design-build regulations to ''preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to the completion of the process of such section 102.'' In other words, Congress has directed that the regulations must preclude the design-build contractor from proceeding with either final design or construction. Therefore, the FHWA is unable to permit the design-builder to proceed with final design, regardless of whether these activities are funded by the FHWA, the State, or the contractor itself.

Third, FDOT, UDOT, TxDOT, VDOT, Caltrans, Indiana Governor Mitch Daniels, AASHTO, DBIA, and ACEC each commented on whether the design-builder is precluded from preparing the NEPA decision document or any NEPA document. In general, these comments pointed out an inconsistency between the preamble to the NPRM, which refers to NEPA documents, and the proposed regulatory text in sections 636.109(b)(4) and (5), which uses the term ''NEPA decision document.'' To clarify this issue, the FHWA intends for the regulations to preclude a design-builder from preparing not only the NEPA decision documents (*i.e.* Categorical Exclusion (CE), Finding of No Significant Impact (FONSI), and Record of Decision (ROD)), but also the NEPA analysis documents (*i.e.* Environmental Assessment (EA) and Environmental Impact Statement (EIS)). The CEQ conflict of interest regulation at 40 CFR 1506.5(c) expressly prohibits a contractor, who has an interest in the outcome of the NEPA process, from preparing an EIS. Additionally, this regulation has also been applied to EAs. *See, e.g., Burkholder* v. *Peters, 58 Fed. Appx. 94 (6th Cir. 2003).* Thus, the final regulations at section 636.109(b)(6) and (7) have been amended to clarify that the design-builder is precluded from preparing all NEPA documents, rather than just the NEPA decision documents. However, while the design-builder cannot prepare the NEPA documents, the FHWA notes that there is nothing in

the final regulations that would prohibit a design-builder from financing the preparation of the NEPA documents, so long as the criteria in section 636.109(b)(7) are met.

Fourth, UDOT, TxDOT, and DBIA suggested some minor clarifications to proposed section 636.109(b)(6) to ensure that the States can consider any work provided by the design-builder in the NEPA analysis. The FHWA agrees with these comments and has revised section 636.109(b)(8) to incorporate UDOT, TxDOT, and DBIA's suggested language.

Fifth, Wilbur Smith Associates commented that barring consultants who are participating in the preparation of the NEPA documents from joining a design-build team will result in less economical projects. Although the FHWA appreciates eliminating unnecessary costs, FHWA notes that the CEQ regulations at 40 CFR 1506.5(c) prohibit such consultants from having a financial or other interest in the outcome of the project to avoid either the reality or the appearance of a conflict, thereby maintaining the credibility of the environmental review process. Sixth, the EPA had several general comments on section 636.109(b). The EPA states that it is supportive of the provisions in the proposed rule intended to ensure an adequate review process and supports the prohibition on the design-builder from having any decisionmaking responsibility on the NEPA process. The EPA further commented that avoiding conflicts of interest and premature commitments to a particular alternative are difficult to ensure in practice. As such, the EPA suggested that the FHWA provide examples of appropriate contract provisions that would ensure that the merits of all alternatives are evaluated. An example of one such provision would be one precluding the commitment of significant financial resources to any particular alternative. Another example would be a provision that clearly allows the State to decide not to move forward with the project in the event the no-build alternative is selected, while allowing the design-build contractor to receive a reasonable reimbursement of certain costs the contractor may have incurred in advancing the project. The FHWA is committed to work with the States to develop any such provisions to also ensure the integrity of the NEPA process is maintained.

The EPA also expressed a concern about using financial incentives linked to milestones that could result in contractor reluctance to revise the NEPA analysis when appropriate. While the FHWA is not aware of any specific problems in this area, the FHWA shares the EPA's concern and will discourage the use of any timeline-based incentives that may have an undue influence on the NEPA process. Additionally, the EPA commented on how appropriate oversight will be maintained under the surface transportation project delivery pilot program at 23 U.S.C. 327. Since this pilot program is limited only to the States' assumption of the Secretary's environmental responsibilities, the FHWA will retain full oversight over the contracting process. Moreover, the pilot program requires a memorandum of understanding to be executed between the State and the FHWA whenever a State assumes any of the Secretary's responsibilities under the pilot program. Appropriate oversight provisions will be specified in these MOUs.

Lastly, the FHWA is adding two new provisions at sections 636.109(b)(1) and (2). Section 636.109(b)(1) is intended to clarify that the design-builder may proceed with preliminary design under a design-build contract. Section 636.109(b)(2) is intended to clarify that the States may permit any design and engineering activities to be undertaken for the purposes of defining the project alternatives and completing the NEPA alternatives analysis and review process; complying with other related environmental laws and regulations; supporting agency coordination, public involvement, permit applications, or development of mitigation plans; or developing the design of the preferred alternative to a higher level of detail when the lead agencies agree that it is warranted in accordance with 23 U.S.C. 139(f)(4)(D). As previously discussed, several comments on the proposed definition of preliminary design expressed the concern that the States would not be able to conduct activities needed to comply with other related environmental laws or advance the design of the preferred alternative as permitted in 23 U.S.C. 139(f)(4)(D). The addition of section 636.109(b)(2) clarifies that the States may conduct these types of activities.

Section 636.109(c) and (d)

UDOT, TxDOT, MdSHA, DBIA, Association of Engineering Employees of Oregon, and Profession Engineers in California Government each commented on the proposed changes in section 636.109(c) and (d). The Association of Engineering Employees of Oregon and Professional Engineers in California Government commented that section 639.109(c) does not go far enough in protecting the integrity of the NEPA process. Section 636.109(c) would require certain FHWA approvals during the project development process and would clarify that any such approval is not a commitment of Federal funds. The FHWA believes that not committing any Federal funds until after the NEPA process is complete, in conjunction with the various FHWA approvals during the project development process as well as the requirements in section 636.109(b), adequately protect the integrity of the NEPA process.

UDOT, TxDOT, MdSHA, and DBIA questioned why the FHWA is requiring concurrence in the issuance of a notice to proceed with preliminary design. Section 1503 of SAFETEA-LU amended 23 U.S.C. 112(b)(3)(D)(ii) to require the States to receive concurrence from the Secretary prior to carrying-out any activity specified in 23 U.S.C. (b)(3)(D)(i), which includes the issuance of notices to proceed with preliminary design work. Thus, the States must receive FHWA concurrence prior to issuing a notice to proceed with preliminary design work.

Section 636.116 What organizational conflict of interest requirements apply to design-build projects?

TxDOT, UDOT, VDOT, PennDOT, DBIA, ACEC each commented on the proposed changes to section 636.116. ACEC supports the proposed changes to section 636.116, because it believes that firms have been unfairly eliminated from competing for design-build contracts merely by virtue of providing some technical work on a NEPA document. ACEC further suggests that the language be revised to preclude the States from disallowing such firms to compete for design-build contracts. In contrast to ACEC's comments, PennDOT commented that it is concerned about the conflict of interest that may arise if the State subsequently needs the firm to provide additional input or work on the NEPA analysis for the project. The FHWA agrees with both ACEC and PennDOT. The FHWA has accommodated ACEC's concern in the final rule by giving the States the flexibility to allow such firms to compete for design-build contracts. The FHWA has also accommodated PennDOT's concern by making the changes discretionary on the part of the States rather than mandatory as requested by ACEC.

VDOT, TxDOT, UDOT, and DBIA all supported the proposed changes to section 636.116. However, TxDOT, UDOT, and DBIA further commented that the contracting agency should have the flexibility to release a subconsultant to the consultant responsible for preparing the NEPA documents from further NEPA responsibilities and allow

such firm to compete for a design-build contract. The FHWA supports giving the States this flexibility and has added a new subsection (d) to section 636.116 in the final rule.

Section 636.119 How does this Part apply to public-private agreements?

TxDOT, FDOT, UDOT, MdSHA, Indiana Governor Mitch Daniels, AGC of America, NCPPP, WGI, and Bechtel each commented on this proposed section. WGI commented that it supports making public-private agreement procurements subject to State law. SCAG, Bechtel, and NCPPP were concerned that the numerous approvals required under this proposed section would add time and cost to the project delivery process. AGC of America commented that it supports the oversight provisions in the proposed section. TxDOT, UDOT, Indiana Governor Mitch Daniels, and SCAG commented that it is inappropriate for the FHWA to assert approval rights over State procedures. TxDOT, UDOT, and MdSHA commented that it is unnecessary for the FHWA to concur in requests for qualifications. TxDOT and UDOT further commented that some provisions of this proposed section were unclear, and FDOT commented that public-private agreement requirements should be an entirely separate part in the Code of Federal Regulations.

After considering these comments, the FHWA agrees that some further revisions may be necessary and that it is more appropriate for these requirements to be contained in a separate part in the Code of Federal Regulations. Accordingly, the FHWA has struck the proposed changes to section 636.119 and will consider whether a future rulemaking for these requirements is necessary. Minor revisions have been made to section 636.119(b) to define the FHWA's requirements for preserving Federal-aid eligibility in any procurement actions under a public-private partnership.

Section 636.302 Are there any limitations on the selection and use of proposal evaluation factors?

TxDOT, UDOT, PennDOT, DBIA, Professional Engineers in California Government, and Association of Engineering Employees of Oregon each commented on the proposed changes to section 636.302. Professional Engineers in California Government and Association of Engineering Employees of Oregon commented that the price evaluation requirements should continue. The FHWA shares the concern about eliminating the price evaluation requirement. After considering these comments and taking a closer look at the proposed regulation, the FHWA has decided to add a new subparagraph to section 636.302(a)(1)(ii) to require that price be considered to the extent that the contract requires payment from the contracting agency utilizing Federal-aid highway funds to the design-builder for any services to be provided prior to final design or construction. The FHWA is adding this requirement, because the FHWA believes that the consideration of price will ensure that a project does not incur unreasonable costs. This provision will ensure that, to the extent the State must make any payments to the design-builder, the price to be paid for these services is one of the factors that States must consider.

The FHWA has also added language to section 636.302(a)(1)(iv) to clarify that the price reasonableness requirement only applies to the extent that the contracting agency wishes to use Federal funds for final design or construction. These provisions also respond to the comments made by TxDOT, UDOT, and DBIA who were concerned that some public-private agreements may not require any payment to be made to the design-builder. However, whenever a contract is awarded prior to the completion of the NEPA process, it is impossible to consider the price of the total contract because an alternative has not yet been selected and final design has not yet been completed. Thus, a contracting agency will be able to consider price only to a certain extent.

PennDOT commented that the proposed procedures in section 636.302(a)(1) would be very complex and hard to implement. Since the statute now permits States to award contracts prior to the conclusion of the NEPA process, which will require the costs for final design and construction to be negotiated later, the States and FHWA must find a way to control the costs under the contract and ensure that the public gets a fair price for these services. Thus, the State will need to develop methodologies through which the State can determine whether the final fixed price for the project is reasonable. An open-book negotiation method through which both the contractor and the State share supporting data on the prices of the items being negotiated can be an effective way to make this determination. While the FHWA recognizes the difficulties in ensuring that the public gets the best price whenever a design-build contract is awarded prior to the conclusion of the NEPA process, we believe that a price reasonableness standard for these costs will be the most effective approach. The FHWA will provide appropriate guidance and support to the States in implementing this standard.

Finally, TxDOT, UDOT, and DBIA each commented that the FHWA should not concur in the States' price reasonableness determination, but rather only the methodologies the States use to make that determination. The FHWA disagrees with this comment. The FHWA is the steward of all Federal funds that are used in highway projects. Since total contract price cannot be considered during the competition to award a contract prior to the conclusion of the NEPA process, the FHWA must have some mechanism to ensure that price for the project for which Federal funds proposed to be used is reasonable.

Rulemaking Analyses and Notices

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

The FHWA has determined that this rule is a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. The Office of Management and Budget (OMB) has reviewed this document under E.O. 12866. This rule is significant, because of the substantial State, environmental, and industry interest in the design-build contracting technique.

The economic impact of this rulemaking will be minimal and it will not adversely affect, in a material way, any sector of the economy. This rulemaking merely revises the FHWA's policies concerning the design-build contracting technique. The final rule will not affect the total Federal funding available to the State DOTs under the Federal-aid highway program. Therefore, an increased use of design-build delivery method will not yield significant economic impacts to the Federal-aid highway program. Additionally, this rule will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

The FHWA does not have sufficient data to quantify the economic impacts of this rule. However, the FHWA believes that increased use of the design-build contracting method may result in certain efficiencies in the cost and time it normally takes to deliver a transportation project. We also believe that States will not use the design-build

contracting technique if using such a technique will increase the cost of a project.

The design-build contracting technique is important to increasing the involvement of the private sector in the delivery of transportation projects. Insofar as this rule will increase the uses of the design-build contracting technique, it may result in increased private sector financial investment in transportation. The FHWA did not receive any comments on the economic impacts analysis in the NPRM.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), we have evaluated the effects of this action on small entities and have determined that the action will not have a significant economic impact on a substantial number of small entities. The rule addresses the obligation of Federal funds to States for Federal-aid highway projects. As such, it affects only States and States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, the Regulatory Flexibility Act does not apply, and the FHWA certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48, March 22, 1995), because it will not result in the expenditure by State, local, tribal governments, or by the private sector, of $128.1 million or more in any 1 year (2 U.S.C. 1532 *et seq.*). This rule merely updates the design-build regulation to reflect the changes made by SAFETEA–LU. The design-build regulation allows, but does not require, States to use the design-build technique for the delivery of Federal-aid projects. States use the design-build contracting technique because, in some instances, it may reduce the time and cost of delivering a project.

Further, the definition of ''Federal Mandate'' in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal-aid highway program permits this type of flexibility.

Executive Order 13132 (Federalism)

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and the FHWA has determined that this rule will not have a substantial direct effect or sufficient federalism implications on the States. The FHWA has also determined that this final rule will not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program. The FHWA did not receive any comments on the intergovernmental review analysis.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), the FHWA must obtain approval from the OMB for each collection of information we conduct, sponsor, or require through regulations. The FHWA has determined that this rule does not contain a collection of information requirement for purposes of the PRA.

National Environmental Policy Act

The FHWA has analyzed this rule for the purpose of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and has determined that this rule will not have any effect on the quality of the environment. The promulgation of regulations has been identified as a categorical exclusion under 23 CFR 771.117(c)(20). However, Federal-aid highway projects on which design-build is used, must still comply with the National Environmental Policy Act of 1969, as amended.

Executive Order 12630 (Taking of Private Property)

The FHWA has analyzed this rule under Executive Order 12630, Governmental Actions and Interface with Constitutionally Protected Property Rights. This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The FHWA certifies that this rule will not cause an environmental risk to health or safety that might disproportionately affect children.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this rule under Executive Order 13175, dated November 6, 2000, and believes that the rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. The rule addresses obligations of Federal funds to States for Federal-aid highway projects and will not impose any direct compliance requirements on Indian tribal governments. Therefore, a tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001. We have determined that it is not a significant energy action under that order, because, although it is a significant regulatory action under Executive Order 12866, it will not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

23 CFR Part 630

Bonds, Government contracts, Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 635

Construction and maintenance, Grant programs—transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 636

Design-build, Grant programs—transportation, Highways and roads.

Issued on: August 7, 2007.

J. Richard Capka,

FHWA Administrator.

■ In consideration of the foregoing, the FHWA amends parts 630, 635, and 636 of title 23, Code of Federal Regulations, as follows:

PART 630—PRECONSTRUCTION PROCEDURES

■ 1. Revise the authority citation for part 630 to read as follows:

Authority: Sec. 1503 of Pub. L. 109–59, 119 Stat.1144; 23 U.S.C. 106, 109, 112, 115, 315, 320, and 402(a); 23 CFR 1.32 and 49 CFR 1.48(b).

■ 2. Amend § 630.106 by revising the section heading and adding paragraph (a)(7) to read as follows:

§ 630.106 Authorization to proceed.

(a) * * *

(7) For design-build projects, the execution or modification of the project agreement for final design and physical construction, and authorization to proceed, shall not occur until after the completion of the NEPA process. However, preliminary design (as defined in 23 CFR 636.103) and preliminary engineering may be authorized in accordance with this section.

* * * * *

PART 635—CONSTRUCTION AND MAINTENANCE

■ 3. Revise the authority citation for part 635 to read as follows:

Authority: Sec. 1503 of Pub. L. 109–59, 119 Stat.1144; 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041 (a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

■ 4. Amend § 635.112 by revising paragraph (i)(1); by redesignating paragraphs (i)(2) and (i)(3) as (i)(3) and (i)(4), respectively; and by adding a new paragraph (i)(2) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(i) * * *

(1) When a Request for Proposals document is issued after the NEPA process is complete, the FHWA Division Administrator's approval of the Request for Proposals document will constitute the FHWA's project authorization and the FHWA's approval of the STD's request to release the document. This approval will carry the same significance as plan, specification and estimate approval on a design-bid-build Federal-aid project.

(2) Where a Request for Proposals document is issued prior to the completion of the NEPA process, the FHWA's approval of the document will only constitute the FHWA's approval of the STD's request to release the document.

* * * * *

■ 5. Revise § 635.309(p)(1) introductory text to read as follows:

§ 635.309 Authorization.

* * * * *

(p) * * *

(1) The FHWA's project authorization for final design and physical construction will not be issued until the following conditions have been met:

* * * * *

■ 6. Revise § 635.413(e)(1)(i) to read as follows:

§ 635.413 Guaranty and warranty clauses.

* * * * *

(e) * * *

(1) * * *

(i) The term of the warranty is short (generally one to two years); however, projects developed under a public-private agreement may include warranties that are appropriate for the term of the contract or agreement.

* * * * *

PART 636—DESIGN-BUILD CONTRACTING

■ 7. Revise the authority citation for part 636 to read as follows:

Authority: Sec. 1503 of Pub. L. 109–59, 119 Stat. 1144; Sec. 1307 of Pub. L. 105–178, 112 Stat. 107; 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

Subpart A—General

■ 8. Amend § 636.103 by adding in alphabetical order the definitions of ''final design,'' ''preliminary design,'' ''price reasonableness,'' and ''public-private agreement,'' and by revising the definition of a ''qualified project'' as follows:

§ 636.103 What are the definitions of terms used in this Part?

* * * * *

Final design means any design activities following preliminary design and expressly includes the preparation of final construction plans and detailed specifications for the performance of construction work.

* * * * *

Preliminary design defines the general project location and design concepts. It includes, but is not limited to, preliminary engineering and other activities and analyses, such as environmental assessments, topographic surveys, metes and bounds surveys, geotechnical investigations, hydrologic analysis, hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, general estimates of the types and quantities of materials, and other work needed to establish parameters for the final design. Prior to completion of the NEPA review process, any such preliminary engineering and other activities and analyses must not materially affect the objective consideration of alternatives in the NEPA review process.

* * * * *

Price reasonableness means the determination that the price of the work for any project or series of projects is not excessive and is a fair and reasonable price for the services to be performed.

* * * * *

Public-private agreement means an agreement between a public agency and a private party involving design and construction of transportation improvements by the private party to be paid for in whole or in part by Federal-aid highway funds. The agreement may also provide for project financing, at-risk equity investment, operations, or maintenance of the project.

* * * * *

Qualified project means any design-build project (including intermodal projects) funded under Title 23, United States Code, which meets the requirements of this Part and for which the contracting agency deems to be appropriate on the basis of project delivery time, cost, construction schedule, or quality.

* * * * *

§ 636.106 [Removed]

■ 9. Remove and reserve § 636.106.

■ 10. Revise § 636.107 to read as follows:

§ 636.107 May contracting agencies use geographic preference in Federal-aid design-build or public-private partnership projects?

No. Contracting agencies must not use geographic preferences (including contractual provisions, preferences or incentives for hiring, contracting, proposing, or bidding) on Federal-aid highway projects, even though the contracting agency may be subject to statutorily or administratively imposed in-State or local geographical preferences in the evaluation and award of such projects.

§ 636.108 [Removed]

■ 11. Remove and reserve § 636.108.

■ 12. Revise § 636.109 to read as follows:

§ 636.109 How does the NEPA process relate to the design-build procurement process?

The purpose of this section is to ensure that there is an objective NEPA process, that public officials and citizens have the necessary environmental impact information for federally funded actions before actions are taken, and that design-build proposers do not assume an unnecessary amount of risk in the event the NEPA process results in a significant change in the proposal, and that the amount payable by the contracting agency to the design-builder does not include significant contingency as the result of risk placed on the design-builder associated with significant changes in the project definition arising out of the NEPA process. Therefore, with respect to the design-build procurement process:

(a) The contracting agency may:

(1) Issue an RFQ prior to the conclusion of the NEPA process as long as the RFQ informs proposers of the general status of NEPA review;

(2) Issue an RFP after the conclusion of the NEPA process;

(3) Issue an RFP prior to the conclusion of the NEPA process as long as the RFP informs proposers of the general status of the NEPA process and that no commitment will be made as to any alternative under evaluation in the NEPA process, including the no-build alternative;

(4) Proceed with the award of a design-build contract prior to the conclusion of the NEPA process;

(5) Issue notice to proceed with preliminary design pursuant to a design-build contract that has been awarded prior to the completion of the NEPA process; and

(6) Allow a design-builder to proceed with final design and construction for any projects, or portions thereof, for which the NEPA process has been completed.

(b) If the contracting agency proceeds to award a design-build contract prior to the conclusion of the NEPA process, then:

(1) The contracting agency may permit the design-builder to proceed with preliminary design;

(2) The contracting agency may permit any design and engineering activities to be undertaken for the purposes of defining the project alternatives and completing the NEPA alternatives analysis and review process; complying with other related environmental laws and regulations; supporting agency coordination, public involvement, permit applications, or development of mitigation plans; or developing the design of the preferred alternative to a higher level of detail when the lead agencies agree that it is warranted in accordance with 23 U.S.C. 139(f)(4)(D);

(3) The design-build contract must include appropriate provisions preventing the design-builder from proceeding with final design activities and physical construction prior to the completion of the NEPA process (contract hold points or another method of issuing multi-step approvals must be used);

(4) The design-build contract must include appropriate provisions ensuring that no commitments are made to any alternative being evaluated in the NEPA process and that the comparative merits of all alternatives presented in the NEPA document, including the no-build alternative, will be evaluated and fairly considered;

(5) The design-build contract must include appropriate provisions ensuring that all environmental and mitigation measures identified in the NEPA document will be implemented;

(6) The design-builder must not prepare the NEPA document or have any decisionmaking responsibility with respect to the NEPA process;

(7) Any consultants who prepare the NEPA document must be selected by and subject to the exclusive direction and control of the contracting agency;

(8) The design-builder may be requested to provide information about the project and possible mitigation actions, and its work product may be considered in the NEPA analysis and included in the record; and

(9) The design-build contract must include termination provisions in the event that the no-build alternative is selected.

(c) The contracting agency must receive prior FHWA concurrence before issuing the RFP, awarding a design-build contract and proceeding with preliminary design work under the design-build contract. Should the contracting agency proceed with any of the activities specified in this section before the completion of the NEPA process (with the exception of preliminary design, as provided in paragraph (d) of this section), the FHWA's concurrence merely constitutes the FHWA approval that any such activities complies with Federal requirements and does not constitute project authorization or obligate Federal funds.

(d) The FHWA's authorization and obligation of preliminary engineering and other preconstruction funds prior to the completion of the NEPA process is limited to preliminary design and such additional activities as may be necessary to complete the NEPA process. After the completion of the NEPA process, the FHWA may issue an authorization to proceed with final design and construction and obligate Federal funds for such purposes.

■ 13. Amend § 636.116 by adding paragraphs (c) and (d) to read as follows:

§ 636.116 What organizational conflict of interest requirements apply to design-build projects?

* * * * *

(c) If the NEPA process has been completed prior to issuing the RFP, the contracting agency may allow a consultant or subconsultant who prepared the NEPA document to submit a proposal in response to the RFP.

(d) If the NEPA process has not been completed prior to issuing the RFP, the contracting agency may allow a subconsultant to the preparer of the NEPA document to participate as an offeror or join a team submitting a proposal in response to the RFP only if the contracting agency releases such subconsultant from further responsibilities with respect to the preparation of the NEPA document.

■ 14. Revise § 636.119(b)(1) and (2) to read as follows:

§ 636.119 How does this part apply to a project developed under a public-private partnership?

* * * * *

(b) * * *

(1) If the public-private agreement establishes price, then all subsequent contracts executed by the developer are considered to be subcontracts and are not subject to Federal-aid procurement requirements.

(2) If the public-private agreement does not establish price, the developer is considered to be an agent of the

owner, and the developer must follow the appropriate Federal-aid procurement requirements (23 CFR part 172 for engineering service contracts, 23 CFR part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts (not subcontracts).

* * * * *

■ 15. Revise § 636.302(a)(1) to read as follows:

§ 636.302 Are there any limitations on the selection and use of proposal evaluation factors?

(a) * * *

(1) You must evaluate price in every source selection where construction is a significant component of the scope of work. However, where the contracting agency elects to release the final RFP and award the design-build contract before the conclusion of the NEPA process (see § 636.109), then the following requirements apply:

(i) It is not necessary to evaluate the total contract price;

(ii) Price must be considered to the extent the contract requires the contracting agency to make any payments to the design-builder for any work performed prior to the completion of the NEPA process and the contracting agency wishes to use Federal-aid highway funds for those activities;

(iii) The evaluation of proposals and award of the contract may be based on qualitative considerations;

(iv) If the contracting agency wishes to use Federal-aid highway funds for final design and construction, the subsequent approval of final design and construction activities will be contingent upon a finding of price reasonableness by the contracting agency;

(v) The determination of price reasonableness for any design-build project funded with Federal-aid highway funds shall be based on at least one of the following methods:

(A) Compliance with the applicable procurement requirements for part 172, 635, or 636, where the contractor providing the final design or construction services, or both, is a person or entity other than the design-builder;

(B) A negotiated price determined on an open-book basis by both the design-builder and contracting agency; or

(C) An independent estimate by the contracting agency based on the price of similar work;

(vi) The contracting agency's finding of price reasonableness is subject to FHWA concurrence.

* * * * *

[FR Doc. 07–3959 Filed 8–9–07; 3:55 pm]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9354]

RIN 1545–BB86

Expenses for Household and Dependent Care Services Necessary for Gainful Employment

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding the credit for expenses for household and dependent care services necessary for gainful employment. The regulations reflect statutory amendments under the Deficit Reduction Act of 1984, the Tax Reform Act of 1986, the Omnibus Budget Reconciliation Act of 1987, the Family Support Act of 1988, the Small Business Job Protection Act of 1996, the Economic Growth and Tax Relief Reconciliation Act of 2001, the Job Creation and Worker Assistance Act of 2002, the Working Families Tax Relief Act of 2004, and the Gulf Opportunity Zone Act of 2005. The regulations affect taxpayers who claim the credit for expenses for household and dependent care services, and dependent care providers.

DATES: *Effective Date:* These regulations are effective August 14, 2007.

Applicability Date: For date of applicability, see § 1.21–1(l).

FOR FURTHER INFORMATION CONTACT: Amy Pfalzgraf, (202) 622–4960 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to the Income Tax Regulations, 26 CFR part 1, relating to the credit for expenses for household and dependent care services necessary for gainful employment (the credit) under section 21 of the Internal Revenue Code (Code).

On May 24, 2006, a notice of proposed rulemaking (REG–139059–02) regarding the credit was published in the **Federal Register** (71 FR 29847). Written and electronic comments responding to the notice of proposed rulemaking were received. No public hearing was requested or held. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and revisions are discussed in the preamble.

Explanation of Provisions and Summary of Comments

1. Time of Payment and Performance of Services

Section 21(b)(2) provides, in part, that employment-related expenses are amounts paid to enable a taxpayer to be gainfully employed for a period for which there are one or more qualifying individuals with respect to a taxpayer. The proposed regulations provide that a taxpayer may take expenses into account under section 21 only in the later of the taxable year the services are performed or the taxable year the expenses are paid. The proposed regulations also provide that the status of an individual as a qualifying individual is determined on a daily basis, that a taxpayer may take into account only expenses that qualify before a disqualifying event, such as a child turning 13, and that the requirements of section 21 and the regulations are applied at the time the services are performed, regardless of when the expenses are paid.

A verbal comment inquired whether, to be creditable, expenses must be paid and services must be performed before a disqualifying event.

The determination of whether expenses qualify as employment-related expenses, including whether an individual is a qualifying individual, can be made only at the time services are performed. Only expenses for the care of a qualifying individual that are for the purpose of enabling the taxpayer to be gainfully employed qualify for the credit. Therefore, services must be performed prior to a disqualifying event and at a time when the purpose is to enable the taxpayer to be gainfully employed. For purposes of determining whether expenses are employment-related expenses, the time of payment is irrelevant, although payment must be made before the credit is claimed. The final regulations provide examples to illustrate these rules.

2. Care of Qualifying Individual and Household Services

Under section 21(b)(2)(A), expenses are employment-related only if the expenses are primarily for household services or for the care of a qualifying

individual. The proposed regulations provide that the primary purpose of expenses for the care of a qualifying individual must be to assure that individual's well-being and protection.

a. Costs for Education

The proposed regulations provide that expenses for a child in nursery school, pre-school, or similar programs for children below the kindergarten level are for the care of a qualifying individual and may be employment-related expenses. Expenses for a child in kindergarten or a higher grade are not for care and therefore, are not employment-related expenses. However, expenses for before-or after-school care of a child in kindergarten or a higher grade may be for care.

Commentators noted that some public school systems offer only half-day kindergarten, and that some parents send their children to private kindergarten because it offers a full-day program. Under the proposed regulations, a parent whose child attends a half-day kindergarten may claim the credit for the cost of an afternoon after-school program. However, a parent whose child attends a full-day private kindergarten may not claim the credit for the cost of services performed in the afternoon, because the services are part of the kindergarten program and not after-school care. Commentators suggested that taxpayers who send their children to full-day private kindergarten should be allowed some apportionment of expenses for the afternoon portion of the kindergarten.

The final regulations do not adopt this comment. Kindergarten programs are primarily educational. See, for example, section 62(d)(1) (definitions of eligible educator and school) and section 530(b)(3)(B) (definition of school). Although nursery school and other programs below the level of kindergarten also may include significant educational elements, for administrative convenience the proposed regulations treat these programs as for care. The final regulations retain these rules for greater ease of administration.

A commentator suggested that amounts paid for sending a child to a private school by a taxpayer living overseas should be an employment-related expense if public education is not available. The final regulations do not adopt this comment. Employment-related expenses must be for the care of a qualifying individual and may not be for other services such as education.

b. Specialty Day Camps

The proposed regulations provide that the full amount paid for a day camp or similar program may be for the care of a qualifying individual although the camp specializes in a particular activity, such as soccer or computers. For administrative convenience, no allocation is required in this situation between the cost of care and amounts paid for learning a specialized skill.

A verbal comment requested that the regulations clarify that summer school is not day camp and that the cost of summer school is not creditable. Another commentator commended the proposed regulations for allowing the credit for the cost of ''education day camps'' that focus on reading, math, writing, and study skills.

The final regulations retain the rule that no allocation is required for the cost of a specialty day camp, but clarify that expenses for summer school and tutoring programs are not creditable. Summer school and tutoring programs are indistinguishable from school and are education, not care. The final regulations provide examples to illustrate these rules.

Section 21(b)(2)(C) provides, in part, that the cost of services performed by a dependent care center are employment-related expenses only if the dependent care center complies with the applicable laws of the state and local government. A commentator requested that the regulations clarify whether a day camp is a dependent care center and must comply with this requirement. The final regulations clarify that the requirements of section 21(b)(2)(C) apply to day camps that meet the definition of dependent care center in section 21(b)(2)(D).

c. Sick Child Centers

A commentator asserted that sick child centers that provide care for children with illnesses who cannot be cared for by the primary care provider primarily provide dependent care and that any medical care provided is incidental. The commentator suggested that these costs may be employment-related expenses.

The final regulations do not adopt this comment. A taxpayer may take an amount into account as either an employment-related expense under section 21 or an expense for medical care under section 213 (but not both). See section 213(e). Whether the care provided at a sick child center assures a child's well-being and protection or constitutes medical care is a factual matter that must be determined on a case-by-case basis.

d. Boarding School

The proposed regulations provide that an allocation must be made between expenses for the care of a qualifying individual and expenses for other goods or services, unless the other goods or services are incidental to and inseparably a part of the care. Specifically, amounts paid for food, lodging, clothing, or education are not for the care of a qualifying individual. The proposed regulations provide an example requiring a taxpayer to allocate the costs of a boarding school between care and education, meals, and housing.

A commentator stated that the example does not provide clear guidance for determining which expenses are for care and whether lodging and meals could be considered incidental and therefore, part of care. The commentator suggested that meals and lodging at a boarding school are incidental to and inseparably a part of the care provided.

The final regulations do not adopt this comment. The example and the regulations clearly distinguish care from food, lodging, and education provided by a boarding school, which are not for the care of a qualifying individual, or incidental to or inseparably a part of the care provided.

e. Expenses for Room and Board of a Caregiver

The proposed regulations provide that the additional cost of providing room and board for a caregiver over usual household expenses may be an employment-related expense. This rule is based on Rev. Rul. 76–288 (1976–2 CB 83), which holds that under the predecessor to section 21, a taxpayer furnishing meals and lodging to a housekeeper who provides care may deduct the allocable expenses attributable to the housekeeper that are in addition to normal household expenses. The ruling provides an example allowing a taxpayer to take into account the additional cost of rent for an apartment with an additional bedroom to accommodate the housekeeper and additional utilities attributable to the housekeeper.

The proposed regulations provide that the general substantiation rules of section 6001 and the implementing regulations apply to taxpayers claiming the credit. A commentator stated that the regulations should clarify whether an increase in utilities (such as electric, water, and gas) may be employment-related expenses and what constitutes acceptable proof of costs.

The final regulations adopt the first of these comments and include an

example similar to the example in Rev. Rul. 76–288. However, the final regulations do not provide special substantiation rules for these costs. These rules encompass substantiation of allocations by taxpayers claiming the credit with respect to the additional cost of providing room and board for a caregiver.

f. Cost of Overnight Camp

A commentator suggested that the credit should be allowed for a portion of the cost of overnight camp allocable to time when parents work. The final regulations do not adopt this comment. Under section 21(b)(2), the cost of overnight camp is not an employment-related expense.

3. Expenses Enabling a Taxpayer To Be Gainfully Employed

Under section 21(b)(2)(A), expenses are employment-related only if the taxpayer's purpose in obtaining the services is to enable the taxpayer to be gainfully employed. The expenses must be for periods during which the taxpayer is gainfully employed or is in active search of gainful employment.

a. Short, Temporary Absence Exception

The proposed regulations provide that a taxpayer must allocate the cost of care on a daily basis if expenses are paid for a period during only part of which the taxpayer is employed or in active search of gainful employment. The proposed regulations provide an exception to the allocation requirement for a short, temporary absence from work for a taxpayer paying for dependent care on a weekly, monthly, or annual basis. Whether an absence is a short, temporary absence is determined based on all the facts and circumstances. The proposed regulations requested comments on an appropriate period to constitute a temporary absence safe harbor.

A commentator suggested that the exception for short, temporary absences should not be limited to taxpayers who pay employment-related expenses on a weekly, monthly, or annual basis. The commentator stated that regardless of payment schedule, taxpayers who take their children out of care due to a short illness or vacation typically must pay for that care when absent or risk losing it.

The final regulations adopt this comment and delete the provision that the temporary absence exception applies only to taxpayers who must pay for care on a weekly, monthly, or annual basis. The final regulations clarify, however, that only those costs that the taxpayer is required to pay during the absence qualify for the exception. The final regulations provide examples to illustrate these rules.

A commentator suggested that a length of absence that is less than a taxpayer's pay period should be deemed to be a short, temporary absence for that taxpayer, up to a maximum of 2 weeks. For example, the maximum short, temporary absence period of a taxpayer with a 1-week pay period would be 4 days. The final regulations do not adopt this comment, which would result in disparate treatment of taxpayers based on length of pay period.

A commentator suggested that the final regulations should adopt 12 weeks as a temporary absence safe harbor. The commentator based this suggestion on the Family Medical Leave Act (FMLA), which guarantees workers a maximum of 12 weeks of unpaid leave for the birth or adoption of a child and other purposes. The final regulations do not adopt this comment. Different policies underlie the FMLA and the dependent care credit. An absence of 12 weeks is not a short, temporary absence for purposes of claiming the credit.

The final regulations include a safe harbor that treats an absence of no more than 2 consecutive calendar weeks as a short, temporary absence, and modify the examples to illustrate this rule.

b. Other Costs

A commentator suggested that the final regulations should clarify that expenses may be paid to enable a taxpayer to be gainfully employed and may be employment-related expenses if one parent works during the day and the other parent works at night, and the expenses are for care while one parent is working and the other is sleeping. Another commentator suggested that the cost of overnight care (not overnight camp) should be an employment-related expense for a taxpayer who works at night. The final regulations include examples illustrating that expenses may be employment-related expenses in these situations.

Commentators suggested that the cost of care should be treated as an employment-related expense for any period that a taxpayer is on short-or long-term disability, leave under the FMLA, paid medical leave, or paid maternity leave. The final regulations do not adopt these comments as these rules would be inconsistent with the statutory requirement that expenses are employment-related expenses only if paid to enable the taxpayer to be gainfully employed.

4. Limitations on Amount Creditable

a. Dollar Limit

Commentators suggested that the dollar limit on employment-related expenses should be increased from $3,000 for one qualifying child and $6,000 for two or more qualifying children, to $5,000 for each qualifying child. The final regulations do not adopt these comments as they are inconsistent with the statutory limitations.

b. Student at an Educational Organization

For purposes of the deemed earned income of a spouse who is a full-time student, section 21(e)(7) and (8) defines *student* as an individual who, during each of 5 calendar months during the taxable year, is a full-time student at an educational organization described in section 170(b)(1)(A)(ii). Section 170(b)(1)(A)(ii) provides that an educational organization normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on.

A commentator suggested that a full-time student in an on-line degree program is a full-time student at an educational organization. The final regulations do not adopt this comment. A degree program offered by an organization that provides instruction exclusively over the internet (as opposed to an organization that provides courses on-line as well as traditional classroom instruction) does not have students in attendance at the place where its educational activities are regularly carried on and is not an educational organization within the meaning of section 170(b)(1)(A)(ii). Accordingly, an individual enrolled in a program provided by an organization that offers only on-line instruction is not a student for purposes of the deemed earned income rule. However, an individual who takes on-line courses at an organization that has traditional classroom instruction as well as on-line courses, and that otherwise meets the definition of educational organization under section 170(b)(1)(A)(ii), may be a student for purposes of the deemed earned income rule.

The final regulations delete the cross-reference in the proposed regulations to the definition of student in section 152(f)(2) (for taxable years beginning after December 31, 2004) or section 151(c)(4) (for taxable years beginning before January 1, 2005), and the regulations thereunder, as that term is

defined in section 21(e)(7) and (8) and these regulations.

5. Substantiation

The proposed regulations provide that taxpayers claiming a credit for employment-related expenses must maintain adequate records or other sufficient evidence to substantiate the expenses in accordance with section 6001 and the regulations thereunder.

A commentator suggested that dependent care assistance program administrators should be able to rely on the representations of plan participants, without additional documentation, to establish that indirect expenses are required and are subject to forfeiture, the proper expense allocation for part-time employees, and whether expenses are paid on a weekly or monthly basis. The final regulations do not adopt this comment as these situations do not present unusual substantiation issues.

6. Conforming Changes

The final regulations incorporate several changes to conform to amendments to the statute. The final regulations reflect that the special dependency rule of section 21(e)(5) applies to children of parents who live apart at all times during the last 6 months of the calendar year as well as to the children of separated or divorced parents. The final regulations reflect the changes made to the definitions of *qualifying individual* and *custodial parent* by the Gulf Opportunity Zone Act of 2005 (Pub. L. 109–135, 119 Stat. 2577). Finally, the final regulations clarify that, for taxable years beginning after December 31, 2004, costs for care outside the taxpayer's household of a qualifying individual who is a dependent or spouse incapable of self-care who regularly spends at least 8 hours each day in the taxpayer's household may continue to qualify for the credit.

7. Effective Date

The final regulations apply to taxable years ending after August 14, 2007.

Effect on Other Documents

Rev. Rul. 76–278 (1976–2 CB 84) and Rev. Rul. 76–288 (1976–2 CB 83) are obsoleted as of August 14, 2007.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Amy Pfalzgraf of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Department of the Treasury participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART I—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.21–1 also issued under 26 U.S.C. 21(f).

Section 1.21–2 also issued under 26 U.S.C. 21(f).

Section 1.21–3 also issued under 26 U.S.C. 21(f).

Section 1.21–4 also issued under 26 U.S.C. 21(f) * * *

§ 1.21–1 [Redesignated as § 1.15–1].

■ **Par. 2.** Section 1.21–1 is redesignated § 1.15–1.

■ **Par. 3.** New §§ 1.21–1, 1.21–2, 1.21–3, and 1.21–4 are added to read as follows:

§ 1.21–1 Expenses for household and dependent care services necessary for gainful employment.

(a) *In general.* (1) Section 21 allows a credit to a taxpayer against the tax imposed by chapter 1 for employment-related expenses for household services and care (as defined in paragraph (d) of this section) of a qualifying individual (as defined in paragraph (b) of this section). The purpose of the expenses must be to enable the taxpayer to be gainfully employed (as defined in paragraph (c) of this section). For taxable years beginning after December 31, 2004, a qualifying individual must have the same principal place of abode (as defined in paragraph (g) of this section) as the taxpayer for more than one-half of the taxable year. For taxable years beginning before January 1, 2005, the taxpayer must maintain a household (as defined in paragraph (h) of this section) that includes one or more qualifying individuals.

(2) The amount of the credit is equal to the applicable percentage of the employment-related expenses that may be taken into account by the taxpayer during the taxable year (but subject to the limits prescribed in § 1.21–2). *Applicable percentage* means 35 percent reduced by 1 percentage point for each $2,000 (or fraction thereof) by which the taxpayer's adjusted gross income for the taxable year exceeds $15,000, but not less than 20 percent. For example, if a taxpayer's adjusted gross income is $31,850, the applicable percentage is 26 percent.

(3) Expenses may be taken as a credit under section 21, regardless of the taxpayer's method of accounting, only in the taxable year the services are performed or the taxable year the expenses are paid, whichever is later.

(4) The requirements of section 21 and §§ 1.21–1 through 1.21–4 are applied at the time the services are performed, regardless of when the expenses are paid.

(5) *Examples.* The provisions of this paragraph (a) are illustrated by the following examples.

Example 1. In December 2007, B pays for the care of her child for January 2008. Under paragraph (a)(3) of this section, B may claim the credit in 2008, the later of the years in which the expenses are paid and the services are performed.

Example 2. The facts are the same as in *Example 1*, except that B's child turns 13 on February 1, 2008, and B pays for the care provided in January 2008 on February 3, 2008. Under paragraph (a)(4) of this section, the determination of whether the expenses are employment-related expenses is made when the services are performed. Assuming other requirements are met, the amount B pays will be an employment-related expense under section 21, because B's child is a qualifying individual when the services are performed, even though the child is not a qualifying individual when B pays the expenses.

(b) *Qualifying individual*—(1) *In general.* For taxable years beginning after December 31, 2004, a qualifying individual is—

(i) The taxpayer's dependent (who is a qualifying child within the meaning of section 152) who has not attained age 13;

(ii) The taxpayer's dependent (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B)) who is physically or mentally incapable of self-care and who has the same principal place of abode as the taxpayer for more than one-half of the taxable year; or

(iii) The taxpayer's spouse who is physically or mentally incapable of self-care and who has the same principal place of abode as the taxpayer for more than one-half of the taxable year.

(2) *Taxable years beginning before January 1, 2005.* For taxable years beginning before January 1, 2005, a qualifying individual is—

(i) The taxpayer's dependent for whom the taxpayer is entitled to a deduction for a personal exemption under section 151(c) and who is under age 13;

(ii) The taxpayer's dependent who is physically or mentally incapable of self-care; or

(iii) The taxpayer's spouse who is physically or mentally incapable of self-care.

(3) *Qualification on a daily basis.* The status of an individual as a qualifying individual is determined on a daily basis. An individual is not a qualifying individual on the day the status terminates.

(4) *Physical or mental incapacity.* An individual is physically or mentally incapable of self-care if, as a result of a physical or mental defect, the individual is incapable of caring for the individual's hygiene or nutritional needs, or requires full-time attention of another person for the individual's own safety or the safety of others. The inability of an individual to engage in any substantial gainful activity or to perform the normal household functions of a homemaker or care for minor children by reason of a physical or mental condition does not of itself establish that the individual is physically or mentally incapable of self-care.

(5) *Special test for divorced or separated parents or parents living apart*—(i) Scope. This paragraph (b)(5) applies to a child (as defined in section 152(f)(1) for taxable years beginning after December 31, 2004, and in section 151(c)(3) for taxable years beginning before January 1, 2005) who—

(A) Is under age 13 or is physically or mentally incapable of self-care;

(B) Receives over one-half of his or her support during the calendar year from one or both parents who are divorced or legally separated under a decree of divorce or separate maintenance, are separated under a written separation agreement, or live apart at all times during the last 6 months of the calendar year; and

(C) Is in the custody of one or both parents for more than one-half of the calendar year.

(ii) *Custodial parent allowed the credit.* A child to whom this paragraph (b)(5) applies is the qualifying individual of only one parent in any taxable year and is the qualifying child of the custodial parent even if the noncustodial parent may claim the dependency exemption for that child for that taxable year. See section 21(e)(5). The custodial parent is the parent having custody for the greater portion of the calendar year. See section 152(e)(4)(A).

(6) *Example.* The provisions of this paragraph (b) are illustrated by the following example.

Example. C pays $420 for the care of her child, a qualifying individual, to be provided from January 2 through January 31, 2008 (21 days of care). On January 20, 2008, C's child turns 13 years old. Under paragraph (b)(3) of this section, C's child is a qualifying individual from January 2 through January 19, 2008 (13 days of care). C may take into account $260, the pro rata amount C pays for the care of her child for 13 days, under section 21. See § 1.21–2(a)(4).

(c) *Gainful employment*—(1) *In general.* Expenses are employment-related expenses only if they are for the purpose of enabling the taxpayer to be gainfully employed. The expenses must be for the care of a qualifying individual or household services performed during periods in which the taxpayer is gainfully employed or is in active search of gainful employment. Employment may consist of service within or outside the taxpayer's home and includes self-employment. An expense is not employment-related merely because it is paid or incurred while the taxpayer is gainfully employed. The purpose of the expense must be to enable the taxpayer to be gainfully employed. Whether the purpose of an expense is to enable the taxpayer to be gainfully employed depends on the facts and circumstances of the particular case. Work as a volunteer or for a nominal consideration is not gainful employment.

(2) *Determination of period of employment on a daily basis*—(i) *In general.* Expenses paid for a period during only part of which the taxpayer is gainfully employed or in active search of gainful employment must be allocated on a daily basis.

(ii) *Exception for short, temporary absences.* A taxpayer who is gainfully employed is not required to allocate expenses during a short, temporary absence from work, such as for vacation or minor illness, provided that the care-giving arrangement requires the taxpayer to pay for care during the absence. An absence of 2 consecutive calendar weeks is a short, temporary absence. Whether an absence longer than 2 consecutive calendar weeks is a short, temporary absence is determined based on all the facts and circumstances.

(iii) *Part-time employment.* A taxpayer who is employed part-time generally must allocate expenses for dependent care between days worked and days not worked. However, if a taxpayer employed part-time is required to pay for dependent care on a periodic basis (such as weekly or monthly) that includes both days worked and days not worked, the taxpayer is not required to allocate the expenses. A day on which the taxpayer works at least 1 hour is a day of work.

(3) *Examples.* The provisions of this paragraph (c) are illustrated by the following examples:

Example 1. D works during the day and her husband, E, works at night and sleeps during the day. D and E pay for care for a qualifying individual during the hours when D is working and E is sleeping. Under paragraph (c)(1) of this section, the amount paid by D and E for care may be for the purpose of allowing D and E to be gainfully employed and may be an employment-related expense under section 21.

Example 2. F works at night and pays for care for a qualifying individual during the hours when F is working. Under paragraph (c)(1) of this section, the amount paid by F for care may be for the purpose of allowing F to be gainfully employed and may be an employment-related expense under section 21.

Example 3. G, the custodial parent of two children who are qualifying individuals, hires a housekeeper for a monthly salary to care for the children while G is gainfully employed. G becomes ill and as a result is absent from work for 4 months. G continues to pay the housekeeper to care for the children while G is absent from work. During this 4-month period, G performs no employment services, but receives payments under her employer's wage continuation plan. Although G may be considered to be gainfully employed during her absence from work, the absence is not a short, temporary absence within the meaning of paragraph (c)(2)(ii) of this section, and her payments for household and dependent care services during the period of illness are not for the purpose of enabling her to be gainfully employed. G's expenses are not employment-related expenses, and she may not take the expenses into account under section 21.

Example 4. To be gainfully employed, H sends his child to a dependent care center that complies with all state and local requirements. The dependent care center requires payment for days when a child is absent from the center. H takes 8 days off from work as vacation days. Because the absence is less than 2 consecutive calendar

weeks, under paragraph (c)(2)(ii) of this section, H's absence is a short, temporary absence. H is not required to allocate expenses between days worked and days not worked. The entire fee for the period that includes the 8 vacation days may be an employment-related expense under section 21.

Example 5. J works 3 days per week and her child attends a dependent care center (that complies with all state and local requirements) to enable her to be gainfully employed. The dependent care center allows payment for any 3 days per week for $150 or 5 days per week for $250. J enrolls her child for 5 days per week, and her child attends the care center for 5 days per week. Under paragraph (c)(2)(iii) of this section, J must allocate her expenses for dependent care between days worked and days not worked. Three-fifths of the $250, or $150 per week, may be an employment-related expense under section 21.

Example 6. The facts are the same as in *Example 5,* except that the dependent care center does not offer a 3-day option. The entire $250 weekly fee may be an employment-related expense under section 21.

(d) *Care of qualifying individual and household services*—(1) *In general.* To qualify for the dependent care credit, expenses must be for the care of a qualifying individual. Expenses are for the care of a qualifying individual if the primary function is to assure the individual's well-being and protection. Not all expenses relating to a qualifying individual are for the individual's care. Amounts paid for food, lodging, clothing, or education are not for the care of a qualifying individual. If, however, the care is provided in such a manner that the expenses cover other goods or services that are incidental to and inseparably a part of the care, the full amount is for care.

(2) *Allocation of expenses.* If an expense is partly for household services or for the care of a qualifying individual and partly for other goods or services, a reasonable allocation must be made. Only so much of the expense that is allocable to the household services or care of a qualifying individual is an employment-related expense. An allocation must be made if a housekeeper or other domestic employee performs household duties and cares for the qualifying children of the taxpayer and also performs other services for the taxpayer. No allocation is required, however, if the expense for the other purpose is minimal or insignificant or if an expense is partly attributable to the care of a qualifying individual and partly to household services.

(3) *Household services.* Expenses for household services may be employment-related expenses if the services are performed in connection with the care of a qualifying individual. The household services must be the performance in and about the taxpayer's home of ordinary and usual services necessary to the maintenance of the household and attributable to the care of the qualifying individual. Services of a housekeeper are household services within the meaning of this paragraph (d)(3) if the services are provided, at least in part, to the qualifying individual. Such services as are performed by chauffeurs, bartenders, or gardeners are not household services.

(4) *Manner of providing care.* The manner of providing care need not be the least expensive alternative available to the taxpayer. The cost of a paid caregiver may be an expense for the care of a qualifying individual even if another caregiver is available at no cost.

(5) *School or similar program.* Expenses for a child in nursery school, pre-school, or similar programs for children below the level of kindergarten are for the care of a qualifying individual and may be employment-related expenses. Expenses for a child in kindergarten or a higher grade are not for the care of a qualifying individual. However, expenses for before- or after-school care of a child in kindergarten or a higher grade may be for the care of a qualifying individual.

(6) *Overnight camps.* Expenses for overnight camps are not employment-related expenses.

(7) *Day camps.* (i) The cost of a day camp or similar program may be for the care of a qualifying individual and an employment-related expense, without allocation under paragraph (d)(2) of this section, even if the day camp specializes in a particular activity. Summer school and tutoring programs are not for the care of a qualifying individual and the costs are not employment-related expenses.

(ii) A day camp that meets the definition of *dependent care center* in section 21(b)(2)(D) and paragraph (e)(2) of this section must comply with the requirements of section 21(b)(2)(C) and paragraph (e)(2) of this section.

(8) *Transportation.* The cost of transportation by a dependent care provider of a qualifying individual to or from a place where care of that qualifying individual is provided may be for the care of the qualifying individual. The cost of transportation not provided by a dependent care provider is not for the care of the qualifying individual.

(9) *Employment taxes.* Taxes under sections 3111 (relating to the Federal Insurance Contributions Act) and 3301 (relating to the Federal Unemployment Tax Act) and similar state payroll taxes are employment-related expenses if paid in respect of wages that are employment-related expenses.

(10) *Room and board.* The additional cost of providing room and board for a caregiver over usual household expenditures may be an employment-related expense.

(11) *Indirect expenses.* Expenses that relate to, but are not directly for, the care of a qualifying individual, such as application fees, agency fees, and deposits, may be for the care of a qualifying individual and may be employment-related expenses if the taxpayer is required to pay the expenses to obtain the related care. However, forfeited deposits and other payments are not for the care of a qualifying individual if care is not provided.

(12) *Examples.* The provisions of this paragraph (d) are illustrated by the following examples:

Example 1. To be gainfully employed, K sends his 3-year old child to a pre-school. The pre-school provides lunch and snacks. Under paragraph (d)(1) of this section, K is not required to allocate expenses between care and the lunch and snacks, because the lunch and snacks are incidental to and inseparably a part of the care. Therefore, K may treat the full amount paid to the pre-school as for the care of his child.

Example 2. L, a member of the armed forces, is ordered to a combat zone. To be able to comply with the orders, L places her 10-year old child in boarding school. The school provides education, meals, and housing to L's child in addition to care. Under paragraph (d)(2) of this section, L must allocate the cost of the boarding school between expenses for care and expenses for education and other services not constituting care. Only the part of the cost of the boarding school that is for the care of L's child is an employment-related expense under section 21.

Example 3. To be gainfully employed, M employs a full-time housekeeper to care for M's two children, aged 9 and 13 years. The housekeeper regularly performs household services of cleaning and cooking and drives M to and from M's place of employment, a trip of 15 minutes each way. Under paragraph (d)(3) of this section, the chauffeur services are not household services. M is not required to allocate a portion of the expense of the housekeeper to the chauffeur services under paragraph (d)(2) of this section, however, because the chauffeur services are minimal and insignificant. Further, no allocation under paragraph (d)(2) of this section is required to determine the portion of the expenses attributable to the care of the 13-year old child (not a qualifying individual) because the household expenses are in part attributable to the care of the 9-year-old child. Accordingly, the entire expense of employing the housekeeper is an employment-related expense. The amount that M may take into account as an employment-related expense under section

21, however, is limited to the amount allowable for one qualifying individual.

Example 4. To be gainfully employed, N sends her 9-year-old child to a summer day camp that offers computer activities and recreational activities such as swimming and arts and crafts. Under paragraph (d)(7)(i) of this section, the full cost of the summer day camp may be for care.

Example 5. To be gainfully employed, O sends her 9-year-old child to a math tutoring program for two hours per day during the summer. Under paragraph (d)(7)(i) of this section, the cost of the tutoring program is not for care.

Example 6. To be gainfully employed, P hires a full-time housekeeper to care for her 8-year old child. In order to accommodate the housekeeper, P moves from a 2-bedroom apartment to a 3-bedroom apartment that otherwise is comparable to the 2-bedroom apartment. Under paragraph (d)(10) of this section, the additional cost to rent the 3-bedroom apartment over the cost of the 2-bedroom apartment and any additional utilities attributable to the housekeeper's residence in the household may be employment-related expenses under section 21.

Example 7. Q pays a fee to an agency to obtain the services of an au pair to care for Q's children, qualifying individuals, to enable Q to be gainfully employed. An au pair from the agency subsequently provides care for Q's children. Under paragraph (d)(11) of this section, the fee may be an employment-related expense.

Example 8. R places a deposit with a pre-school to reserve a place for her child. R sends the child to a different pre-school and forfeits the deposit. Under paragraph (d)(11) of this section, the forfeited deposit is not an employment-related expense.

(e) *Services outside the taxpayer's household*—(1) *In general.* The credit is allowable for expenses for services performed outside the taxpayer's household only if the care is for one or more qualifying individuals who are described in this section at—

(i) Paragraph (b)(1)(i) or (b)(2)(i); or

(ii) Paragraph (b)(1)(ii), (b)(2)(ii), (b)(1)(iii), or (b)(2)(iii) and regularly spend at least 8 hours each day in the taxpayer's household.

(2) *Dependent care centers*—(i) *In general.* The credit is allowable for services performed by a dependent care center only if—

(A) The center complies with all applicable laws and regulations, if any, of a state or local government, such as state or local licensing requirements and building and fire code regulations; and

(B) The requirements provided in this paragraph (e) are met.

(ii) *Definition.* The term *dependent care center* means any facility that provides full-time or part-time care for more than six individuals (other than individuals who reside at the facility) on a regular basis during the taxpayer's taxable year, and receives a fee, payment, or grant for providing services for the individuals (regardless of whether the facility is operated for profit). For purposes of the preceding sentence, a facility is presumed to provide full-time or part-time care for six or fewer individuals on a regular basis during the taxpayer's taxable year if the facility has six or fewer individuals (including the taxpayer's qualifying individual) enrolled for full-time or part-time care on the day the qualifying individual is enrolled in the facility (or on the first day of the taxable year the qualifying individual attends the facility if the qualifying individual was enrolled in the facility in the preceding taxable year) unless the Internal Revenue Service demonstrates that the facility provides full-time or part-time care for more than six individuals on a regular basis during the taxpayer's taxable year.

(f) *Reimbursed expenses.* Employment-related expenses for which the taxpayer is reimbursed (for example, under a dependent care assistance program) may not be taken into account for purposes of the credit.

(g) *Principal place of abode.* For purposes of this section, the term *principal place of abode* has the same meaning as in section 152.

(h) *Maintenance of a household*—(1) *In general.* For taxable years beginning before January 1, 2005, the credit is available only to a taxpayer who maintains a household that includes one or more qualifying individuals. A taxpayer maintains a household for the taxable year (or lesser period) only if the taxpayer (and spouse, if applicable) occupies the household and furnishes over one-half of the cost for the taxable year (or lesser period) of maintaining the household. The household must be the principal place of abode for the taxable year of the taxpayer and the qualifying individual or individuals.

(2) *Cost of maintaining a household.* (i) Except as provided in paragraph (h)(2)(ii) of this section, for purposes of this section, the term *cost of maintaining a household* has the same meaning as in § 1.2–2(d) without regard to the last sentence thereof.

(ii) The cost of maintaining a household does not include the value of services performed in the household by the taxpayer or by a qualifying individual described in paragraph (b) of this section or any expense paid or reimbursed by another person.

(3) *Monthly proration of annual costs.* In determining the cost of maintaining a household for a period of less than a taxable year, the cost for the entire taxable year must be prorated on the basis of the number of calendar months within that period. A period of less than a calendar month is treated as a full calendar month.

(4) *Two or more families.* If two or more families occupy living quarters in common, each of the families is treated as maintaining a separate household. A taxpayer is maintaining a household if the taxpayer provides more than one-half of the cost of maintaining the separate household. For example, if two unrelated taxpayers with their respective children occupy living quarters in common and each taxpayer pays more than one-half of the household costs for each respective family, each taxpayer is treated as maintaining a household.

(i) Reserved.

(j) *Expenses qualifying as medical expenses*—(1) *In general.* A taxpayer may not take an amount into account as both an employment-related expense under section 21 and an expense for medical care under section 213.

(2) *Examples.* The provisions of this paragraph (j) are illustrated by the following examples:

Example 1. S has $6,500 of employment-related expenses for the care of his child who is physically incapable of self-care. The expenses are for services performed in S's household that also qualify as expenses for medical care under section 213. Of the total expenses, S may take into account $3,000 under section 21. S may deduct the balance of the expenses, or $3,500, as expenses for medical care under section 213 to the extent the expenses exceed 7.5 percent of S's adjusted gross income.

Example 2. The facts are the same as in *Example 1,* however, S first takes into account the $6,500 of expenses under section 213. S deducts $500 as an expense for medical care, which is the amount by which the expenses exceed 7.5 percent of his adjusted gross income. S may not take into account the $6,000 balance as employment-related expenses under section 21, because he has taken the full amount of the expenses into account in computing the amount deductible under section 213.

(k) *Substantiation.* A taxpayer claiming a credit for employment-related expenses must maintain adequate records or other sufficient evidence to substantiate the expenses in accordance with section 6001 and the regulations thereunder.

(l) *Effective/applicability date.* This section and §§ 1.21–2 through 1.21–4 apply to taxable years ending after August 14, 2007.

§ 1.21–2 Limitations on amount creditable.

(a) *Annual dollar limitation.* (1) The amount of employment-related expenses that may be taken into account under § 1.21–1(a) for any taxable year cannot exceed—

(i) $2,400 ($3,000 for taxable years beginning after December 31, 2002, and before January 1, 2011) if there is one qualifying individual with respect to the taxpayer at any time during the taxable year; or

(ii) $4,800 ($6,000 for taxable years beginning after December 31, 2002, and before January 1, 2011) if there are two or more qualifying individuals with respect to the taxpayer at any time during the taxable year.

(2) The amount determined under paragraph (a)(1) of this section is reduced by the aggregate amount excludable from gross income under section 129 for the taxable year.

(3) A taxpayer may take into account the total amount of employment-related expenses that do not exceed the annual dollar limitation although the amount of employment-related expenses attributable to one qualifying individual is disproportionate to the total employment-related expenses. For example, a taxpayer with expenses in 2007 of $4,000 for one qualifying individual and $1,500 for a second qualifying individual may take into account the full $5,500.

(4) A taxpayer is not required to prorate the annual dollar limitation if a qualifying individual ceases to qualify (for example, by turning age 13) during the taxable year. However, the taxpayer may take into account only amounts that qualify as employment-related expenses before the disqualifying event. See also § 1.21–1(b)(6).

(b) *Earned income limitation*—(1) *In general.* The amount of employment-related expenses that may be taken into account under section 21 for any taxable year cannot exceed—

(i) For a taxpayer who is not married at the close of the taxable year, the taxpayer's earned income for the taxable year; or

(ii) For a taxpayer who is married at the close of the taxable year, the lesser of the taxpayer's earned income or the earned income of the taxpayer's spouse for the taxable year.

(2) *Determination of spouse.* For purposes of this paragraph (b), a taxpayer must take into account only the earned income of a spouse to whom the taxpayer is married at the close of the taxable year. The spouse's earned income for the entire taxable year is taken into account, however, even though the taxpayer and the spouse were married for only part of the taxable year. The taxpayer is not required to take into account the earned income of a spouse who died or was divorced or separated from the taxpayer during the taxable year. See § 1.21–3(b) for rules providing that certain married taxpayers legally separated or living apart are treated as not married.

(3) *Definition of earned income.* For purposes of this section, the term *earned income* has the same meaning as in section 32(c)(2) and the regulations thereunder.

(4) *Attribution of earned income to student or incapacitated spouse.* (i) For purposes of this section, a spouse is deemed, for each month during which the spouse is a full-time student or is a qualifying individual described in § 1.21–1(b)(1)(iii) or (b)(2)(iii), to be gainfully employed and to have earned income of not less than—

(A) $200 ($250 for taxable years beginning after December 31, 2002, and before January 1, 2011) if there is one qualifying individual with respect to the taxpayer at any time during the taxable year; or

(B) $400 ($500 for taxable years beginning after December 31, 2002, and before January 1, 2011) if there are two or more qualifying individuals with respect to the taxpayer at any time during the taxable year.

(ii) For purposes of this paragraph (b)(4), a full-time student is an individual who, during each of 5 calendar months of the taxpayer's taxable year, is enrolled as a student for the number of course hours considered to be a full-time course of study at an educational organization as defined in section 170(b)(1)(A)(ii). The enrollment for 5 calendar months need not be consecutive.

(iii) Earned income may be attributed under this paragraph (b)(4), in the case of any husband and wife, to only one spouse in any month.

(c) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. In 2007, T, who is married to U, pays employment-related expenses of $5,000 for the care of one qualifying individual. T's earned income for the taxable year is $40,000 and her husband's earned income is $2,000. T did not exclude any dependent care assistance under section 129. Under paragraph (b)(1) of this section, T may take into account under section 21 only the amount of employment-related expenses that does not exceed the lesser of her earned income or the earned income of U, or $2,000.

Example 2. The facts are the same as in *Example 1* except that U is a full-time student at an educational organization within the meaning of section 170(b)(1)(A)(ii) for 9 months of the taxable year and has no earned income. Under paragraph (b)(4) of this section, U is deemed to have earned income of $2,250. T may take into account $2,250 of employment-related expenses under section 21.

Example 3. For all of 2007, V is a full-time student and W, V's husband, is an individual who is incapable of self-care (as defined in § 1.21–1(b)(1)(iii)). V and W have no earned income and pay expenses of $5,000 for W's care. Under paragraph (b)(4) of this section, either V or W may be deemed to have $3,000 of earned income. However, earned income may be attributed to only one spouse under paragraph (b)(4)(iii) of this section. Under the limitation in paragraph (b)(1)(ii) of this section, the lesser of V's and W's earned income is zero. V and W may not take the expenses into account under section 21.

(d) *Cross-reference.* For an additional limitation on the credit under section 21, see section 26.

§ 1.21–3 Special rules applicable to married taxpayers.

(a) *Joint return requirement.* No credit is allowed under section 21 for taxpayers who are married (within the meaning of section 7703 and the regulations thereunder) at the close of the taxable year unless the taxpayer and spouse file a joint return for the taxable year. See section 6013 and the regulations thereunder relating to joint returns of income tax by husband and wife.

(b) *Taxpayers treated as not married.* The requirements of paragraph (a) of this section do not apply to a taxpayer who is legally separated under a decree of divorce or separate maintenance or who is treated as not married under section 7703(b) and the regulations thereunder (relating to certain married taxpayers living apart). A taxpayer who is treated as not married under this paragraph (b) is not required to take into account the earned income of the taxpayer's spouse for purposes of applying the earned income limitation on the amount of employment-related expenses under § 1.21–2(b).

(c) *Death of married taxpayer.* If a married taxpayer dies during the taxable year and the survivor may make a joint return with respect to the deceased spouse under section 6013(a)(3), the credit is allowed for the year only if a joint return is made. If, however, the surviving spouse remarries before the end of the taxable year in which the deceased spouse dies, a credit may be allowed on the decedent spouse(s separate return.

§ 1.21–4 Payments to certain related individuals.

(a) *In general.* A credit is not allowed under section 21 for any amount paid by the taxpayer to an individual—

(1) For whom a deduction under section 151(c) (relating to deductions for personal exemptions for dependents) is allowable either to the taxpayer or the taxpayer's spouse for the taxable year;

(2) Who is a child of the taxpayer (within the meaning of section 152(f)(1) for taxable years beginning after

December 31, 2004, and section 151(c)(3) for taxable years beginning before January 1, 2005) and is under age 19 at the close of the taxable year;

(3) Who is the spouse of the taxpayer at any time during the taxable year; or

(4) Who is the parent of the taxpayer's child who is a qualifying individual described in § 1.21–1(b)(1)(i) or (b)(2)(i).

(b) *Payments to partnerships or other entities.* In general, paragraph (a) of this section does not apply to services performed by partnerships or other entities. If, however, the partnership or other entity is established or maintained primarily to avoid the application of paragraph (a) of this section to permit the taxpayer to claim the credit, for purposes of section 21, the payments of employment-related expenses are treated as made directly to each partner or owner in proportion to that partner's or owner's ownership interest. Whether a partnership or other entity is established or maintained to avoid the application of paragraph (a) of this section is determined based on the facts and circumstances, including whether the partnership or other entity is established for the primary purpose of caring for the taxpayer's qualifying individual or providing household services to the taxpayer.

(c) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. During 2007, X pays $5,000 to her mother for the care of X's 5-year old child who is a qualifying individual. The expenses otherwise qualify as employment-related expenses. X's mother is not her dependent. X may take into account under section 21 the amounts paid to her mother for the care of X's child.

Example 2. Y is divorced and has custody of his 5-year old child, who is a qualifying individual. Y pays $6,000 during 2007 to Z, who is his ex-wife and the child's mother, for the care of the child. The expenses otherwise qualify as employment-related expenses. Under paragraph (a)(4) of this section, Y may not take into account under section 21 the amounts paid to Z because Z is the child's mother.

Example 3. The facts are the same as in Example 2, except that Z is not the mother of Y's child. Y may take into account under section 21 the amounts paid to Z.

§§ 1.44A–1 through 1.44A–4 [Removed]

■ **Par. 4.** Sections 1.44A–1, 1.44A–2, 1.44A–3, and 1.44A–4 are removed.

§ 1.214–1 [Removed]

■ **Par. 5.** Section 1.214–1 is removed.

§§ 1.214A–1 through 1.214A–5 [Removed]

■ **Par. 6.** Sections 1.214A–1, 1.214A–2, 1.214A–3, 1.214A–4, and 1.214A–5 are removed.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 7.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 8.** In § 602.101, paragraph (b) is amended to remove entries 1.44A–1 and 1.44A–3.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: August 2, 2007.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E7–15753 Filed 8–13–07; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9353]

RIN 1545–BC67

Section 1045 Application to Partnerships

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the application of section 1045 of the Internal Revenue Code (Code) to partnerships and their partners. These regulations provide rules regarding the deferral of gain on a partnership's sale of qualified small business stock (QSB stock) and a partner's sale of QSB stock distributed by a partnership. These regulations also provide rules for a taxpayer (other than a C corporation) who sells QSB stock and purchases replacement QSB stock through a partnership. The regulations affect partnerships that invest in QSB stock and their partners.

DATES: *Effective Date:* These regulations are effective August 14, 2007.

Applicability Dates: For dates of applicability of these regulations, see § 1.1045–1(j).

FOR FURTHER INFORMATION CONTACT: Jian H. Grant at (202) 622–3050 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1893. Responses to these collections of information are mandatory and are required to obtain a benefit. The collections of information in these final regulations are in § 1.1045–1(b)(3)(ii)(C), (b)(5)(ii), and (c)(4)(ii). The information collected in § 1.1045–1(b)(5)(ii) is required to ensure that gain from the sale of QSB stock by a partnership is reported correctly. The information collected in § 1.1045–1(b)(3)(ii)(C) and (c)(4)(ii) will be used by the partnership and the partner to make the basis adjustments upon the sale of QSB stock and the purchase of replacement QSB stock when necessary. The likely respondents are businesses or other for-profit institutions and small businesses or organizations.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Estimated total annual reporting burden: 1,500 hours.

The estimated annual burden per respondent varies from 45 to 75 minutes, depending on individual circumstances, with an estimated average of 1 hour.

Estimated number of respondents: 1,500.

Estimated annual frequency of responses: On occasion.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to these collections of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and return information are confidential, as required by 26 U.S.C. 6103.

Background

This document amends 26 CFR part 1 under section 1045 of the Code by adding § 1.1045–1 regarding the application of section 1045 to partnerships and their partners.

Section 1045 permits a non-corporate taxpayer that holds QSB stock for more than six months and sells it after August

5, 1997, to elect to defer recognizing gain (other than gain treated as ordinary income) on the sale. To qualify for such deferral, the taxpayer must purchase QSB stock (replacement QSB stock) within a 60-day period beginning on the date of the sale of the QSB stock. Any gain not recognized reduces the cost basis of the replacement QSB stock. The taxpayer recognizes gain to the extent the amount realized on the sale of the QSB stock exceeds the cost basis of the replacement QSB stock. The benefits of section 1045 with respect to a sale of QSB stock by a partnership flow through to a non-corporate partner that held an interest in the partnership at all times the partnership held the QSB stock. See section 1045(b)(5) and the legislative history accompanying section 6005(f)(2) of the Internal Revenue Service Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 6005(f)(2)), July 22, 1998. In response to inquiries, the IRS issued Rev. Proc. 98–48 (1998–2 CB 367) which provides procedures for taxpayers (including passthrough entities and individuals holding interests in a passthrough entity) to elect to apply section 1045. Since Rev. Proc. 98–48 was published, the IRS and the Treasury Department received further inquiries regarding the application of section 1045 to partnerships and their partners. See § 601.601(d)(2)(ii)(b) of this chapter.

On July 15, 2004, in response to those inquiries, a notice of proposed rulemaking and a notice of public hearing (REG–150562–03; 2004–32 IRB 175) were published in the **Federal Register** (69 FR 42370) regarding the application of section 1045 to partnerships and their partners. No one requested to speak at the public hearing. Accordingly, the public hearing scheduled for November 9, 2004, was cancelled in the **Federal Register** (69 FR 62631) on October 27, 2004. Comments responding to the proposed regulations were received. After consideration of the comments, the proposed regulations are adopted as revised by this Treasury decision.

Summary of Comments and Explanation of Revisions

1. QSB Stock—Replacement QSB Stock Requirement

The proposed regulations provided that the term ''QSB stock'' had the same meaning given such term by section 1202(c) and did not include an interest in a partnership that held QSB stock. Thus, under the proposed regulations, an investment in a partnership that held QSB stock was not treated as an investment in QSB stock. Consequently, a partner that sold an interest in a partnership that held QSB stock was not treated as selling QSB stock, and could not elect to apply section 1045 with respect to gain realized on the sale of the partnership interest. Similarly, under the proposed regulations, a partner that made a section 1045 election with respect to QSB stock sold by the partnership could not treat as replacement QSB stock an interest in a second partnership that held QSB stock.

Commentators agreed that an interest in a partnership that owns QSB stock should not be treated as an investment in QSB stock. Some commentators, however, argued that the final regulations should permit a partner that makes a section 1045 election with respect to QSB stock sold by one partnership to satisfy the replacement QSB stock requirement of section 1045 by holding an interest in a partnership, which acquires QSB stock within the statutory period. Commentators believed that the suggested rule is consistent with the intent of Congress to encourage investments in QSB stock.

The final regulations adopt this comment. A taxpayer (other than a C corporation) that sells QSB stock and elects to apply section 1045 may satisfy the replacement QSB stock requirement with QSB stock that is purchased within the statutory period by a partnership in which the taxpayer is a partner on the date the QSB stock is purchased (purchasing partnership). In addition, the final regulations provide that an eligible partner of a partnership that sells QSB stock (selling partnership) and elects to apply section 1045 may satisfy the replacement QSB stock requirement with QSB stock purchased by a purchasing partnership during the statutory period. The IRS and the Treasury Department believe that these rules are appropriate because they are consistent with the underlying continuous economic interest requirement of section 1045. Although the final regulations permit the replacement QSB stock requirement to be satisfied in this manner, for the reasons stated, a partner that sells its interest in the purchasing partnership is not treated as selling replacement QSB stock.

The final regulations contain rules for calculating a partner's distributive share of partnership gain that is not recognized as a result of an election under section 1045 by the partner. These rules are necessary for determining how much gain a partner can defer upon a sale of QSB stock under section 1045. These rules address instances in which the eligible partner continues to defer gain under section 1045 from a prior sale or sales of QSB stock.

2. Basis Adjustments

The proposed regulations provided rules regarding adjustments to an eligible partner's basis in a partnership interest and a partnership's basis in replacement QSB stock. One rule required a partnership to make a basis adjustment to the partnership's replacement QSB stock by the amount of gain from the partnership's sale of QSB stock that is deferred by an eligible partner, the effect of which is determined under the principles of § 1.743–1(g), (h), and (j). Under this rule, the basis adjustments constitute an adjustment to the basis of the partnership's replacement QSB stock with respect to that eligible partner only. To allow the partnership to make the appropriate basis adjustments, the proposed regulations required any partner that must recognize all or a part of the partner's distributive share of partnership section 1045 gain to notify the partnership of the amount of the partnership section 1045 gain that was recognized.

One commentator argued that many partnerships that invest in QSB stock are thinly staffed, and that they would incur additional administrative expenses to comply with the notification and basis adjustment requirements. Therefore, the commentator suggested that the partner make the basis adjustments with respect to the partnership's replacement QSB stock, unless the partnership makes an election to make the basis adjustments.

The IRS and the Treasury Department believe that, if the partnership makes an election under section 1045 and purchases replacement QSB stock, the partnership is the proper party to make the appropriate basis adjustments with respect to that stock. Accordingly, this comment is not adopted. As noted below, a partnership is not required to maintain these basis adjustments for eligible partners that separately make the election under section 1045. The final regulations also clarify that if a partnership makes an election under section 1045, the partnership must attach a statement to the partnership return for the taxable year in which the partnership purchases replacement QSB stock setting forth the computation of the adjustment, the replacement QSB stock to which the adjustment has been made, the date(s) on which such stock was acquired by the partnership, and each partner's distributive share of deferred partnership section 1045 gain.

If a taxpayer or an eligible partner makes an election under section 1045

and treats its interest in QSB stock purchased by a purchasing partnership as its replacement QSB stock, the final regulations provide specific rules for the determination of the partner's basis in the replacement QSB stock and interest in the purchasing partnership. In these cases, the partner's adjusted basis in the partnership interest is reduced by the partner's gain that is deferred under section 1045, and the electing partner must reduce its share of the partnership's adjusted basis of the replacement QSB stock by the amount of gain deferred. When the basis reduction results from a partner-level election, the final regulations require the partner, rather than the partnership, to retain records setting forth the computation of this basis adjustment, the replacement QSB stock to which the adjustment has been made, and the date(s) on which such stock was acquired by the purchasing partnership.

3. Gain Recognition Upon Certain Distributions

The final regulations provide rules requiring a partner to recognize gain upon a distribution of replacement QSB stock to another partner that reduces the partner's share of the replacement QSB stock held by a partnership. The amount of gain that the partner must recognize is determined based on the amount of gain that the partner would have recognized upon a sale of the distributed replacement QSB stock for its fair market value on the date of the distribution (not to exceed the amount of gain previously deferred by the partner with respect to the distributed replacement QSB stock). Any gain recognized by a partner whose interest is reduced must be taken into account in determining the adjusted basis of the partner's interest in the partnership and also taken into account in determining the partnership's adjusted basis in the QSB stock distributed to another partner under § 1.1045–1(e)(4). These rules apply in the case of a partner election or a partnership election under section 1045.

4. Nonrecognition Limitation

The proposed regulations provided that the amount of gain that an eligible partner may defer under section 1045 may not exceed: (A) The partner's smallest percentage interest in the partnership's income, gain, or loss with respect to the QSB stock that was sold, multiplied by (B) the partnership's realized gain from the sale of such stock. This nonrecognition rule follows section 1202(g)(2) and (3) by ensuring that the partner can defer recognition of only the gain that relates to the partner's continuous economic interest in the QSB stock that was sold.

Commentators agreed with the underlying ''continuous ownership'' requirement in the proposed regulations, but raised concerns that the nonrecognition limitation rule may be difficult to administer when a partnership does not have a simple ''pro rata'' partnership arrangement. One commentator suggested that the nonrecognition limitation rule only apply in certain situations.

The IRS and the Treasury Department continue to believe that a nonrecognition limitation rule is consistent with section 1045 and the underlying continuous economic interest requirement in section 1202(g)(2) and (3). The continuous economic interest requirement as applied under section 1202(c)(1)(B) requires that QSB stock must be acquired by the taxpayer at its original issuance in exchange for money or other property or as compensation for services provided to such corporation. Taxpayers that invest through a partnership acquire the requisite interest for purposes of the continuous economic interest requirement by an investment of capital in the partnership. Accordingly, to address the commentator's concerns, the nonrecognition rule has been modified to provide that the amount of gain that an eligible partner may defer under section 1045 may not exceed: (A) The partner's smallest percentage interest in partnership capital from the time the QSB stock is acquired until the time the QSB stock is sold, multiplied by (B) the partnership's realized gain from the sale of such stock. The IRS and the Treasury Department believe that this nonrecognition rule in the final regulations will be easier to administer, is consistent with each partner's economic interest in the partnership, and will not inappropriately limit the amount of gain that can be deferred.

5. Opt Out of Partnership Election by Partner

The proposed regulations allowed an eligible partner to make a section 1045 election with respect to all or part of the partner's share of gain from the partnership's sale of QSB stock only if the partnership did not make a section 1045 election, or the partnership did make a section 1045 election, but failed to purchase any (or enough) replacement QSB stock within the statutory time period. If a partnership elected to apply section 1045 and purchased replacement QSB stock, all eligible partners of the partnership were required to defer their distributive shares of the partnership section 1045 gain. One commentator suggested that an eligible partner should be allowed to opt out of a partnership section 1045 election and either purchase separate replacement QSB stock directly, and elect to apply section 1045 at the partner level, or recognize the partner's distributive share of the partnership section 1045 gain. The IRS and the Treasury Department believe that allowing a partner to opt out of a partnership section 1045 election is consistent with providing the intended and desired flexibility for investments in QSB stock. Accordingly, this comment is adopted. The final regulations provide that a partner that elects out of a partnership's section 1045 election must notify the partnership in writing. If an eligible partner opts out of a partnership section 1045 election, such action does not constitute a revocation of the partnership section 1045 election and the partnership section 1045 election continues to apply to the other partners.

The final regulations do not impose a deadline for when a partner must notify the partnership that the partner is opting out of a partnership section 1045 election. The IRS and the Treasury Department believe partnerships are responsible for obtaining the required information to report gain properly, and that the partnership agreement should require that partners supply this notice to the partnership in a timely manner.

6. Tiered-Partnership Rules

Under the proposed regulations, only an eligible partner was entitled to defer gain under section 1045. The proposed regulations provided special rules for determining whether a partner was an eligible partner if a partnership (upper-tier partnership) held an interest in a partnership (lower-tier partnership) that held QSB stock. The proposed regulations disregarded the upper-tier partnership's ownership of the lower-tier partnership and treated each partner of the upper-tier partnership as owning an interest in the lower-tier partnership directly. The preamble to the proposed regulations explained that, although this rule provided a simple approach, it limited the availability of section 1045 in situations involving tiered partnerships. The IRS and the Treasury Department requested comments specifically on the application of section 1045 in tiered-partnership situations.

Commentators suggested that an upper-tier partnership should be an ''eligible partner'' of a lower-tier partnership and allowed to make an election to defer gain under section 1045 with respect to the distributive share of the gain from the lower-tier

partnership's sale of QSB stock. After careful consideration, the IRS and the Treasury Department have concluded that treating an upper-tier partnership as an ''eligible partner'' of a lower-tier partnership would create an unacceptable administrative burden and increased complexity to the rules. Therefore, the final regulations retain the rule in the proposed regulations relating to tiered-partnership structures. The final regulations, however, clarify that the rule does not preclude a partner in an upper-tier partnership from treating its interest in QSB stock that was purchased by either the upper-tier partnership or a lower-tier partnership as replacement QSB stock. The final regulations contain an example illustrating this rule.

7. Disregarded Entity Rules

One commentator suggested that the final regulations set forth rules that are specific to disregarded entities. It has been determined that this suggestion is beyond the scope of the regulations and, therefore, is not included in the final regulations.

8. Election Procedures and Reporting Rules

The proposed regulations provided that a partnership making a section 1045 election must do so on the partnership's timely filed return (including extensions) for the taxable year during which the partnership sells the QSB stock. The proposed regulations also provided that a partner making an election under section 1045 with respect to its distributive share of gain on the partnership's sale of QSB stock must do so on the partner's timely filed Federal income tax return (including extensions) for the taxable year in which such gain is taken into account. The final regulations retain these rules. However, in both cases, the proposed regulations stated that the electing partnership or partner also must follow the procedures of Rev. Proc. 98–48. In contrast, the final regulations provide that a partnership making an election under section 1045 or a partner making an election under section 1045 must do so in accordance with the applicable forms and instructions. It is anticipated that the applicable forms and instructions will be revised to take into account the rules in the final regulations.

Effective Date

The final regulations apply to sales of QSB stock on or after August 14, 2007.

Effect on Other Documents

Rev. Proc. 98–48 (1998–2 CB 367) is modified to include the following sentence at the end of the PURPOSE section: ''This revenue procedure does not apply in situations described in § 1.1045–1 of the Income Tax regulations.'' See § 601.601(d)(2)(ii)(*b*) of this chapter.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that QSB stock is not held by a substantial number of small entities and that the time required to make the election is estimated to average 1 hour. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Jian H. Grant, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 602 are amended as follows:

■ **Paragraph 1.** The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.1045–1 is added to read as follows:

§ 1.1045–1 Application to partnerships.

(a) *Overview of section.* A partnership that holds qualified small business stock (QSB stock) (as defined in paragraph (g)(1) of this section) for more than 6 months, sells such QSB stock, and purchases replacement QSB stock (as defined in paragraph (g)(2) of this section) may elect to apply section 1045. An eligible partner (as defined in paragraph (g)(3) of this section) of a partnership that sells QSB stock, may elect to apply section 1045 if the eligible partner purchases replacement QSB stock directly or through a purchasing partnership (as defined in paragraph (c)(1)(i) of this section). A taxpayer (other than a C corporation) that holds QSB stock for more than 6 months, sells such QSB stock and purchases replacement QSB stock through a purchasing partnership may elect to apply section 1045. A section 1045 election is revocable only with the prior written consent of the Commissioner. To obtain the Commissioner's prior written consent, the person who made the section 1045 election must submit a request for a private letter ruling. (For further guidance, see Rev. Proc. 2007–1, 2007–1 CB 1 (or any applicable successor) and § 601.601(d)(2)(ii)(*b*) of this chapter.) Paragraph (b) of this section provides rules for partnerships that elect to apply section 1045. Paragraph (c) of this section provides rules for certain taxpayers other than C corporations and for eligible partners that elect to apply section 1045. Paragraph (d) of this section provides a limitation on the amount of gain that an eligible partner does not recognize under section 1045. Paragraph (e) of this section provides rules for partnership distributions of QSB stock to an eligible partner. Paragraph (f) of this section provides rules for contributions of QSB stock or replacement QSB stock to a partnership. Paragraph (g) of this section provides definitions of certain terms used in section 1045 and this section. Paragraph (h) of this section provides reporting rules for partnerships and partners that elect to apply section 1045. Paragraph (i) of this section provides examples illustrating the provisions of this section. Paragraph (j) of this section contains the effective/applicability date.

(b) *Partnership election*—(1) *Partnership purchase of replacement QSB stock.* A partnership that holds QSB stock for more than 6 months, sells such QSB stock, and purchases replacement QSB stock may elect in accordance with paragraph (h) of this section to apply section 1045. If the partnership elects to apply section 1045, then, subject to the provisions of

paragraphs (b)(4) and (d) of this section, each eligible partner shall not recognize its distributive share of any partnership section 1045 gain (as determined under paragraph (b)(2) of this section). For this purpose, partnership section 1045 gain equals the partnership's gain from the sale of the QSB stock reduced by the greater of—

(i) The amount of the gain from the sale of the QSB stock that is treated as ordinary income; or

(ii) The excess of the amount realized by the partnership on the sale over the total cost of all replacement QSB stock purchased by the partnership (excluding the cost of any replacement QSB stock purchased by the partnership that is otherwise taken into account under section 1045).

(2) *Partner's distributive share of partnership section 1045 gain.* A partner's distributive share of partnership section 1045 gain shall be in the same proportion as the partner's distributive share of the partnership's gain from the sale of the QSB stock. For this purpose, the partnership's gain from the sale of QSB stock and the partner's distributive share of that gain are determined without regard to basis adjustments under section 743(b) and paragraph (b)(3)(ii) of this section.

(3) *Basis adjustments*—(i) *Partner's interest in a partnership.* The adjusted basis of an eligible partner's interest in a partnership shall not be increased under section 705(a)(1) by gain from a partnership's sale of QSB stock that is not recognized by the partner as the result of a partnership election under paragraph (b)(1) of this section.

(ii) *Partnership's replacement QSB stock*—(A) *Rule.* The basis of a partnership's replacement QSB stock is reduced (in the order acquired) by the amount of gain from the partnership's sale of QSB stock that is not recognized by an eligible partner as a result of the partnership's election under section 1045. The basis adjustment with respect to any amount described in this paragraph (b)(3)(ii) constitutes an adjustment to the basis of the partnership's replacement QSB stock with respect to that partner only. The effect of such a basis adjustment is determined under the principles of § 1.743–1(g), (h), and (j) except as modified in this paragraph (b)(3)(ii)(A). If a partnership sells QSB stock with respect to which a basis adjustment has been made under this paragraph (b)(3)(ii), and the partnership makes an election under paragraph (b)(1) of this section with respect to the sale and purchases replacement QSB stock, the basis adjustment shall carry over to the replacement QSB stock except to the extent otherwise provided in this paragraph (b)(3)(ii). The basis adjustment that carries over to the replacement QSB stock shall be reduced (but not below zero) by the eligible partner's distributive share of the excess, if any, of the greater of the amount determined under paragraph (b)(1)(i) or (ii) of this section from the sale of the QSB stock, over the partnership's gain from the sale of the QSB stock (determined without regard to basis adjustments under section 743 or paragraph (b)(3)(ii) of this section). The excess amount that reduces the basis adjustment shall be accounted for as gain in accordance with § 1.743–1(j)(3). See *Example 5* of paragraph (i) of this section. For purposes of this paragraph (b)(3)(ii), a partnership must presume that a partner did not recognize that partner's distributive share of the partnership section 1045 gain as a result of the partnership's section 1045 election unless the partner notifies the partnership to the contrary as described in paragraph (b)(5)(ii) of this section. However, if a partnership knows that a particular partner is classified, for Federal tax purposes, as a C corporation, then the partnership may presume that the partner did not defer recognition of its distributive share of the partnership section 1045 gain, even in the absence of a notification by the partner. If a partnership makes an election under section 1045, but an eligible partner opts out of the election under paragraph (b)(4) of this section and provides to the partnership the notification required under paragraph (b)(5)(ii) of this section, no basis adjustments under this paragraph (b)(3)(ii) are required with respect to that partner as a result of the section 1045 election by the partnership.

(B) *Tiered-partnership rule.* If a partnership (upper-tier partnership) holds an interest in another partnership (lower-tier partnership) that makes an election under section 1045, the portion of the lower-tier partnership's basis adjustment as provided in paragraph (b)(3)(ii)(A) of this section in the replacement QSB stock must be segregated and allocated to the upper-tier partnership and any eligible partner as defined in paragraph (g)(3)(iii) of this section. Similarly, that portion of the basis of the upper-tier partnership's interest in the lower-tier partnership attributable to the basis adjustment as provided in paragraph (b)(3)(ii)(A) of this section in the lower-tier partnership's replacement QSB stock must be segregated and allocated solely to any eligible partner as defined in paragraph (g)(2)(iii) of this section.

(C) *Statement of adjustments.* A partnership that must adjust the basis of replacement QSB stock under this paragraph (b) must attach a statement to the partnership return for the taxable year in which the partnership purchases replacement QSB stock setting forth the computation of the adjustment, the replacement QSB stock to which the adjustment has been made, the date(s) on which such QSB stock was acquired by the partnership, and the amount of the adjustment that is allocated to each partner.

(4) *Eligible partners may opt out of partnership's section 1045 election.* An eligible partner may opt out of the partnership's section 1045 election with respect to QSB stock either by recognizing the partner's distributive share of the partnership section 1045 gain, or by making a partner section 1045 election under paragraph (c) of this section with respect to the partner's distributive share of the partnership section 1045 gain. See paragraph (b)(5)(ii) of this section for applicable notification requirements. Opting out of a partnership's section 1045 election under this paragraph (b)(4) does not constitute a revocation of the partnership's election, and such election shall continue to apply to other partners of the partnership.

(5) *Notice requirements*—(i) *Partnership notification to partners.* A partnership that makes an election under paragraph (b)(1) of this section must notify all of its partners of the election and the purchase of replacement QSB stock, in accordance with the applicable forms and instructions, and separately state each partner's distributive share of partnership section 1045 gain from the sale of QSB stock under section 702. Each partner shall determine whether the partner is an eligible partner within the meaning of paragraph (g)(3) of this section and report the partner's distributive share of partnership section 1045 gain from the partnership's sale of QSB stock, including gain not recognized, in accordance with the applicable forms and instructions.

(ii) *Partner notification to partnership.* Any partner that must recognize all or part of the partner's distributive share of partnership section 1045 gain must notify the partnership, in writing, of the amount of partnership section 1045 gain that is recognized by the partner. Similarly, an eligible partner that opts out of a partnership's section 1045 election under paragraph (b)(4) of this section must notify the partnership, in writing, that the partner is opting out of the partnership's section 1045 election.

(c) *Partner election*—(1) *In general*—(i) *Rule.* An eligible partner of a partnership that sells QSB stock (selling partnership) may elect in accordance with paragraph (h) of this section to apply section 1045 if replacement QSB stock is purchased by the eligible partner. An eligible partner of a selling partnership may elect in accordance with paragraph (h) of this section to apply section 1045 if replacement QSB stock is purchased by a partnership in which the taxpayer is a partner (directly or through an upper-tier partnership) on the date on which the partnership acquires the replacement QSB stock (purchasing partnership). A taxpayer other that a C corporation that sells QSB stock held for more than 6 months at the time of the sale may elect in accordance with paragraph (h) of this section to apply section 1045 if replacement QSB stock is purchased by a purchasing partnership (including a selling partnership).

(ii) *Partner purchase of replacement QSB stock.* Subject to paragraph (d) of this section, an eligible partner of a selling partnership that elects to apply section 1045 with respect to the eligible partner's purchase of replacement QSB stock must recognize its distributive share of gain from the sale of QSB stock by the selling partnership only to the extent of the greater of—

(A) The amount of the eligible partner's distributive share of the selling partnership's gain from the sale of the QSB stock that is treated as ordinary income; or

(B) The excess of the eligible partner's share of the selling partnership's amount realized (as determined under paragraph (c)(2) of this section) on the sale by the selling partnership of the QSB stock (excluding the cost of any replacement QSB stock purchased by the selling partnership) over the cost of any replacement QSB stock purchased by the eligible partner (excluding the cost of any replacement QSB stock that is otherwise taken into account under section 1045).

(iii) *Partnership purchase of replacement QSB stock—(A) Partner of a selling partnership.* Subject to paragraph (d) of this section, an eligible partner that treats its interest in QSB stock purchased by a purchasing partnership as a purchase of replacement QSB stock by the eligible partner and that elects to apply section 1045 with respect to such purchase must recognize its total gain (the eligible partner's distributive share of gain from the selling partnership's sale of QSB stock and any gain taken into account under paragraph (c)(5) of this section from the sale of replacement QSB stock) only to the extent of the greater of—

(*1*) The amount of the eligible partner's distributive share of the selling partnership's gain from the sale of the QSB stock that is treated as ordinary income; or

(*2*) The excess of the eligible partner's share of the selling partnership's amount realized (as determined under paragraph (c)(2) of this section) on the sale by the selling partnership of the QSB stock (excluding the cost of any replacement QSB stock purchased by the selling partnership) over the eligible partner's share of the purchasing partnership's cost of the replacement QSB stock, as determined under paragraph (c)(3) of this section (excluding the cost of any QSB stock that is otherwise taken into account under section 1045).

(B) *Taxpayer other than a C corporation.* Subject to paragraph (d) of this section, a taxpayer other than a C corporation that treats its interest in QSB stock purchased by a purchasing partnership with respect to which the taxpayer is a partner as a purchase of replacement QSB stock by the taxpayer must recognize its gain from the sale of the QSB stock only to the extent of the greater of—

(*1*) The amount of gain from the sale of the QSB stock that is treated as ordinary income; or

(*2*) The excess of the amount realized by the taxpayer on the sale of the QSB stock over the partner's share of the purchasing partnership's cost of the replacement QSB stock, as determined under paragraph (c)(3) of this section (excluding the cost of any QSB stock that is otherwise taken into account under section 1045).

(2) *Eligible partner's share of amount realized by partnership*—(i)—*General rule.* The eligible partner's share of the amount realized by the selling partnership is the amount realized by the partnership on the sale of the QSB stock (excluding the cost of any replacement QSB stock otherwise taken into account under section 1045) multiplied by the following fraction—

(A) The numerator of which is the eligible partner's distributive share of the partnership's realized gain from the sale of the QSB stock; and

(B) The denominator of which is the partnership's realized gain on the sale of the QSB stock.

(ii) *General rule modified for determining eligible partner's share of amount realized by purchasing partnership upon a sale of replacement QSB stock in certain situations*—(A) *No gain realized or loss realized on sale of replacement QSB stock.* If a purchasing partnership does not realize a gain or realizes a loss from the sale of replacement QSB stock for which an election under this section was made for purposes of applying paragraph (c)(1)(iii)(A) of this section, the eligible partner's share of the amount realized is—

(*1*) The greater of—

(*i*) The amount determined in paragraph (c)(2)(i) of this section from a prior sale of QSB stock (that is not otherwise taken into account under paragraph (c)(2) of this section) in which the eligible partner had a distributive share of gain allocated to the eligible partner that was not recognized under paragraph (c)(1)(iii)(A) of this section; or

(*ii*) The amount realized by a taxpayer other than a C corporation from a prior sale of QSB stock (that is not otherwise taken into account under paragraph (c)(2) of this section) in which the taxpayer realized gain that was not recognized under paragraph (c)(1)(iii)(B) of this section; less

(*2*) The eligible partner's distributive share of any loss recognized on the sale of replacement QSB stock, if applicable.

(B) *Eligible partner's interest in purchasing partnership is reduced and gain realized on sale of replacement QSB stock.* If an eligible partner's interest in a purchasing partnership is reduced subsequent to the sale of QSB stock and the purchasing partnership realizes a gain from the sale of the replacement QSB stock, the eligible partner's share of the amount realized upon a sale of replacement QSB stock must be determined under paragraph (c)(2)(i) of this section based on the distributive share of the partnership's realized gain that would have been allocated to the eligible partner if the eligible partner's interest in the partnership had not been reduced.

(iii) *Eligible partner's share of the amount realized.* For purposes of determining the eligible partner's share of the amount realized by the partnership, the partnership's realized gain from the sale of QSB stock and the eligible partner's distributive share of that gain are determined without regard to basis adjustments under section 743(b) and paragraphs (b)(3)(ii) and (c) of this section.

(3) *Partner's share of the cost of QSB stock purchased by a purchasing partnership.* The partner's share of the cost (adjusted basis) of replacement QSB stock purchased by a purchasing partnership is the percentage of the partnership's future income and gain, if any, that is reasonably expected to be allocated to the partner (determined without regard to any adjustment under

section 1045) with respect to the replacement QSB stock that was purchased by the partnership, multiplied by the cost of that replacement QSB stock. The assumptions made by a partnership in determining the reasonably expected allocation of income and gain must be consistent for each partner. For example, a partnership may not treat the same item of income or gain as being reasonably expected to be allocated to more than one partner.

(4) *Basis adjustments*—(i) *Eligible partner's interest in selling partnership.* Under section 705(a)(1), the adjusted basis of an eligible partner's interest in a selling partnership that sells QSB stock is increased by the partner's distributive share of gain without regard to paragraph (c)(1) of this section. However, if the selling partnership is also a purchasing partnership, the adjusted basis of an eligible partner's interest in a partnership that sells QSB stock may be reduced under paragraph (c)(4)(iii) of this section.

(ii) *Replacement QSB stock.* A partner's basis in any replacement QSB stock that is purchased by the partner, as well as the adjusted basis of any replacement QSB stock that is purchased by a purchasing partnership and that is treated as the partner's replacement QSB stock must be reduced (in the order replacement QSB stock is acquired by the partner and purchasing partnership, as applicable) by the partner's distributive share of the gain on the sale of the selling partnership's QSB stock that is not recognized by the partner under paragraph (c)(1) of this section, or by the gain on a sale of QSB stock by the partner that is not recognized by the partner under section 1045, as applicable. If replacement QSB stock is purchased by the purchasing partnership, the purchasing partnership shall maintain its adjusted basis in the replacement QSB stock without regard to any basis adjustments required by this paragraph (c)(4)(ii). The eligible partner, however, shall in computing its distributive share of income, gain, loss and deduction from the purchasing partnership with respect to the replacement QSB stock take into account the variation between the adjusted basis in the QSB stock as determined under this paragraph (c)(4)(ii) and the adjusted basis determined without regard to this paragraph (c)(4)(ii). A partner must retain records setting forth the computation of this basis adjustment, the replacement QSB stock to which the adjustment has been made, and the date(s) on which such stock was acquired. See *Examples 7* and *8* of paragraph (i) of this section.

(iii) *Partner's basis in purchasing partnership interest.* A partner that treats the partner's interest in QSB stock purchased by a purchasing partnership as the partner's replacement QSB stock must reduce (in the order replacement QSB stock is acquired) the adjusted basis of the partner's interest in the purchasing partnership by the partner's distributive share of the gain on the sale of the selling partnership's QSB stock that is not recognized by the partner pursuant to paragraph (c)(1) of this section, or by the gain on a sale of QSB stock by the partner that is not recognized by the partner under section 1045, as applicable. Similarly, a partner of an upper-tier partnership that treats the partner's interest in QSB stock purchased by a lower-tier purchasing partnership as the partner's replacement QSB stock must reduce (in the order replacement QSB stock is acquired) the adjusted basis of the partner's interest in the upper-tier partnership by the partner's distributive share of the gain on the sale of the selling partnership's QSB stock that is not recognized by the partner pursuant to paragraph (c)(1) of this section, or by the gain on a sale of QSB stock by the partner that is not recognized by the partner under section 1045, as applicable.

(iv) *Increase in basis on sale of QSB stock by purchasing partnership.* A partner that recognizes gain under paragraph (c)(5) of this section must increase the adjusted basis of the partner's interest in the purchasing partnership under section 705(a)(1) by the amount of the gain recognized by that partner. Similarly, a partner in an upper-tier partnership that recognizes gain under paragraph (c)(5) of this section must increase the adjusted basis of the partner's interest in the upper-tier partnership under section 705(a)(1) by the amount of the gain recognized by that partner.

(5) *Partner recognition of gain.* At the time that either the partner or the purchasing partnership (whichever applies) sells or exchanges replacement QSB stock, the amount recognized by the partner is determined by taking into account the basis adjustments described in paragraph (c)(4)(ii) of this section. Similarly, a partner of an upper-tier partnership that owns an interest in a lower-tier partnership that holds replacement QSB stock must take into account the basis adjustments described in paragraph (c)(4)(ii) of this section in determining the amount recognized by the partner on a sale of the interest in the lower-tier partnership by the upper-tier partnership or the partner's distributive share of gain from the upper-tier partnership. See paragraph (e)(4) of this section for rules applicable to certain distributions of replacement QSB stock.

(d) *Nonrecognition limitation*—(1) *In general.* For purposes of this section, the amount of gain that an eligible partner does not recognize under paragraphs (b)(1) and (c)(1) of this section cannot exceed the nonrecognition limitation. Except as otherwise provided in paragraph (d)(2) of this section, the nonrecognition limitation is equal to the product of—

(i) The partnership's realized gain from the sale of the QSB stock, determined without regard to any basis adjustment under section 734(b) or section 743(b) (other than basis adjustments described in paragraph (b)(3)(ii) of this section); and

(ii) The eligible partner's smallest percentage interest in partnership capital as determined in paragraph (d)(2) of this section. See *Example 9* of paragraph (i) of this section.

(2) *Eligible partner's smallest percentage interest in partnership capital.* An eligible partner's smallest percentage interest in partnership capital is the eligible partner's percentage share of capital determined at the time of the acquisition of the QSB stock as adjusted prior to the time the QSB stock is sold to reflect any reduction in the capital of the eligible partner including a reduction as a result of a disproportionate capital contribution by other partners, a disproportionate capital distribution to the eligible partner or the transfer of an interest by the eligible partner, but excluding income and loss allocations.

(3) *Special rule for tiered partnerships.* For purposes of paragraph (d)(1)(ii) of this section, if an eligible partner is treated as owning an interest in a lower-tier purchasing partnership through an upper-tier partnership, the eligible partner's percentage interest in the purchasing partnership shall be proportionately adjusted to reflect the eligible partner's percentage interest in the upper-tier partnership.

(e) *Partnership distribution of QSB stock to a partner*—(1) *In general.* Subject to paragraphs (e)(2) and (3) of this section, in the case of a partnership distribution of QSB stock to a partner, the partner shall be treated for purposes of this section as—

(i) Having acquired such stock in the same manner as the partnership; and

(ii) Having held such stock during any continuous period immediately preceding the distribution during which it was held by the partnership. See

Examples 10 and *11* of paragraph (i) of this section.

(2) *Eligibility under section 1202(c).* Paragraph (e)(1) of this section does not apply unless all eligibility requirements with respect to QSB stock as defined in section 1202(c) are met by the distributing partnership with respect to its investment in QSB stock.

(3) *Distribution nonrecognition limitation*—(i) *Generally.* The amount of gain that an eligible partner does not recognize under this section on the sale of QSB stock that was distributed by the partnership to the partner cannot exceed the distribution nonrecognition limitation. For this purpose, the distribution nonrecognition limitation is—

(A) The partner's section 1045 amount realized (determined under paragraph (e)(3)(ii) of this section); reduced by

(B) The partner's section 1045 adjusted basis (determined under paragraph (e)(3)(iii) of this section).

(ii) *Section 1045 amount realized*—(A) *QSB stock received in liquidation of partner's interest and in certain nonliquidating distributions.* If a partner receives QSB stock from the partnership in a distribution in liquidation of the partner's interest in the partnership or as part of a series of related distributions by the partnership in which the partnership distributes all of the partnership's QSB stock of a particular type, then the partner's section 1045 amount realized is the partner's amount realized from the sale of the distributed QSB stock, multiplied by a fraction—

(*1*) The numerator of which is the partner's smallest percentage interest in partnership capital determined under paragraph (e)(3)(ii)(B) of this section; and

(*2*) The denominator of which is the partner's percentage interest in that type of QSB stock immediately after the distribution (determined under paragraph (e)(3)(iv) of this section).

(B) *Partner's smallest percentage interest in partnership capital.* A partner's smallest percentage interest in partnership capital is the partner's percentage share of capital determined at the time of the acquisition of the QSB stock as adjusted prior to the time the QSB stock is distributed to the partner to reflect any reduction in the capital of the partner including a reduction as a result of a disproportionate capital contribution by other partners, a disproportionate capital distribution to the partner, or the transfer of a capital interest by the partner, but excluding income and loss allocations.

(C) *QSB stock received in other distributions.* If a partner receives QSB stock in a distribution from the partnership that is not described in paragraph (e)(3)(ii)(A) of this section, the partner's section 1045 amount realized is the partner's amount realized from the sale of the distributed QSB stock multiplied by the partner's smallest percentage interest in partnership capital determined under paragraph (e)(3)(ii)(B) of this section.

(iii) *Section 1045 adjusted basis*—(A) *QSB stock received in liquidation of partner's interest and in certain nonliquidating distributions.* If a partner receives QSB stock from the partnership in a distribution in liquidation of the partner's interest in the partnership or as part of a series of related distributions by the partnership in which the partnership distributes all of the partnership's QSB stock of a particular type, then the partner's section 1045 adjusted basis is the product of—

(*1*) The partnership's basis in all of the QSB stock of the type distributed (without regard to basis adjustments under section 734(b) or section 743(b), other than basis adjustments described in paragraphs (b)(3)(ii) and (c)(4)(ii) of this section);

(*2*) The partner's smallest percentage interest in partnership capital determined under paragraph (e)(3)(ii)(B) of this section; and

(*3*) The proportion of the distributed QSB stock that was sold by the partner.

(B) *QSB stock received in other distributions.* If a partner receives QSB stock in a distribution from the partnership that is not described in paragraph (e)(3)(iii)(A) of this section, the partner's section 1045 adjusted basis is the product of—

(*1*) The partnership's basis in the QSB stock sold by the partner (without regard to basis adjustments under section 734(b) or section 743(b), other than basis adjustments described in paragraphs (b)(3)(ii) and (c)(4)(ii) of this section); and

(*2*) The partner's smallest percentage interest in partnership capital determined under paragraph (e)(3)(ii)(B) of this section.

(iv) *Partner's percentage interest in distributed QSB stock.* For purposes of this paragraph (e)(3), a partner's percentage interest in a type of QSB stock immediately after a partnership distribution is the value (as of the date of the distribution) of the QSB stock distributed to the partner divided by the value (as of the date of the distribution) of all of that type of QSB stock that was acquired by the partnership.

(v) *QSB stock of the same type.* For purposes of this paragraph (e)(3), QSB stock will be of the same type as the distributed QSB stock if it has the same issuer and the same rights and preferences as the distributed QSB stock and was acquired by the partnership at original issue.

(4) *Distribution of replacement QSB stock to a partner that reduces another partner's interest in the replacement QSB stock.* For purposes of this section, a partner must recognize gain upon a distribution of replacement QSB stock to another partner that reduces the partner's share of the replacement QSB stock held by a partnership. The amount of gain that the partner must recognize is determined based on the amount of gain that the partner would recognize upon a sale of the distributed replacement QSB stock for its fair market value on the date of the distribution but not to exceed the amount that was previously not recognized by the partner under section 1045 with respect to the distributed replacement QSB stock. Any gain recognized by a partner whose interest is reduced must be taken into account in determining the adjusted basis of the partner's interest in the partnership and also taken into account in determining the partnership's adjusted basis in the QSB stock distributed to another partner under paragraph (e)(3) of this section.

(f) *Contribution of QSB stock or replacement QSB stock to a partnership.* Section 721 applies to a contribution of QSB stock to a partnership. Except as provided in section 721(b), any gain that was not recognized by the taxpayer under section 1045 is not recognized when the taxpayer contributes QSB stock to a partnership in exchange for a partnership interest. Stock that is contributed to a partnership is not QSB stock in the hands of the partnership. See *Example 12* of paragraph (i) of this section.

(g) *Definitions.* For purposes of section 1045 and this section, the following terms are defined as follows:

(1) *Qualified small business stock.* The term *qualified small business stock* (QSB stock) has the meaning provided in section 1202(c). The term ''QSB stock'' does not include an interest in a partnership that purchases or holds QSB stock. See *Example 1* of paragraph (i) of this section.

(2) *Replacement QSB stock.* The term *replacement QSB stock* is any QSB stock purchased within 60 days beginning on the date of a sale of QSB stock.

(3) *Eligible partner*—(i) *In general.* Except as provided in paragraphs (e)(1), (g)(3)(ii), (iii) and (iv) of this section, an eligible partner with respect to QSB stock is a taxpayer other than a C corporation that holds an interest in a partnership on the date the partnership acquires the QSB stock and at all times thereafter for more than 6 months until

the partnership sells or distributes the QSB stock.

(ii) *Acquisition by gift or at death.* For purposes of paragraph (g)(3)(i) of this section, a taxpayer who acquires from a partner (other than a C corporation) by gift or at death an interest in a partnership that holds QSB stock is treated as having held the acquired interest in the partnership during the period the partner (other than a C corporation) held the interest in the partnership.

(iii) *Tiered partnership.* For purposes of paragraph (g)(3)(i) of this section, if a partnership (upper-tier partnership) holds an interest in another partnership (lower-tier partnership) that holds QSB stock, then the upper-tier partnership's ownership of the lower-tier partnership is disregarded and each partner of the upper-tier partnership is treated as owning the interest in the lower-tier partnership directly. The partner of the upper-tier partnership is treated as owning the interest in the lower-tier partnership during the period in which both—

(A) The partner of the upper-tier partnership held an interest in the upper-tier partnership; and

(B) The upper-tier partnership held an interest in the lower-tier partnership. See *Examples 3* and *4* of paragraph (i) of this section.

(iv) *Multiple tiers of partnerships.* Principles similar to those described in paragraph (g)(3)(iii) of this section apply where a taxpayer holds an interest in a lower-tier partnership through multiple tiers of partnerships.

(4) *Month(s).* For purposes of this section, the term *month(s)* means a period commencing on the same numerical day of any calendar month as the day on which the QSB stock is sold and ending with the close of the day preceding the numerically corresponding day of the succeeding calendar month or, if there is no corresponding day, with the last day of the succeeding calendar month.

(h) *Reporting and election rules*—(1) *Time and manner of making election.* A partnership making an election under section 1045 (as described under paragraph (b)(1) of this section) must do so on the partnership's timely filed (including extensions) Federal income tax return for the taxable year during which the sale of QSB stock occurs. A partner making an election under section 1045 (as described under paragraph (c)(1) of this section) must do so on the partner's timely filed (including extensions) Federal income tax return for the taxable year during which the partner's distributive share of the partnership's gain from the sale of the QSB stock is taken into account by such partner under section 706. In addition, a partnership or partner making an election under section 1045 must make such election in accordance with the applicable forms and instructions.

(2) *Purchases, distributions, and sales of QSB stock or replacement QSB stock by partnerships.* A partnership that purchases, distributes to a partner, or sells or exchanges QSB stock or replacement QSB stock must provide information to the Commissioner and to the partnership's partners to the extent provided by the applicable forms and instructions.

(3) *Nonrecognition of gain by eligible partners.* An eligible partner that does not recognize gain under section 1045 must provide information to the Commissioner to the extent provided by the applicable forms and instructions.

(i) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. Sale of a partnership interest. On January 1, 2008, A, an individual, X, a C corporation, and Y, a C corporation, form PRS, a partnership. A, X, and Y each contribute $250 to PRS and agree to share all partnership items equally. PRS purchases QSB stock for $750 on February 1, 2008. On November 4, 2008, A sells A's interest in PRS for $500, realizing $250 of capital gain. Under paragraph (g)(1) of this section, an interest in a partnership that holds QSB stock is not treated as QSB stock. Therefore, the sale of an interest in a partnership that holds QSB stock is not treated as a sale of QSB stock, and A may not elect to apply section 1045 with respect to A's $250 gain from the sale of A's interest in PRS.

Example 2. Election by partner; replacement by partnership. (i) Assume the same facts as in *Example 1*, except that A does not sell A's interest in PRS. Instead, PRS sells the QSB stock (QSB1 stock) for $1,500 on November 3, 2008. PRS realizes $750 of gain from the sale of the QSB1 stock (none of which is treated as ordinary income) and allocates $250 of gain to each of A, X, and Y. PRS does not make a section 1045 election. On November 30, 2008, A contributes $500 to ABC, a partnership, in exchange for a 10 percent interest in ABC. ABC then purchases QSB stock (QSB2 stock) for $5,000 on December 1, 2008. ABC has no other assets. A makes an election under paragraph (c)(1) of this section and treats A's percentage interest in ABC's QSB2 stock as replacement QSB stock under paragraph (c)(1)(iii) of this section with respect to the $250 gain PRS allocated to A. Under paragraph (c)(3) of this section, A's share of the cost of QSB2 stock purchased by ABC is $500 (A's reasonably expected income and gain with respect to QSB2 stock, or 10 percent multiplied by the cost of the QSB2 stock, $5,000). Under paragraph (c)(1)(iii) of this section, A will not recognize the $250 gain PRS allocated to A, because A's share of the amount realized by PRS, $500 (the total amount realized by the partnership on the sale of the QSB1 stock ($1,500) multiplied by A's share of the gain from the sale of the QSB1 stock ($250) over the total gain realized by the partnership on the sale of the QSB1 stock ($750)), does not exceed A's share of ABC's cost of the QSB2 stock acquired by ABC, $500. Under paragraph (c)(4)(ii) of this section, A must reduce A's share of ABC's basis in the QSB2 stock by $250. Under paragraph (c)(4)(iii) of this section, A must reduce A's basis in A's interest in ABC by $250. Under paragraph (c)(4)(i) of this section, A's basis in A's interest in PRS is increased by $250.

(ii) Assume the same facts as in paragraph (i) of this *Example 2*, except that A does not contribute $500 to ABC in exchange for a partnership interest. Instead, on November 30, 2008, EFG, a partnership in which A has an existing 10 percent partnership interest, purchases QSB stock for $5,000. Under paragraph (c)(1) of this section, A may treat A's 10 percent interest in EFG's QSB stock as replacement QSB stock with respect to the $250 of gain PRS allocated to A.

(iii) Assume the same facts as in paragraph (i) of this *Example 2*, except that ABC owns QSB stock that ABC purchased on November 10, 2008, and ABC does not purchase QSB stock on December 1, 2008. Under paragraph (c)(1) of this section, ABC is not a purchasing partnership with respect to A for the QSB stock ABC purchased on November 10, 2008. A may not treat A's percentage interest in ABC's QSB stock as replacement QSB stock to defer the $250 gain PRS allocated to A, because A acquired its interest in ABC after ABC acquired the QSB stock.

(iv) Assume the same facts as in paragraph (i) of this *Example 2*, except that ABC sells QSB2 stock on July 30, 2009, for $5,000. ABC realizes no gain or loss on the sale of QSB2 stock. A desires to continue to rollover the $250 gain from the sale of QSB1 stock. Under paragraph (c)(2)(ii)(A) of this section, A's share of the amount realized is $500, which was A's share of the amount realized on the prior sale of QSB1 stock. Accordingly, A must elect to apply section 1045 and purchase $500 of replacement QSB stock either directly or through a purchasing partnership to continue to defer the $250 gain from the sale of QSB1 stock.

Example 3. Tiered partnerships; partnership election. (i) On January 1, 2008, A, an individual, and B, an individual, each contribute $500 to UTP, (upper-tier partnership) for equal partnership interests. On February 1, 2008, UTP and C, an individual, each contribute $1,000 to LTP, (lower-tier partnership) for equal partnership interests. On March 1, 2008, LTP purchases QSB stock for $500. On April 1, 2008, D, an individual, joins UTP by contributing $500 to UTP for a ⅓ interest in UTP. On December 1, 2008, LTP sells the QSB stock for $2000. Under paragraph (g)(3)(iii) of this section, A, B, and D are treated as owning an interest in LTP during the period in which each of the partners held an interest in UTP and UTP held an interest in LTP. Therefore, under paragraphs (g)(3)(i) and (iii) of this section, A and B are eligible partners, and D and UTP are not eligible partners with respect to the QSB stock sold by LTP. Under paragraph

(g)(3)(i) of this section, C is also an eligible partner with respect to the QSB stock sold by LTP.

(ii) Assume the same facts as in paragraph (i) of this *Example 3*. LTP realizes a gain of $1,500 on the December 1, 2008, sale of QSB stock. LTP allocates $750 of gain to each of UTP and C. UTP, in turn, allocates $250 (of the $750 of gain allocated to UTP) to each of A, B, and D. LTP makes a section 1045 election. On January 1, 2009, LTP purchases replacement QSB stock for $2,000. Under paragraph (b)(5)(ii) of this section, D notifies UTP that it recognizes $250 of gain and UTP notifies LTP. Because A, B, and C are eligible partners with respect to the QSB stock sold by LTP, A and B may each defer $250 of LTP's section 1045 gain and C may defer $750 of LTP's section 1045 gain. LTP must decrease its basis in the replacement QSB stock by the $750 of partnership section 1045 gain that was allocated to C and by $500 of the partnership section 1045 gain that was allocated to UTP. These basis reductions are with respect to UTP (A and B) and C only. Under paragraph (b)(3)(ii)(B) of this section, the basis of UTP's interest in LTP attributable to the LTP's replacement QSB stock must be segregated and allocated to A and B. In addition, A and B each have a $250 negative basis adjustment in their respective interests in UTP. If UTP sells its interest in LTP for $1,250, A and B would each recognize $250 of gain from the sale of the LTP interest. D would not recognize any gain or loss from the sale.

Example 4. Tiered partnerships; partner election. (i) On January 1, 2008, A, an individual, and X, a C corporation, form UTP, a partnership. A and X each contribute $250 to UTP and agree to share all partnership items equally. Also, on January 1, 2008, UTP and Y, a C corporation, form LTP, a partnership. UTP and Y contribute $500 and $250, respectively, to LTP. UTP and Y agree to share all partnership items equally. LTP purchases QSB stock for $750 on February 1, 2008. On November 3, 2008, LTP sells the QSB stock for $1,500. LTP realizes $750 of gain from the sale of the QSB stock (none of which is treated as ordinary income) and allocates $250 gain to Y and $500 gain to UTP. Of the $500 gain allocated to UTP from the sale of QSB stock, $250 is allocated to A and $250 is allocated to X. LTP purchases replacement QSB stock (replacement QSB1 stock) for $1,350 on December 15, 2008. LTP does not make an election under section 1045. Under the rules provided in paragraph (c) of this section, A makes an election under section 1045 on its timely filed return for the taxable year for which the distributive share of gain from the sale of QSB stock is taken into account by A under section 706. Under paragraph (c)(1)(iii) of this section, A treats A's interest in replacement QSB1 stock as replacement stock with respect to A's distributive share of LTP's section 1045 gain. On March 30, 2009, LTP sells replacement QSB1 stock for $1,650. LTP realizes $300 of gain from the sale of replacement QSB1 stock (none of which is treated as ordinary income) and allocates $100 to Y and $200 to UTP.

(ii) Under paragraph (c)(1)(iii) of this section, A must recognize its distributive share of gain from LTP's sale of QSB stock ($250) only to the extent of the greater of A's distributive share of LTP's gain from the sale of QSB stock that is treated as ordinary income ($0) or the amount by which A's share of the amount realized by LTP's sale of QSB stock exceeds A's share of LTP's cost of the replacement QSB1 stock, $50 (⅓ of $1,500, or $500, minus ⅓ of $1,350, or $450). Because Y is not an eligible partner of LTP under paragraph (g)(3) of this section, Y must recognize its $250 distributive share of partnership gain from the sale of the QSB stock. Also, X is not an eligible partner under paragraph (g)(3) of this section, and it must recognize its $250 distributive share of gain from UTP attributable to UTP's distributive share of $500 of LTP's gain from the sale of QSB stock.

(iii) Under section 705(a)(1), the adjusted basis of Y's interest in LTP is increased by $250, and the adjusted basis of UTP's interest in LTP is increased by $500. Under section 705(a)(1), the adjusted basis of X's interest in UTP is increased by $250, and the adjusted basis of A's interest in UTP is increased by $250. However, under paragraph (c)(4)(iii) of this section, the adjusted basis of A's interest in UTP is reduced by the $200 of partnership section 1045 gain that was not recognized by A.

(iv) Under paragraph (c)(4)(ii) of this section, the LTP's adjusted basis in replacement QSB1 stock is reduced by the $200 of gain from the sale of QSB stock that is not recognized by A, as a result of A's election under section 1045. A must retain records setting forth the computation of this basis adjustment, the replacement QSB stock to which the adjustment is made, and dates the stock was acquired. LTP's adjusted basis in the replacement QSB1 stock is maintained without regard to the eligible partner's adjustment provided in paragraph (c)(4)(ii) of this section.

(v) On the sale of replacement QSB1 stock, LTP realizes a gain of $300, $100 of which is allocated to Y and $200 of which is allocated to UTP. UTP allocates $100 of this gain to A. Under paragraph (c)(5) of this section, in determining A's amount recognized upon the sale of replacement QSB1 stock by LTP, A must take into account A's basis adjustment of $200. Accordingly, A recognizes a total gain of $300 upon the sale of replacement QSB1 stock, absent an additional section 1045 election by A or LTP. Under paragraph (c)(4)(iv) of this section, the adjusted basis of A's interest in UTP is increased by $300 under section 705(a)(1).

(vi) Assume the same facts as in paragraph (i) of this *Example 4*, except that UTP sells its entire interest in LTP on March 30, 2009, for $1,200. UTP realizes a gain of $200 on the sale of its interest in LTP ($1,200 amount realized less $1,000 adjusted basis) and allocates $100 of this gain to A. Under paragraph (c)(5) of this section, in determining A's amount recognized upon the sale of UTP's interest in LTP, A must take into account A's basis adjustment of $200. Accordingly, A recognizes a total gain of $300 upon the sale of the interest in LTP. Under paragraph (c)(4)(iv) of this section, the adjusted basis in A's interest in UTP is increased by $300 under section 705(a)(1).

Example 5. Partnership sale of QSB stock and purchase and sale of replacement QSB stock. (i) On January 1, 2008, A, an individual, X, a C corporation, and Y, a C corporation, form PRS, a partnership. A, X, and Y each contribute $250 to PRS and agree to share all partnership items equally. PRS purchases QSB stock for $750 on February 1, 2008. On November 3, 2008, PRS sells the QSB stock for $1,500. PRS realizes $750 of gain from the sale of the QSB stock (none of which is treated as ordinary income) and allocates $250 of gain to each of A, X, and Y. PRS purchases replacement QSB stock (replacement QSB1 stock) for $1,350 on December 15, 2008. On its timely filed return for the taxable year during which the sale of the QSB stock occurs, PRS makes an election to apply section 1045. A does not make an election to apply section 1045 with respect to the November 3, 2008, sale of QSB stock. PRS knows that X and Y are C corporations. On March 30, 2009, PRS sells replacement QSB1 stock for $1,650. PRS realizes $300 of gain from the sale of replacement QSB1 stock (none of which is treated as ordinary income) and allocates $100 of gain to each of A, X, and Y. A does not make an election to apply section 1045 with respect to the March 30, 2009, sale of replacement QSB1 stock.

(ii) Under paragraph (b)(1) of this section, the partnership section 1045 gain from the November 3, 2008, sale of QSB stock is $600 ($750 gain less $150 ($1,500 amount realized on the sale of QSB stock less $1,350 cost of replacement QSB1 stock)). This amount must be allocated among the partners in the same proportions as the entire gain from the sale of QSB stock is allocated to the partners, ⅓ ($200) to A, ⅓ ($200) to X, and ⅓ ($200) to Y.

(iii) Because neither X nor Y is an eligible partner under paragraph (g)(3) of this section, X and Y must each recognize its $250 distributive share of partnership gain from the sale of QSB stock. Because A is an eligible partner under paragraph (g)(3) of this section, A may defer recognition of A's $200 distributive share of partnership section 1045 gain. A is not required to separately elect to apply section 1045. A must recognize A's remaining $50 distributive share of the partnership's gain from the sale of QSB stock.

(iv) Under section 705(a)(1), the adjusted bases of X's and Y's interests in PRS are each increased by $250. Under section 705(a)(1) and paragraph (b)(3)(i) of this section, the adjusted basis of A's interest in PRS is not increased by the $200 of partnership section 1045 gain that was not recognized by A, but is increased by A's remaining $50 distributive share of gain.

(v) PRS must decrease its basis in the replacement QSB1 stock by the $200 of partnership section 1045 gain that was allocated to A. This basis reduction is a reduction with respect to A only. PRS then adjusts A's distributive share of gain from the sale of replacement QSB1 stock to reflect the effect of A's basis adjustment under paragraph (b)(3)(ii) of this section. In accordance with the principles of § 1.743–1(j)(3), the amount of A's gain from the March 30, 2009, sale of replacement QSB1 stock in which A has a $200 negative basis adjustment equals $300 (A's share of PRS's

gain from the sale of replacement QSB1 stock ($100), increased by the amount of A's negative basis adjustment for replacement QSB1 stock ($200)). Accordingly, upon the sale of replacement QSB1 stock, A recognizes $300 of gain, and X and Y each recognize $100 of gain.

(vi) Assume the same facts as in paragraph (i) of this *Example 5*, except that PRS purchases replacement QSB stock (replacement QSB2 stock) on April 15, 2009, for $1,150 and PRS makes an election to apply section 1045 with respect to the March 30, 2009, sale of replacement QSB1 stock. Under paragraph (b)(3)(ii)(A) of this section, PRS' $200 basis adjustment in QSB1 stock relating to the November 3, 2008, sale of QSB stock carries over to the basis adjustment for QSB2 stock. This basis adjustment is an adjustment with respect to A only. The $200 basis adjustment is reduced by A's distributive share of the excess of $500 (the greater of the amount determined under paragraph (b)(1)(i), $0, or (ii) of this section, $500 ($1,650 amount realized on the sale of QSB1 stock less $1,150 cost of replacement QSB2 stock)) over $300 (PRS' gain from the sale of QSB1 stock), or $67 ($200 ($500 minus $300) divided by 3). Under paragraph (b)(3)(ii)(A), A must account for the $67 excess amount that reduces PRS' basis adjustment in QSB2 stock as gain in accordance with § 1.743–1(j)(3). Therefore, A now has a $133 negative basis adjustment with respect to replacement QSB2 stock (($200) negative basis adjustment from the November 3, 2008, sale of QSB stock plus $67 positive basis adjustment from the March 30, 2009, sale of QSB1 stock). A also recognizes the $100 of gain allocated by PRS to A from the March 30, 2009, sale of replacement QSB1 stock for total gain recognition of $167 ($100 plus $67).

Example 6. Partnership sale of QSB stock; election by eligible partner; replacement QSB stock purchased by purchasing partnership. (i) Assume the same facts as in *Example 5* except that PRS does not make an election under section 1045 with respect to the sale of either the QSB stock on November 3, 2008, or the QSB1 stock on March 30, 2009. However, A makes an election under section 1045 with respect to the sale of QSB stock and treats the purchase of QSB1 stock on December 15, 2008, by PRS, as the purchase of replacement QSB stock. Additionally, A makes an election under section 1045 with respect to the sale of QSB1 stock and treats the purchase of QSB2 stock on April 15, 2009, by PRS, as the purchase of replacement QSB stock.

(ii) A's distributive share of gain from the November 3, 2008, sale of QSB stock is $250 (A's ⅓ interest in $750 of total PRS gain). Under paragraph (c)(1)(iii) of this section, A must recognize only $50 of A's distributive share of PRS' gain of $250, that is the excess of A's share of the amount realized on the sale of QSB stock, or $500 (the total amount realized by PRS on the sale of QSB stock ($1,500) multiplied by A's share of the gain from the sale of QSB stock ($250) over the total gain realized by PRS on the sale of QSB stock ($750)), minus A's share of PRS' cost of QSB1 stock, or $450 (⅓ of $1,350). Under section 705(a)(1) and paragraph (c)(4)(i) of this section, A's adjusted basis in its interest in PRS is increased by $250. However, under paragraph (c)(4)(iii) of this section, because PRS is a purchasing partnership, A's adjusted basis of its interest in PRS is then reduced by the deferred gain of $200. Also under paragraph (c)(4)(ii) of this section, PRS' adjusted basis in QSB1 stock is reduced by the gain not recognized of $200 and A must take into account such adjusted basis in computing A's income, gain, loss or deduction with respect to QSB1 stock. A must retain records setting forth the computation of this basis adjustment, the replacement QSB stock to which the adjustment is made, and dates the stock was acquired.

(iii) A's distributive share of gain from the March 30, 2009, sale of QSB1 stock is $100 (A's ⅓ interest in $300 of total PRS gain) and under paragraph (c)(5) of this section, A must take into account A's $200 basis adjustment with respect to the QSB1 stock that was sold. Accordingly, A's total gain from the sale of QSB1 stock is $300. Under paragraph (c)(1)(iii) of this section, A must recognize only $167 of A's total gain of $300, that is, the excess of A's share of the amount realized on the sale of QSB1 stock, or $550 (the total amount realized by PRS on the sale of QSB1 stock ($1,650) multiplied by A's share of the gain from the sale of QSB1 stock ($100) over the total gain realized by PRS on the sale of QSB1 stock ($300)) minus A's share of PRS' cost of QSB2 stock, or $383 (⅓ of $1,150). Under section 705(a)(1), A's adjusted basis in A's interest in PRS is increased by A's $100 distributive share of gain from the sale of QSB1 stock. Under paragraph (c)(4)(iv) of this section, A's adjusted basis of A's interest in PRS is increased by the additional $67 of gain recognized under paragraph (c)(5) of this section. Also, under paragraph (c)(4)(ii) of this section, PRS' adjusted basis in QSB2 stock is reduced by the gain not recognized of $133 ($300 minus $167) and A must take into account such adjusted basis in computing A's income, gain, loss or deduction with respect to QSB2 stock. A must retain records setting forth the computation of this basis adjustment, the replacement QSB stock to which the adjustment is made, and dates the stock was acquired.

Example 7. Partnership sale of QSB stock and partner purchase of replacement QSB stock. (i) Assume the same facts as in paragraph (i) of *Example 5*, except that PRS does not make an election under section 1045 with respect to the sale of the QSB stock and does not purchase replacement QSB stock. On November 30, 2008, A, an eligible partner under paragraph (g)(3) of this section, purchases replacement QSB stock for $500. A elects pursuant to paragraph (c) of this section to apply section 1045 on A's timely filed return for the taxable year that A is required to include A's distributive share of PRS' gain from the sale of the QSB stock.

(ii) Under paragraph (c)(2) of this section, A's share of the amount realized from PRS' sale of the QSB stock is $500 (the total amount realized by the partnership on the sale of the QSB stock ($1,500) multiplied by A's share of the gain from the sale of the QSB stock ($250) over the total gain realized by the partnership on the sale of the QSB stock ($750)). Because A purchased, within 60 days of PRS' sale of the QSB stock, replacement QSB stock for a cost equal to A's share of the partnership's amount realized on the sale of the QSB stock, and because A made an election pursuant to paragraph (c) of this section to apply section 1045, A defers recognition of A's $250 distributive share of gain from PRS' sale of the QSB stock. Under section 705(a)(1) and paragraph (c)(4)(i) of this section, the adjusted basis of A's interest in PRS is increased by $250. Under paragraph (c)(4)(ii) of this section, A's adjusted basis in the replacement QSB stock is $250 ($500 cost minus $250 nonrecognition amount).

Example 8. Partial replacement by partnership; partial replacement by partner. (i) On January 1, 2008, A, an individual, and X, a C corporation, form PRS, a partnership. A and X each contribute $500 to PRS and agree to share all partnership items equally. PRS purchases QSB stock on February 1, 2008, for $1,000 and subsequently sells the QSB stock on January 31, 2010, for $3,000. PRS realizes $2,000 of gain from the sale of the QSB stock (none of which is treated as ordinary income) and allocates $1,000 of gain to each of A and X. On February 10, 2010, PRS purchases replacement QSB stock for $2,200. On March 20, 2010, A purchases replacement QSB stock for $400. PRS makes an election to apply section 1045 under paragraph (b)(1) of this section with respect to the partnership section 1045 gain from the sale of QSB stock and A does not opt out of PRS' section 1045 election under paragraph (b)(4) of this section. Also, A makes an election under paragraph (c)(1) of this section with respect to the remaining gain from the sale of the QSB stock.

(ii) Under paragraph (b)(1) of this section, partnership section 1045 gain is $1,200 ($2,000 less $800 ($3,000 amount realized on the sale of the QSB stock minus $2,200 cost of the replacement QSB stock)). This amount is allocated among the partners in the same proportions as the entire gain from the sale of the QSB stock is allocated to the partners, 1/2 to A ($600), and 1/2 to X ($600). Because A is an eligible partner, A defers recognition of A's $600 distributive share of partnership section 1045 gain.

(iii) A also made an election under section 1045 and purchased, within 60 days of PRS' sale of the QSB stock, replacement QSB stock for $400. Therefore, under paragraph (c)(1) of this section, A may defer a portion of A's distributive share of the remaining gain from the partnership's sale of the QSB stock. A must recognize that remaining gain to the extent that A's share of the amount realized by PRS on the sale of the QSB stock (excluding the cost of the QSB stock that was replaced by PRS) exceeds the cost of the replacement QSB stock purchased by A during the 60-day period following the sale of the QSB stock. The amount realized by PRS on the sale of the QSB stock (excluding the cost of the QSB stock that was replaced by PRS) is $800 ($3,000 minus $2,200). Under paragraph (c)(2) of this section, A's share of that amount realized is $400 ($1,000 (A's share of the realized gain from the sale of the QSB stock) ÷ $2,000 (PRS total realized

gain from the sale of the QSB stock) multiplied by $800). Because the replacement QSB stock purchased by A cost $400, A defers recognition of all of the remaining gain from the sale of the QSB stock.

(iv) The adjusted basis of A's interest in PRS is not increased by the $600 gain that was not recognized pursuant to paragraph (b)(1) of this section, but is increased by the $400 gain that was not recognized pursuant to paragraph (c)(1) of this section. See paragraphs (b)(3)(i) and (c)(4)(i) of this section. PRS must decrease its basis in the replacement QSB stock by the $600 of partnership section 1045 gain that was allocated to A. See paragraph (b)(3)(ii) of this section. A must decrease A's basis in the replacement QSB stock purchased by A by the $400 not recognized pursuant to paragraph (c)(1) of this section. See paragraph (c)(4)(ii) of this section.

Example 9. Change in partner's interest in partnership while partnership holds QSB stock. (i) On January 1, 2008, A, an individual, and X, a C corporation, form PRS, a partnership. A and X each contribute $500 to PRS and agree to share all partnership items equally. PRS purchases QSB stock on February 1, 2008, for $1,000. On August 2, 2008, A sells a 25 percent interest in PRS to Z. On July 10, 2009, A repurchases the 25 percent interest from Z for $500. PRS makes a timely election under section 754 for the 2008 taxable year. Under section 743(b), A has a positive basis adjustment of $250. On January 31, 2011, PRS sells the QSB stock for $3,000. PRS realizes $2,000 of gain from the sale of the QSB stock (none of which is treated as ordinary income) and allocates $1,000 of gain to each of A and X. On February 10, 2010, PRS purchases replacement QSB stock for $3,000. PRS makes an election to apply section 1045 under paragraph (b)(1) of this section with respect to the partnership section 1045 gain from the sale of QSB stock.

(ii) Of the $2,000 of realized gain from the sale of the QSB stock, PRS allocates $1,000 to A and $1,000 to X. However, A has a positive basis adjustment of $250 under section 743(b) as a result of the purchase of the 25 percent interest in PRS from Z; therefore, A's share of the gain is reduced to $750. Because A is an eligible partner under paragraph (g)(3) of this section, A may defer recognition of A's distributive share of gain from the sale of the QSB stock subject to the nonrecognition limitation described in paragraph (d) of this section. The smallest percentage interest that A held in PRS capital during the time that PRS held the QSB stock is 25 percent. Under the nonrecognition limitation, A may not defer more than 25 percent of the partnership gain realized from the sale of the QSB stock (determined without regard to any basis adjustment under section 734(b) or section 743(b), other than a basis adjustment described in paragraph (b)(3)(ii) of this section). Because the partnership's realized gain determined without regard to A's basis adjustment under section 743(b) is $2,000, A may defer recognition of $500 (25 percent of $2,000) of the gain from the sale of the QSB stock. A must recognize the remaining $250 of that gain.

Example 10. Sale by partner of QSB stock received in a liquidating distribution. (i) On January 1, 2008, A, an individual, and X, a C corporation, form PRS, a partnership. A and X each contribute $1,500 to PRS and agree to share all partnership items equally. PRS purchases QSB stock on February 1, 2008, for $3,000. On May 1, 2008, when the QSB stock has appreciated in value to $4,000, A contributes $1,000 to PRS, increasing A's interest in PRS capital to 60 percent. On June 1, 2011, when the QSB stock is still worth $4,000, PRS makes a liquidating distribution of $3,000 worth of QSB stock to A. Under section 732, A's basis in the distributed QSB stock is $2,500. A sells the QSB stock on August 4, 2011, for $6,000, realizing a gain of $3,500 (none of which is treated as ordinary income). A purchases replacement QSB stock on August 30, 2011, for $5,500, and makes an election under section 1045 with respect to the August 4, 2011, sale of QSB stock.

(ii) A is an eligible partner under paragraph (g)(3) of this section. Therefore, under paragraph (e)(1) of this section, A is treated as having acquired the distributed QSB stock in the same manner as PRS and as having held the QSB stock since February 1, 2008, its original issue date. Because A purchased, within 60 days of A's sale of the QSB stock, replacement QSB stock, A is eligible to defer a portion of A's gain from the sale of the QSB stock. A must recognize gain, however, to the extent that A's amount realized on the sale of the QSB stock, $6,000, exceeds the cost of the replacement QSB stock purchased by A during the 60-day period beginning on the date of the sale of the QSB stock, $5,500. Accordingly, A must recognize $500 of the gain from the sale of the QSB stock. A defers recognition of the remaining $3,000 of gain to the extent that such gain does not exceed the distribution nonrecognition limitation under paragraph (e)(3) of this section.

(iii) Under paragraph (e)(3)(i) of this section, A's nonrecognition limitation with respect to the sale of the QSB stock is A's section 1045 amount realized with respect to the stock, reduced by A's section 1045 adjusted basis with respect to the stock. A's amount realized from the sale is the product of A's amount realized from the sale, $6,000; and a fraction—

(*1*) The numerator of which is A's smallest percentage interest in PRS capital with respect to such stock, 50 percent; and

(*2*) The denominator of which is A's percentage interest in that type of partnership QSB stock immediately after the distribution, 75 percent (the value of the stock distributed to A, $3,000, divided by the value of all QSB stock of that type acquired by PRS, $4,000).

(iv) Therefore, A's section 1045 amount realized is $4,000 ($6,000 multiplied by 50/75). Because PRS distributed the QSB stock to A in liquidation of A's interest in PRS, A's section 1045 adjusted basis is the product of PRS' basis in all of the QSB stock of the type distributed, $3,000; A's smallest percentage interest in PRS capital with respect to QSB stock of the type distributed, 50 percent; and the percentage of the distributed QSB stock that was sold by A, 100 percent. Therefore, A's section 1045 adjusted basis is $1,500 (the product of $3,000, 50 percent, and 100 percent)) and A's nonrecognition limitation amount on the sale of the QSB stock is $2,500 ($4,000 section 1045 amount realized minus $1,500 section 1045 adjusted basis). Accordingly, A defers recognition of $2,500 of the remaining $3,000 gain from the sale of the QSB stock and must recognize $500 of the remaining $3,000 gain. Accordingly, A's total gain recognized from the sale of the QSB stock is $1,000.

(v) A's basis in the replacement QSB stock is $3,000 (cost of the replacement QSB stock, $5,500, reduced by the gain not recognized under section 1045, $2,500).

Example 11. Sale by partner of QSB stock received in a nonliquidating distribution. (i) The facts are the same as in *Example 10,* except that, on June 1, 2011, PRS distributes only $2,000 of the QSB stock to A, reducing A's interest in PRS capital from 60 percent to 33 percent. PRS' basis in the distributed QSB stock is $1,500. On November 1, 2011, A sells for $2,500 the QSB stock distributed by PRS to A and purchases, within 60 days of the date of sale of the QSB stock, replacement QSB stock for $2,500. A makes a timely election to apply section 1045 with respect to A's sale of the distributed QSB stock.

(ii) Under section 732, A's basis in the distributed QSB stock is $1,500. Therefore, A realizes a gain on the sale of the distributed QSB stock of $1,000. Because A made an election to apply section 1045 to the sale, and because A purchased, within 60 days of A's sale of the QSB stock, replacement QSB stock at a cost equal to the amount realized on the sale of the distributed QSB stock, A defers recognition of the gain from the sale of the QSB stock to the extent that such gain does not exceed the distribution nonrecognition limitation.

(iii) Under paragraph (e)(3) of this section, the nonrecognition limitation with respect to A's sale of the QSB stock is A's section 1045 amount realized reduced by A's section 1045 adjusted basis. Because PRS did not distribute all of the particular type of QSB stock and the distribution of the QSB stock to A was not in liquidation of A's interest in PRS, under paragraph (e)(3)(ii)(C) of this section A's section 1045 amount realized is $1,250 (A's amount realized from the sale of the distributed QSB stock, $2,500, multiplied by A's smallest percentage interest in PRS capital with respect to such stock, 50 percent). Under paragraph (e)(3)(iii)(B) of this section, A's section 1045 adjusted basis is the product of the partnership's basis in the QSB stock sold by the partner, $1,500, and A's smallest percentage interest in the partnership capital with respect to such stock, 50 percent. Therefore, A's section 1045 adjusted basis is $750 (50 percent of $1,500), and A's nonrecognition limitation amount on the sale of the QSB stock is $500 ($1,250 section 1045 amount realized minus $750 section 1045 adjusted basis). As this amount is less than the amount of gain that A is eligible to defer under section 1045, $1,000, A defers recognition of only $500 of the gain from the sale of the QSB stock. A must recognize the remaining $500 of that gain.

(iv) A's basis in the replacement QSB stock is $2,000 (cost of the replacement QSB stock, $2,500, reduced by the gain not recognized under section 1045, $500).

Example 12. Contribution of replacement QSB stock to a partnership. (i) On January 1, 2008, A, an individual, B, an individual, and X, a C corporation, form PRS, a partnership. A, B, and X each contribute $250 to PRS and agree to share all partnership items equally. On February 1, 2008, PRS purchases QSB stock for $750. PRS sells the QSB stock on November 3, 2008, for $1,050. PRS realizes $300 of gain from the sale of the QSB stock (none of which is treated as ordinary income) and allocates $100 of gain to each of its partners. PRS informs the partners that it does not intend to make an election under section 1045 with respect to the sale of the QSB stock. Each partner's share of the amount realized from the sale of the QSB stock is $350. On November 30, 2008, A, an eligible partner within the meaning of paragraph (g)(3) of this section, purchases replacement QSB stock for $350 and makes a section 1045 election under paragraph (c)(1) of this section. Subsequently, A transfers the replacement QSB stock to ABC, a partnership, in exchange for an interest in ABC.

(ii) Because A purchased within 60 days of PRS's sale of the QSB stock, replacement QSB stock for a cost equal to A's share of the partnership's amount realized on the sale of the QSB stock, and because A made a valid election to apply section 1045 with respect to A's share of the gain from PRS's sale of the QSB stock, A does not recognize A's $100 distributive share of the gain from PRS's sale of the QSB stock. Before the contribution of the replacement QSB stock to ABC, A's adjusted basis in the replacement QSB stock is $250 ($350 cost minus $100 nonrecognition amount). A does not recognize gain upon the contribution of QSB stock to ABC under section 721(a). Upon the contribution of the replacement QSB stock to ABC, A's basis in the ABC partnership interest is $250, and ABC's basis in the replacement QSB stock is $250. However, the replacement QSB stock does not qualify as QSB stock in ABC's hands. Neither A nor ABC will be eligible to defer gain under section 1045 on a subsequent sale of the replacement QSB stock.

(j) *Effective date/applicability—In general.* This section applies to sales of QSB stock on or after August 14, 2007.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 3.** The authority citation for part 602 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 4.** In § 602.101 paragraph (b) is amended by adding in numerical order, § 1.1045–1, to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * *	*
1.1045–1	1545–1893
* * * *	*

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: August 2, 2007.

Eric Solomon,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. E7–15948 Filed 8–13–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

RIN 1219–AB52

Sealing of Abandoned Areas

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Extension of comment period.

SUMMARY: The Mine Safety and Health Administration (MSHA) is extending the comment period for the Emergency Temporary Standard (ETS) on sealing of abandoned areas of underground coal mines published on May 22, 2007 (72 FR 28796). This extension gives commenters additional time to review recently posted documents on MSHA's Web site and a recently published report from the National Institute for Occupational Safety and Health (NIOSH) entitled ''Explosion Pressure Design Criteria for New Seals in U.S. Coal Mines'' (NIOSH Publication No. 2007–144, July 2007).

DATES: The comment period will close on September 17, 2007.

ADDRESSES: Comments must be clearly identified and may be submitted by any of the following methods:

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

(2) Electronic mail: *zzMSHA-Comments@dol.gov.* Include ''RIN 1219–AB52'' in the subject line of the message.

(3) Telefax: (202) 693–9441. Include ''RIN 1219–AB52'' in the subject.

(4) Regular Mail: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia, 22209–3939.

(5) Hand Delivery or Courier: MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia 22209–3939. Sign in at the receptionist's desk on the 21st floor.

(6) Docket: Comments can be accessed electronically at *http://www.msha.gov* under the ''Rules and Regs'' link. MSHA will post all comments on the Internet without change, including any personal information provided. Comments may also be reviewed at the Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, Virginia. Sign in at the receptionist's desk on the 21st floor.

MSHA maintains a listserve that enables subscribers to receive e-mail notification when rulemaking documents are published in the **Federal Register**. To subscribe to the listserve, go to *http://www.msha.gov/subscriptions/subscribe.aspx.*

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, MSHA, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939. Ms. Silvey can be reached at Silvey.Patricia@dol.gov (Internet E-mail), (202) 693–9440 (voice), or (202) 693–9441 (facsimile). This notice is available on the Internet at *http://www.msha.gov/REGSINFO.HTM.*

SUPPLEMENTARY INFORMATION: MSHA issued an Emergency Temporary Standard (ETS) on May 22, 2007 (72 FR 28796). On June 25, 2007, MSHA notified the public that the comment period for the ETS would close on August 17, 2007 (72 FR 34609). On August 3, 2007, the National Mining Association requested that the comment period be extended 30 days to allow additional time to comment on several new ETS related documents recently posted on MSHA's Web page, including a set of compliance assistance questions and answers posted on July 23, 2007; MSHA's Procedure Instruction Letter No. I07–V–04, Procedures for Inspection of Seals, issued on July 24, 2007, and posted on July 25, 2007; and the Seal Design Approval Information Template updated on August 2, 2007.

In addition, MSHA posted four new seal designs on August 2, 2007: Three 50 psi seal designs and one 120 psi seal design. Furthermore, NIOSH recently published a final report on ''Explosion Pressure Design Criteria for New Seals in U.S. Coal Mines.'' The report is available on the Internet at: *http://www.cdc.gov/niosh/mining/pubs/pdfs/2007–144.pdf.*

MSHA is extending the comment period to September 17, 2007. This

action allows commenters sufficient time to fully review the posted documents and submit comments. MSHA will accept written comments and other appropriate data from any interested party up to the close of the comment period on September 17, 2007.

Dated: August 9, 2007.

John P. Pallasch,

Deputy Assistant Secretary for Mine Safety and Health.

[FR Doc. 07–3977 Filed 8–9–07; 4:19 pm]

BILLING CODE 4510–43–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[DOD–2007–HA–0048]

RIN 0720–AB16

TRICARE; Outpatient Hospital Prospective Payment System (OPPS)

AGENCY: Office of the Secretary, DoD.

ACTION: Interim final rule.

SUMMARY: This interim final rule implements a prospective payment system for hospital outpatient services similar to that furnished to Medicare beneficiaries, as set forth in section 1833(t) of the Social Security Act. The rule also recognizes applicable statutory requirements and changes arising from Medicare's continuing experience with this system including certain related provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. The Department is publishing this rule as an interim final rule to implement existing statutory requirements for adoption of Medicare payment methods for institutional care. Interim final rule publication will ensure the expeditious implementation of a proven hospital OPPS, providing incentives for hospitals to furnish outpatient services in an efficient and effective manner. However, public comments are invited and will be considered for possible revisions to the final rule.

DATES: *Effective Dates:* September 13, 2007.

Comments: Written comments received at the address indicated below by October 15, 2007 will be accepted.

ADDRESSES: You may submit comments, identified by docket number and or RIN number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: David E. Bennett, TRICARE Management Activity, Medical Benefits and Reimbursement Systems, telephone (303) 676–3494.

SUPPLEMENTARY INFORMATION:

I. Justification for Interim Final Rule (IFR) Making

In accordance with Title 5, Part I, Chapter 5, Subchapter II, § 553(b)(3)(B) of the Administrative Procedures Act, the following rationale is being provided for implementing TRICARE's OPPS under the IFR process.

In the National Defense Authorization Act for Fiscal Year 2002 (NDAA–02), Public Law 107–107 (December 28, 2001), several reforms were enacted relating to TRICARE coverage and payment methods for skilled nursing and home health services which were all implemented through interim final rule (IFR) making to ensure expeditious implementation of Congressionally mandated reimbursement systems. In addition to the requirement that TRICARE establish an integrated sub-acute care program consisting of skilled nursing facility and home health care services modeled after the Medicare program, Congress also—in section 707 of NDAA–02—changed the statutory authorization (in 10 U.S.C. 1079(j)(2)) that TRICARE payment methods for institutional care ''may be'' determined to the extent practicable in accordance with Medicare payment rules to a mandate that TRICARE payment methods ''shall be'' determined to the extent practicable in accordance with Medicare payment rules. Section 707(c) required that the amendments made by this section shall take effect on the date that is 90 days after the date of the enactment of the Act.

In the supplementary sections of both the Sub-Acute Care Program interim and final rules (67 FR 40597, June 13, 2002, and 70 FR 61377—Supplementary Information, VIII. Payment Methods for Hospital Outpatient Services), the public was informed of the Agency's intent to adopt and implement the Medicare Prospective Payment System to the extent practicable. However, because of complexities of the Medicare transition process and the lack of TRICARE cost report data comparable to Medicare's, it was not practicable for the Department to adopt Medicare OPPS for hospital outpatient services at that time.

It was recognized that adoption of the Medicare OPPS would require full commitment by the Agency to ensure expeditious implementation of the OPPS given the fact that Medicare's outpatient reimbursement system had been in effect since August 1, 2000. A formal OPPS work group was formed over 2½ years ago to finalize operational requirements and develop sophisticated software for processing and payment of hospital outpatient claims. Although the agency was committed to mirroring the basic Medicare reimbursement methodology as closely as possible (i.e., Medicare Ambulatory Payment Classification (APC) system, national APC payment rates, geographical wage adjustments, discounting, coding requirements, etc.), there were modifications that had to be done to the software grouping and pricing components to accommodate TRICARE's unique beneficiary and benefit structure. The continual updating of grouping and pricing software based on ongoing Medicare quarterly updates, along with TRICARE specific requirements, have been a challenge to both TRICARE and its Managed Care Support Contractors.

Based on the agency's requirement to implement OPPS as mandated under section 707 of NDAA–02 (i.e., the statutory change to 10 U.S.C. 1079(j)(2)) that TRICARE payment methods for institutional care shall be determined to the extent practicable in accordance with Medicare payment rules), and to maximize the administrative efficiencies and cost-savings of this new reimbursement system, TRICARE opted to go with the same interim final rule making process that it used in implementing the two previously mandated Medicare reimbursement systems (i.e., the TRICARE Home Health Agency and the Skilled Nursing Facility Prospective Payment System, which also statutorily mandated under the same NDAA as OPPS—which was section 707 of NDAA–02).

The fact that TRICARE will be following Medicare changes to the extent practicable (i.e., outpatient services provided in hospitals subject to Medicare OPPS as specified in 42 CFR § 413.65 and 42 CFR § 419.20 will be paid in accordance with the provisions

outlined in section 1833(t) of the Social Security Act and its implementing Medicare regulation (42 CFR 419)) would make it difficult to conform to the traditional proposed and final rule making process since changes would be continual and ongoing based on Medicare rules and policy transmittals. The IFR process would most accurately reflect the provisions of the payment methodology at the time of implementation, while at the same time affording public review and comment which will be addressed in the Final Rule.

It is estimated that going with proposed and final rulemaking instead of interim final and final rule making would result in at least a 12-month delay in implementation of the TRICARE Outpatient Prospective Payment System, which in turn would result in the program foregoing projected cost-savings in the amount of $50 to $70 million.

TRICARE's Managed Care Support Contractors (MCSCs) have fully integrated the OPPS Outpatient Code Editor and Pricer into their claims processing systems (i.e., the software modules that were developed to process and accurately price hospital outpatient claims). A 12-month delay in implementation of OPPS would result in an additional $8–12 million in administrative costs for the government. Even though the system would remain in test mode it would have to be maintained and updated during the delay (4–6 updates), which would require staff support and programming. Maintaining multiple outpatient reimbursement systems would impose an administrative burden on TRICARE and its MCSCs.

A delay would also be extremely challenging from a public relations standpoint, since the MCSCs have already gone out to their network hospitals and renegotiated contracts. Approximately 97 percent of all network agreements have been renegotiated to accommodate implementation of the TRICARE OPPS. As a result, providers are anticipating conversion to OPPS within the near future (i.e., they are reconfiguring their charge masters to accommodate TRICARE OPPS billing).

OPPS will ensure consistency of hospital outpatient payments throughout the United States, thus reducing the denial and return of claims to providers for coding errors. Providers will have access to OCE/Pricer software that will facilitate the filing and payment of outpatient claims with their TRICARE claims processors. A 12-month delay would reduce overall administrative cost savings for both providers and TRICARE contractors. These administrative efficiencies/cost-savings will not be lost through IFR making.

The general public and other interested parties (*e.g.*, consulting groups and medical associations) are also anticipating implementation of OPPS in the near future. A significant delay in implementation will cause frustration and confusion. The education efforts will have to be doubled to accommodate a significant delay in implementation of OPPS.

There is urgency for TRICARE implementation of the Medicare OPPS given the fact that the Medicare OPPS has been in place since August 1, 2000. The initial delay, which was reflected in the previous Sub-Acute Care Program interim and final rules (67 FR 40597, June 13, 2002, and 70 FR 61377), was due in part to the Agency's desire to avoid the transitioning provisions that were in effect under the Medicare program from its implementation though CY 2005. The remaining time was necessary to accommodate the revised programming necessary to accommodate TRICARE's unique population and benefit structure. The OPPS workgroup (both TMA and contractor staff) has worked over the past three years to ensure expeditious implementation of this Congressionally mandated outpatient reimbursement system.

II. Overview

The OPPS evolved out of Congressional mandates for replacement of Medicare's cost-based payment methodology with a prospective payment system (PPS). Medicare implemented OPPS for services furnished on or after August 1, 2000, with temporary transitional provisions to buffer the financial impact of the new prospective payment system (e.g., incorporating transitional pass-through adjustments and proportional reductions in beneficiary cost-sharing to lessen potential payment reductions experienced under the new OPPS).

Congress likewise established enabling legislation under section 707 of the National Defense Authorization Act of Fiscal Year 2002 (NDAA–02), Pub. L. 107–107 (December 28, 2001) changing the statutory authorization [in 10 U.S.C. 1079(j)(2)] that TRICARE payment methods for institutional care be determined, to the extent practicable, in accordance with the same reimbursement rules used by Medicare. Similarly, under 10 U.S.C. 1079(h), the amount to be paid to health care professional and other non-institutional health care providers ''shall be equal to an amount determined to be appropriate, to the extent practicable, in accordance with the same reimbursement rules used by Medicare''. Based on these statutory provisions, TRICARE is adopting Medicare's prospective payment system for reimbursement of hospital outpatient services currently in effect for the Medicare program as required under the Balanced Budget Act of 1997 (BBA 1997), (Pub. L 105–33) which added section 1833(t) of the Social Security Act providing comprehensive provisions for establishment of a hospital OPPS. The Act required development of a classification system for covered outpatient services that consisted of groups arranged so that the services within each group were comparable clinically and with respect to the use of resources. The Act also described the method for determining the Medicare payment amount and beneficiary coinsurance amount for services covered under the outpatient PPS. This included the formula for calculating the conversion factor and data requirements for establishing relative payment weights.

Centers for Medicare and Medicaid Services (CMS) published a proposed rule in the **Federal Register** on September 8, 1998 (63 FR 47552) setting forth the proposed PPS for hospital outpatient services. On June 30, 1999, a correction notice was published (64 FR 35258) to correct a number of technical and typographical errors contained in the September 8, 1998 proposed rule.

Subsequent to publication of the proposed rule, the Medicare, Medicaid, and State Child Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA 1999) (Pub. L. 106–133) enacted on November 29, 1999, made major changes that affected the proposed outpatient PPS. The following BBRA 1999 provisions were implemented in a final rule (65 FR 18434) published on April 7, 2000.

- Made adjustments for covered services whose costs exceed a given threshold (i.e., an outlier payment).
- Established transitional pass-through payments for certain medical devices, drugs, and biologicals.
- Placed limitations on judicial review for determining outlier payments and the determination of additional payments for certain medical devices, drugs, and biologicals.
- Included as covered outpatient services implantable prosthetics and durable medical equipment and diagnostic x-ray, laboratory, and other tests associated with those implantable items.

• Limited the variation of costs of services within each payment classification group.
• Required at least annual review of the groups, relative payment weights, and the wage and other adjustments to take into account changes in medical practice, the addition of new services, new cost data, and other relevant information or factors.
• Established transitional corridors that would limit payment reductions under the hospital outpatient PPS.
• Established hold harmless provisions for rural and cancer hospitals.
• Provided that the coinsurance amount for a procedure performed in a year could not exceed the hospital inpatient deductible for the year.

Section 1833(t) of the Social Security Act was subsequently amended by the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 (Pub. L. 106–554) and the Medicare Prescription Drug, Improvement, and Modernization Act (MMA) of 2003 (Pub. L. 108–173), making additional changes in the OPPS.

As a prelude to implementation of the OPPS, Congress enacted the Omnibus Budget Reconciliation Act of 1986 (OBRA) (Pub. L. 99–509) which paved the way for development of a PPS for hospital outpatient services by prohibiting payment for nonphysician services furnished to hospital patients (inpatients and outpatients), unless the services were furnished either directly or under arrangement with the hospital, except for services of physician assistants, nurse practitioners and clinical nurse specialists. Exceptions were also made for clinical diagnostic procedures, the payment of which may only be made to the person or entity that performed, or supervised the performance of, the test; and for exceptionally intensive hospital outpatient services provided to skilled nursing facility (SNF) residents that lie well beyond the scope of the care that SNFs would ordinarily furnish, and thus beyond the ordinary scope of the SNF care plan. Consolidated billing facilitated the payment of services included within the scope of each ambulatory payment classification (APC). The OBRA also mandated hospitals to report claims for services under the Healthcare Common Procedure Coding System (HCPCS) which enabled the identification of specific procedures and services used in the development of outpatient PPS rates.

Ongoing changes and refinement to the OPPS have been accomplished through annual proposed and final rulemaking, along with interim transmittals and program memoranda taking into consideration changes in medical practice, addition of new services, new cost data, and other relevant information and factors. TRICARE will recognize to the extent practicable all applicable statutory requirements and changes arising from Medicare's continuing experience with this prospective payment system, including changes to the amounts and factors used to determine the payment rates for hospital outpatient services paid under the prospective payment system [e.g., annual recalibration (updating) of group weights and conversion factors and adjustments for area wage differences (wage index updates)].

While TRICARE intends to remain as true as possible to Medicare's basic OPPS methodology (i.e., adoption and updating of the Medicare data elements used to calculate the prospective payment amounts), there will be some deviations required to accommodate the uniqueness of the TRICARE program. These deviations have been designed to accommodate existing TRICARE benefit structure and claims processing procedures/systems implemented under the TRICARE Next Generation Contracts (T–NEX), while at the same time eliminating any undue financial burden to TRICARE Prime, Extra, and Standard beneficiary populations. Following is a brief discussion of each of these deviations:

• *Outpatient Code Editor (OCE)*—The Medicare Outpatient Code Editor with APC program edits data to help identify possible errors in coding and assigns Ambulatory Payment Classification numbers based on HCPCS codes for payment under the OPPS. The OPPS is an outpatient equivalent of the inpatient, Diagnosis Related Group (DRG)-based PPS. Like the inpatient system based on DRGs, each APC has a pre-established prospective payment amount associated with it. However, unlike the inpatient system that assigns a patient to a single DRG, multiple APCs can be assigned to one outpatient claim. If a patient has multiple outpatient services during a single visit, the total payment for the visit is computed as the sum of the individual payments for each service. Medicare provides updated versions of the OCE, along with installation and user manuals, to its fiscal intermediaries on a quarterly basis. The updated OCE reflects all new coding and editing changes during that quarter.

It was found upon initial testing of the OCE that it could not be used in its present form given the fact that the extensive editing embedded in its software program was specific to Medicare's benefit structure and internal claims processing requirements. As a result, the Agency has developed a TRICARE-specific OCE which will better accommodate the benefit structure and claims processing systems currently in place under the T–NEX contracts. This modified software package will edit claims data for errors and indicate actions to be taken and reasons why the actions are necessary. This expanded functionality will facilitate the linkage between the action being taken, the reasons for the action, and the information on the claim that caused the action. The edits will be specific for TRICARE, ensuring compliance with current claims processing criteria. The OCE will also assign an APC number for each service covered under the OPPS and return information to be used as input to the TRICARE PRICER program.

Like Medicare's OCE, the TRICARE-specific OCE will be updated on a quarterly basis incorporating, to the extent practicable, all Medicare changes/updates (i.e., those changes initiated through rulemaking and transmittals/program memoranda). Periodic updating of the TRICARE-specific OCE will ensure consistency and accuracy of claims processing and payment under the OPPS.

• *Deductible and Cost-Sharing*—Medicare's OPPS coinsurance was initially frozen at 20 percent of the national median charge for the services within each APC (wage adjusted for the provider's geographic area) or 20 percent of the APC payment rate, whichever was greater (i.e., the coinsurance for an APC could not fall below 20 percent of the APC payment rate). This was designed so that, as the total payment to the provider increased each year based on market basket updates, the present or frozen coinsurance amount would become a smaller portion of the total payment until the coinsurance represented 20 percent of the total. Once the coinsurance became 20 percent of the payment amount, annual updates would be applied to the coinsurance so that it would continue to account for 20 percent of the total charge. Wage adjusted coinsurance amounts were further limited by the Medicare inpatient deductible. Subsequent legislation has accelerated the reduction of beneficiary copayment amounts by imposing prescribed percentage limitations off of the APC payment rate. For example, for all services paid under the OPPS in CY 2005, the national unadjusted copayment amount cannot

exceed 45 percent of the APC rate. Accelerated reductions were imposed specifically for those APC groups for which coinsurance represented a relatively high proportion of the total payment.

A program payment percentage is calculated for each APC by subtracting the unadjusted national coinsurance amount for the APC from the unadjusted payment rate and dividing the result by the unadjusted payment rate. The payment rate for each APC group is the basis for determining the total payment (subject to wage-index adjustment) that a hospital will receive from the beneficiary and the Medicare program.

Since imposition of Medicare's unadjusted national coinsurance amounts would have an adverse financial impact on TRICARE beneficiaries (i.e., imposition of significantly higher cost-sharing for Primary beneficiaries), the Agency has opted to use the following hospital outpatient deductible and cost-sharing/copayments currently being applied in Tables 1 and 2 below for Prime, Extra, and Standard TRICARE programs for hospital outpatient services:

TABLE 1.—HOSPITAL OUTPATIENT DEDUCTIBLES

TRICARE programs	Active duty family members		Retirees, their family members and survivors
	E1–E4	E5 and above	
Prime	None	None	None.
Extra	$50 per Individual	$150 per Individual	$150 per Individual.
	$100 Maximum per family	$300 Maximum per family	$300 Maximum per family.
Standard	$50 per Individual	$150 per Individual	$150 per Individual.
	$100 Maximum per family	$300 Maximum per family	$300 Maximum per family.

TABLE 2.—HOSPITAL OUTPATIENT COPAYMENTS/COST-SHARING

TRICARE prime program			TRICARE extra program	TRICARE standard program
Active duty family members		Retirees, their family members and survivors		
E1–E4	E5 and above			
$0 copayment per visit.	$0 copayment per visit.	$12 copayment per visit.	Active Duty Family Members: Cost-share—15% of fee negotiated by contractor. Retirees, Their Family Members and Survivors: Cost-share—20% of the fee negotiated by the contractor.	Active Duty Family Members: Cost-share—20% of the allowable charge. Retirees, Their Family Members & Survivors: Cost-share—25% of the allowable charge.

• *Hold-Harmless Protection*—Since the inception of the Medicare OPPS, providers have been eligible to receive additional transitional outpatient payments (TOPs) if the payments they received under the OPPS were less than the payments they could have received for the same services under the payment system in effect before the OPPS. Prior to January 1, 2004, most hospitals that realized lower payments under OPPS received transitional corridor payments based on a percent of the decreased payments, with the exception of cancer hospitals, children's hospitals and rural hospitals having 100 or fewer beds which were held harmless under this provision and paid the full amount of the decrease in payment under the OPPS. Since transitional corridor payments were intended to be temporary payments to ease the provider's transition from a prior cost-based payment system to a prospective payments system, they were terminated as of January 1, 2004, with the exception of cancer and children's hospitals who were held harmless permanently under transitional corridor provisions of the statute (section 1833(t)(7) of the Social Security Act). The authority for making transitional corridor payments under section 1833(t)(7)(D)(i) of the Act, as amended by section 411 Pub. L. 108–173, expired for rural hospitals having 100 or fewer beds, and sole community hospitals (SCHs) located in rural areas as of December 31, 2005. However, subsequent legislation (Section 5105 of Pub. L. 109–171) reinstituted the hold-harmless transitional outpatient payments (TOPs) for covered OPD services furnished on or after January 1, 2006, and before January 1, 2009, for rural hospitals having 100 or fewer beds that are not SCHs. This provision provided an increased payment for such hospitals for outpatient services if the OPPS payment they received was less than the pre-BBA payment amount (i.e., the amount that was received prior to implementation of OPPS) that they would have received for the same covered service. When the OPPS payment is less than the payment the provider would have received prior to OPPS implementation, the amount of payment is increased by 90 percent of the amount of that difference for CY 2007, and by 85 percent of the amount of the difference for CY 2008. The amount of payment under Section 1833(t)(13)(B) of the Act, as amended by section 411 of Pub. L. 108–73, also provided a payment increase for rural SCHs of 7.1 percent for all services and procedures paid under the OPPS, excluding drugs, biologicals, brachytherapy seeds and services paid under pass-through payments effective January 1, 2006, if justified by a study of the difference in costs for rural SCHs.

While the Agency adopted the hold-harmless TOPs for rural hospitals having 100 or fewer beds and SCHs, it opted to totally exempt cancer and children's hospitals from the OPPS in lieu of imposing the hold-harmless provision, given the administrative complexity of capturing the data required for payment of monthly interim TOP amounts. TOPs would require a comparison of what would have been paid [i.e., billed charges and CHAMPUS Maximum Allowable Charge (CMAC) amounts] prior to implementation of the OPPS for hospital outpatient services to those amounts actually paid under the OPPS for the same services. A TOP would be allowed in addition to the OPPS amount if payment to a cancer or children's hospital was lower than the amount that

would have been paid prior to implementation of the OPPS. Since transitional corridor payments were specifically designed to supplement the losses experienced under the OPPS (i.e., to pay for services at the full amount that would have been allowed prior to implementation of the OPPS), and most, if not all, outpatient services paid at a billed or CMAC would exceed the OPPS amount, the program cannot justify the administrative burden/expense of maintaining the hold-harmless provisions for cancer and children's hospitals. As a result, TRICARE will continue to reimburse cancer and children's hospitals on a fee-for-services basis using billed charges and CMAC rates; i.e., they will be excluded altogether from the OPPS.

Adoption of the Medicare OPPS has also highlighted other policy considerations which must be addressed in order to accommodate preexisting authorization criteria and reimbursement systems. Following are these identified policy considerations and prescribed resolutions:

• *Partial Hospitalization Programs (PHP)*—Currently, TRICARE coverage extends to both full- and half-day psychiatric partial hospitalization services furnished by TRICARE-authorized partial psychiatric hospitalization programs and authorized mental health providers for the active treatment of a mental disorder. Each psychiatric partial hospitalization program must be either a distinct part of an otherwise authorized institutional provider or a freestanding program certified pursuant to TRICARE certification standards; i.e., the facility must be accredited by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) under the current edition of the Accreditation Manual for Mental Health, Chemical Dependency, and Mental Retardation/Developmental Disabilities Services and meet all other requirements as prescribed under 32 CFR 199.6(b)(4)(xii)(A) through (D). These authorized and participating partial hospitalization programs are paid a percentage off of the average inpatient per diem amount per case to both high- and low-volume psychiatric hospitals. Full-day partial hospitalization programs (minimum of 6 hours) receive 40 percent of the average inpatient per diem, while partial hospitalization programs with less than 6 hours (with a minimum of three hours) will be paid a per diem of 75 percent of the rate for full-day partial hospitalization programs.

Although the prescribed payment methodology for PHP under OPPS is similar to that currently being used (i.e., payment under a per diem recognizing the provider's overhead costs and support staff), there are subtle differences in that OPPS' all-inclusive per diems represent actual median costs of furnishing a day of partial hospitalization while per diems under the existing TRICARE system as prescribed under 32 CFR 199.14(a)(2)(ix) are extrapolated from inpatient costs based on the intensity of the program (i.e., dependent on whether it is classified as a full- or half-day program). Another notable difference between the two programs is the continuation of reimbursement of half-day PHPs (≥ to 3 hrs. but < 6 hrs.) under TRICARE which are currently not recognized for payment under the Medicare OPPS (i.e., Medicare has not established a separate APC for half-day PHPs which can be used for reimbursement under the TRICARE OPPS). This deviation from the Medicare PHP required the establishment of an additional APC, the per diem of which was set at 75 percent of the unadjusted full-day PHP APC amount (i.e., 75 percent of the APC 0033 amount of $234.73, equaling $176.05 for CY 2007). This will ensure continued coverage of a well established mental health treatment modality (half-day PHP) which has been in place under TRICARE for over a decade. The above-established per diems reflect the structure and scheduling of PHPs, and the composition of the PHP APC consists of the cost of all services provided each day. Although there is a requirement that each PHP day include a psychotherapy service, there is no specification regarding the specific mix of other services furnished within the day.

The TRICARE criteria under which PHP services may be rendered are different than Medicare's—both with regard to the need for PHP services and facility requirements. Currently, Medicare OPPS partial hospitalization services may be provided to patients in lieu of inpatient psychiatric care in hospital outpatient departments or Medicare-certified community mental health centers (CMHCs). The Agency has opted to retain the existing mental health review criteria under 32 CFR 199.4(b)(10) in order to ensure the continued level and quality of mental health care afforded under the basic program. Following are the TRICARE review criteria for determining the medical necessity of psychiatric partial hospitalization services:

• The patient is suffering significant impairment from a mental disorder (as defined in § 199.2) which interferes with age appropriate functioning.

• The patient is unable to maintain himself or herself in the community, with appropriate support, at a sufficient level of functioning to permit an adequate course of therapy exclusively on an outpatient basis (but is able, with appropriate support, to maintain a basic level of functioning to permit partial hospitalization services and presents no substantial imminent risk of harm to self or others).

• The patient is in need of crisis stabilization, treatment of partially stabilized mental health disorders, or services as a transition from an inpatient program.

• The admission into the partial hospitalization program is based on the development of an individualized diagnosis and treatment plan expected to be effective for the patient and permit treatment at a less intensive level.

Based on existing mental health review criteria under 32 CFR 199.4(b)(10) and certification requirements prescribed under 32 CFR 1996(b)(4)(xii)(A), including accreditation by the JCAHO, under the current edition of the Accreditation Manual for Mental Health, Chemical Dependency, and Mental Retardation/Developmental Disabilities Services, not all hospital-based PHPs will be assured of receiving payment under the OPPS unless they meet the above prescribed certification requirements and enter into a participation agreement with TRICARE. CMHC PHPs have been excluded from payment under the TRICARE OPPS since CMHCs are not recognized as authorized providers under the TRICARE program.

While the authorization standards under 32 CFR 199.6(b)(4)(xii)(A) through (D) will be retained/applied for both hospital-based and freestanding PHPs currently recognized under the Program, including the requirement for a written participation agreement with TRICARE, freestanding PHPs will be exempt from OPPS and will continue to be reimbursed under the old TRICARE PHP per diem system as prescribed under 32 CFR 199.14(a)(2)(ix), subject to their own unique mental health copayment/cost-sharing provisions.

• *Ambulatory Surgery Procedures*—Currently, ambulatory surgery procedures provided in both freestanding ambulatory surgery centers (ASCs) and hospital outpatient departments or emergency rooms are paid using prospectively determined rates established on a cost basis and divided into eleven groups as prescribed under 32 CFR 199.14(d). These payment groups are further adjusted for area

labor costs based on Metropolitan Statistical Areas (MSAs). The payment rates established under this system apply only to facility charges for ambulatory surgery (e.g., standard overhead amounts that include, but are not limited to, nursing and technician services, use of the facility and supplies and equipment directly related to the surgical procedure) and do not include such items as physician's fees, laboratory, X-rays or diagnostic procedures (other than those directly related to the performance of the surgical procedure), prosthetics and durable medical equipment for use in the patient's home. Ambulatory surgery procedures (both provided in hospital-based and freestanding ambulatory surgery centers) are subject to their own unique copayment/cost-sharing provisions under the current TRICARE ambulatory surgery benefit.

With implementation of the OPPS, hospital-based ambulatory surgery procedures will no longer be reimbursed under the original eleven tier payment system, but will instead be paid on a rate-per-service basis that varies according to the APC group to which the surgical procedure is assigned. The relative weight of the APC group will represent the median hospital cost of the services included in the APC relative to the median cost of services included in APC 0606, Level 3 Clinic Visit. The prospective payment rate for each APC will be calculated by multiplying the APC's relative weight by a nationally established conversion factor and adjusting it for geographic wage differences. The APC payment will be subject to the deductible and cost-sharing/copayment amounts currently being applied under Prime, Extra, and Standard TRICARE programs for hospital outpatient services. Denial of Medicare inpatient procedures will also be adhered to under the OPPS (i.e., denial of inpatient surgical procedures performed in a hospital outpatient setting) except for those inpatient procedures, which upon medical review, could be safely and efficaciously rendered in an outpatient setting due to TRICARE's younger, healthier beneficiary population. TRICARE-specific APCs will be developed for these designated inpatient procedures based on median costs off of the most recent 12 months of claims history. OPPS reimbursement will also be extended for an inpatient procedure performed to resuscitate or stabilize a patient with an emergent, life-threatening condition who dies before being admitted as a patient, which in this case, will be paid under a new technology APC.

Freestanding ASCs will be exempt from OPPS and will continue to be paid under the existing eleven tier payment system. ASC procedures will be placed into one of ten groups by their median per procedure cost, starting with $0 to $299 for Group 1, and ending with $1,000 to $1,299 for Group 9 and $1,300 and above for Group 10, subject to their own unique copayment/cost-sharing provisions under the TRICARE freestanding ambulatory surgery benefit. The eleventh payment tier/group was added to the ASC reimbursement system as of November 1, 1998, for extracorporeal shock wave lithotripsy, with a rate established off of the inpatient Diagnostic Related Group (DRG) 323 which is currently $3,289.

• *Birthing Centers*—As described in 32 CFR 199.6(b)(4)(xi)(3), a birthing center is a freestanding or institution-affiliated outpatient maternity care program which principally provides a planned course of outpatient prenatal care and outpatient childbirth services limited to low-risk pregnancies. These all-inclusive maternity and childbirth services are currently being reimbursed in accordance with 32 CFR 199.14(e) at the lower of the TRICARE established all-inclusive rate or the billed charge. The all-inclusive rate includes laboratory studies, prenatal management, labor management, delivery, post-partum management, newborn care, birth assistant, certified nurse-midwife professional services, physician professional services, and the use of the facility to the extent that they are usually associated with a normal pregnancy and childbirth. Since institutional-affiliated maternity centers will continue to be reimbursed under the TRICARE maximum allowable birthing center all-inclusive rate methodology as prescribed under 32 CFR 199.14(e), payment will be equal to the sum of the Class 3 CMAC for total obstetrical care for a normal pregnancy and delivery (CPT code 59400) and the TMA supplied non-professional component amount, which includes both the technical and professional components of tests usually associated with a normal pregnancy and childbirth. As a result, hospital-based birthing centers will continue to be reimbursed the same as freestanding birthing centers except that updating of the hospital-based all inclusive rate, consisting of the CMAC for procedure code 59400 (Birthing Center, all-inclusive charge, complete) and the state specific non-professional component, will lag two months behind the freestanding birthing center all-inclusive update; i.e., the freestanding birthing center all-inclusive rate components will usually be updated on February 1 of each year to coincide with the annual CMAC file update, followed by the hospital-based birthing center all-inclusive rate component updates on April 1 of the same year. There will also be differences in cost-sharing based on the particular outpatient setting, since the cost-share amount for freestanding birthing center claims will continue to be calculated using the ambulatory surgery formula while cost-share for hospital-based claims will be calculated under the regular outpatient cost-sharing provisions.

• *Observation Stays*—Observation Services are those services furnished on a hospital's premises, including the use of a bed and periodic monitoring by a hospital's staff, which are reasonable and necessary to evaluate an outpatient's condition or to determine the need for a possible admission to the hospital as an inpatient. Under Medicare, a hospital may receive separate APC payments for observation services for patients having diagnoses of chest pain, asthma, or congestive heart failure, when billed in conjunction with an evaluation and management visit for a minimum of 8 hours. Since these qualifying diagnoses would greatly restrict separate payment of observation stays currently being reimbursed based solely on medical necessity, they are being expanded to accommodate the special needs of unique TRICARE beneficiary populations (e.g., separate payment for maternity observations stays). Separate payment of maternity observation stays required the modification of the existing conditional criteria for separate payment of observation stays associated with pain, asthma or congestive heart failure. Under the TRICARE OPPS, additional hospital services (e.g., separate emergency room visit or clinic visit) will not be required on a claim with a maternity diagnosis in order to receive separate payment for an observation stay. The minimum time requirements have also been reduced from 8 to 4 hours to ensure maximum coverage of medically necessary maternity observation stays.

• *End-State Renal Disease (ESRD) Dialysis Services*—In accordance with sections 1881(b) (2) and (b)(7) of the Social Security Act, a facility that furnishes dialysis services to Medicare patients with ESRD is paid a prospectively determined rate for each dialysis treatment furnished. The rate is a composite that includes all costs associated with furnishing dialysis services except for the costs of

physician services and certain laboratory tests and drugs that are billed separately. CMS has exercised the authority granted under section 1833(t)(1)(B)(i) to exclude from the outpatient PPS those services for patients with ESRD that are paid under the ESRD composite rate. Since TRICARE does not have a comparable composite rate in effect for payment of ESRD services, they will be reimbursed under TRICARE's OPPS.

III. Treatment Settings Subject to Outpatient Prospective Payment System

The outpatient prospective payment system is applicable to any hospital participating in the Medicare program except for Critical Access Hospitals (CAHs), Indian Health Service hospitals, certain hospitals in Maryland that qualify for payment under the state's cost containment waiver, and hospitals located outside one of the 50 states, the District of Columbia and Puerto Rico and specialty care providers which include: (1) Cancer and children's hospitals; (2) freestanding ASCs; (3) freestanding partial hospitalization programs (PHPs); (4) freestanding psychiatric and substance use disorder rehabilitation facilities (SUDRFs); (5) comprehensive outpatient rehabilitation facilities (CORFs); (6) home health agencies (HHAs); (7) hospice programs; (8) other corporate services providers (e.g., freestanding cardiac catheterization centers, freestanding sleep diagnostic centers, and freestanding hyperbaric oxygen treatment centers); (9) freestanding birthing centers; (10) VA hospitals; and (11) freestanding ESRD centers. Due to their inability to meet the more stringent requirements imposed for hospital-based and freestanding PHPs under the Program. CMHCs have also been excluded from payment under OPPS for partial hospitalization program (PHP) services since they are not recognized as authorized providers under the TRICARE program.

An outpatient department, remote location hospital, satellite facility, or other provider-based entity must also be either created by, or acquired by, a main provider (hospital qualifying for payment under OPPS) for the purpose of furnishing health care services of the same type as those furnished by the main provider under the name, ownership, and financial administrative control of the main provider, in accordance with the following requirements under 42 CFR § 413.65 (Medicare Regulation) in order to qualify for payment under the OPPS:

• *Licensure*—The outpatient department, remote location hospital, or the satellite facility and the main hospital are operated under the same license, except in areas where the State requires a separate license for the department of the provider.

• *Clinical Integration*—Professional staff of the outpatient department, remote location hospital or satellite facility are monitored by, and have clinical privileges at the main hospital. The medical director of the outpatient facility must also maintain a reporting relationship with the chief medical officer at the main hospital that has the same frequency, intensity and level of accountability that exists in the relationship between other departmental medical directors and the chief medical officer of the main hospital. Medical records for patients treated in the facility or organization must be integrated into a unified retrieval system (or cross reference) of the main hospital and there must be full access to all services provided at the main hospital for patients treated in the outpatient facility requiring further care.

• *Financial integration.* The financial operation of the outpatient facility must be fully integrated within the financial system of the main hospital, as evidenced by shared income and expenses between the main hospital and outpatient facility.

• *Public awareness.* The outpatient department, remote location hospital, or a satellite facility is held out to the public and other payers as part of the main provider. When patients enter the outpatient facility they are aware that they are entering the main provider and are billed accordingly.

Having clear criteria for provider-based status is important because this designation can result in additional TRICARE payments for services at the provider-based facility (i.e., the incorporation of additional facility costs for covered outpatient services/procedures). TRICARE will accept CMS' provider-based status evaluations/determinations for all hospital outpatient facilities seeking reimbursement under the TRICARE OPPS.

IV. Application of Ambulatory Payment Classification (APC) Model

Payment for services under the OPPS is based on grouping outpatient services into APC groups in accordance with provisions outlined in section 1833(t) of the Social Security Act and its implementing regulation 42 CFR part 419. This grouping is accommodated through the reporting of HCPCS codes and descriptors that are used to group homogenous services (both clinically and in terms of resource consumption) into their respective APC groups.

During the development of the hospital OPPS it was recognized that certain hospital outpatient services were being paid based on fee schedules or other prospectively determined rates that were being applied across other ambulatory care settings. As a result, the following services were excluded from the OPPS in order to achieve consistency of payment across different service delivery sites: (1) Physician services; (2) nurse practitioner and clinical nurse specialist services; (3) physician assistant services; (4) certified nurse-midwife services; (5) services of a qualified psychologist; (6) clinical social worker services, except under half- and full-day partial hospitalization programs in which the services are included within the per diem payment amount; (7) services of an anesthetist; (8) screening and diagnostic mammographies; (9) clinical diagnostic services; (10) non-implantable DME, orthotics, prosthetics, and prosthetic devices and supplies; (11) hospital outpatient services furnished to SNF inpatients as part of their comprehensive care plan; (12) ambulance services; (13) physical therapy; (14) speech-language pathology; (15) occupational therapy; (16) influenza and pneumococcal pneumonia vaccines; (17) take-home surgical dressings; (18) services and procedures designated as requiring inpatient care; and (19) ambulance services. These services will continue to be reimbursed under the current CMAC fee schedule or other TRICARE-recognized allowable charge methodology (e.g., statewide prevailings).

The remaining outpatient procedures which were not being paid under current fee schedules or other prospectively determined rates were grouped under an APC as set forth in section 1833(t)(2)(B) of the Social Security Act and under 42 CFR § 419.31 based on the following criteria:

• *Resource Homogeneity*—The amount and type of facility resources (for example, operating room, medical supplies, and equipment) that are used to furnish or perform the individual procedures or services within each APC group should be homogeneous. That is, the resources used are relatively constant across all procedures or services even though resources used may vary somewhat among individual patients.

• *Clinical Homogeneity*—The definition of each APC should be ''clinically meaningful.'' That is, the procedures or services included within

the APC group relate generally to a common organ system or etiology, have the same degree of extensiveness, and utilize the same method of treatment.

• *Provider Concentration*—The degree of provider concentration associated with the individual services that comprise the APC is considered. If a particular service is offered only in a limited number of hospitals, then the impact of payment for the services is concentrated in a subset of hospitals. Therefore, it is important to have an accurate payment level for services with a high degree of provider concentration. Conversely, the accuracy of payment levels for services that are routinely offered by most hospitals does not bias the payment system against any subset of hospitals.

• *Frequency of Service*—Unless there is a high degree of provider concentration, creating separate APC groups for services that are infrequently performed is avoided. Since it is difficult to establish reliable payment rates for low-volume groups, HCPCS codes are assigned to an APC that is most similar in terms of resource use and clinical coherence.

• *Minimal Opportunities for Upcoding and Code Fragmentation*—The APC system is intended to discourage using a code in a higher paying group to define the care. That is, putting two related codes such as the codes, for excising a lesion for 1.1 cm and one of 1.0 cm, in different APC groups may create an incentive to exaggerate the size of the lesions in order to justify the incrementally higher payment. APC groups based on subtle distinctions would be susceptible to this kind of coding. Therefore, APC groups were kept as broad and inclusive as possible without sacrificing resource or clinical homogeneity.

These procedures, along with their specific HCPCS coding and descriptors, were used to identify and group services within each established APC group. They included: (1) Surgical procedures (including hospital-based ASC procedures currently being paid under the eleven tier ASC payment methodology); (2) radiology, including radiation therapy; (3) clinic visits; (4) emergency department visits; (5) diagnostic services and other diagnostic tests; (6) partial hospitalization for the mentally ill; (7) surgical pathology; (8) cancer therapy; (9) implantable medical items (e.g., prosthetic implants, implantable DME and implantable items used in performing diagnostic x-rays and laboratory tests); (10) specific hospital outpatient services furnished to a beneficiary who is admitted to a SNF, but in which case the services are beyond the scope of SNF comprehensive care plans; (11) certain preventive services, such as colorectal cancer screening; (12) acute dialysis (e.g., dialysis for poisoning); and (13) ESRD services. These hospital outpatient procedures will be paid on a rate-per-service basis that varies according to the APC group to which they are assigned.

In accordance with section 1833(t)(2) of the Social Security Act, services and items within an APC group cannot be considered comparable with respect to the use of resources in the APC group if the highest median cost is more than 2 times the lowest median cost for an item or service within the same group (referred to a the ''2 times rule''). Exceptions may be granted in unusual cases, such as low-volume items and services, but cannot be extended in cases of a drug or biological that has been designated as an orphan drug under section 526 of the Federal Food, Drug and Cosmetic Act.

V. Packaging and Special Payment Provisions Under OPPS

The prospective payment system establishes a national payment rate, standardized for geographic wage differences, that includes operating and capital-related costs that are directly related and integral to performing a procedure or furnishing a service on an outpatient basis, which has ultimately resulted in the establishment of distinct groups of surgical, diagnostic, and partial hospitalization services, as well as medical visits. No separate payment is made for packaged services, because the cost of these items is included in the APC payment for the service of which they are an integral part. These costs include, but are not limited to: (1) Use of operating suite; (2) use of procedure room or treatment room; (3) use of recovery room or area; (4) use of an observation bed; (5) anesthesia, along with supplies and equipment for administering and monitoring anesthesia or sedation; (6) certain drugs, biologicals, and other pharmaceuticals; (7) medical and surgical supplies; (8) surgical dressings; (9) devices used for external reduction of fractures and dislocations; (10) intraocular lenses (IOLs); (11) capital related costs; (12) costs incurred to procure donor tissue other than corneal tissue; (13) incidental services such as venipuncture; (14) implantable items used in connection with diagnostic laboratory tests, and other diagnostics; and (15) implantable prosthetic devices (other than dental) which replace all or part of an internal body organ (including colostomy bags and supplies directly related to colostomy care), including replacement of these devices.

Payments for packaged services under the OPPS are bundled into the payment providers receive for separately payable services provided on the same day and are identified by the status indicator (SI) ''N''. Hospitals include charges for packaged services on their claims, and the costs associated with these packaged services are bundled into the costs for separately payable procedures in calculating their payment rates. The following criteria are used in determining whether procedures should be packaged: (1) Whether the service is normally provided separately or in conjunction with other services; (2) how likely it is for the costs of the packaged code to be appropriately mapped to the separately payable codes with which it was performed; (3) whether the APC payment to which the services were packaged will offset the hospital's actual costs; and (4) whether the expected cost of the service is relatively low.

Special logic has also been programmed into the OCE which will have the OPPS PRICER automatically assign payment for a special packaged service reported on a claim if there were no other services separately payable under the OPPS claim for the same date. A new status indicator ''Q'' will be assigned to these special packaged codes to indicate that they are usually packaged, except for special circumstances when they are separately payable.

Based on the above packaging criteria, is was felt that certain other expensive items and services which were otherwise considered an integral part of another procedure should not be packaged within that procedure's APC payment rate, since the resulting payment would not offset the costs of those items and services. This could have a potentially negative impact, thereby jeopardizing access to these items and services in a hospital outpatient setting. As a result, the costs associated with these items and services were not packaged within the APC of the primary procedure with which they were normally associated. Instead, separate APCs were developed for payment of these items and services under the following payment provisions:

• *Transitional Pass-Through for Additional Costs of Drugs, Biologicals, and Radiopharmaceuticals.* Although the costs of drugs, biologicals and pharmaceuticals are generally packaged into the APC payment rate for the primary procedure or treatment with which the drugs are usually furnished,

there are special temporary additional payments or ''transitional pass-through payments'' available under section 1833(t)(6) of the Social Security Act for at least two years, but not more than three years for the following drugs and biologicals: (1) Current orphan drugs, as designated under section 526 of the Federal Food, Drugs, and Cosmetic Act; (2) current drugs and biological agents used for treatment of cancer; (3) current radiopharmaceutical drugs and biological products; and (4) new drugs and biologic agents in instances where the item was not being paid as a hospital outpatient service as of December 31, 1996, and where the cost of the item is ''not insignificant'' in relation to the hospital OPPS payment amount.

Section 1833(t)(6)(D)(i) of Social Security Act sets the payment rate for pass-through eligible drugs as amounts determined under section 1842(o) of the Act. Section 1847A of the Act establishes the use of average sales price (ASP) methodology (i.e., the rate equivalent to the payment that would be received in a physician office setting) as the basis for payment for drugs and biologicals described in section 1842(o)(1)(C) of the Act. Section 1883(t)(6)(D)(i) also states if a drug or biological is covered under a competitive acquisition contract under section 1847B of the Act, the payment rate is equal to the average price for the drug or biologicals for all competitive acquisition areas. Thus, drugs and biologicals with pass-through status in CY 2007 will receive payment consistent with the provision of section 1842(o) of the Act, at a rate that is equivalent to the payment they would receive in a physician office setting (ASP) or the rate that would be paid under the competitive acquisitions program, while pass-through radiopharmaceuticals will be paid the hospital's charge for the radiopharmaceutical adjusted to the cost using the hospital's overall cost-to-charge ratio (CCR).

• *Packaging and Payment for Drugs, Biologicals and Radiopharmaceuticals Without Pass-Through Status.* Drugs, biologicals and radiopharmaceuticals that do not have pass-through status are paid in one of two ways: Either packaged into the APC payment rate for the procedure or treatment with which the products are usually furnished, or separately based on a packaging threshold which has been set at $55 for CY 2007. Therefore, for CY 2007 and beyond, drugs, biologicals and radiopharmaceuticals that are not new and do not have pass-through status will be packaged if their calculated per-day cost is equal to or more than $55 for CY 2007 or equal to or more than the updated threshold (i.e., the packaging threshold inflated annually by the Producer Price Index (PPI) for prescription drugs), with the exception of 5HT3 antiemetics which will continue to be paid separately regardless of their calculated per-day cost.

Section 1833(t)(14) of the Act requires special classification of certain separately payable drugs, biologicals and radiopharmaceuticals and mandates payment under section 1833(t)(14)(A)(iii) of the Act for specified covered outpatient drugs in CY 2006 and subsequent years to be equal to the average acquisition cost for the drug subject to any adjustment for overhead costs, which for CY 2007 is a combined rate of ASP + 6 percent. Separately payable drugs and biologicals without ASP-based data will be paid at their mean cost calculated from Medicare CY 2005 hospital claims data. The preadmission-related services associated with intravenous immune globulin (IVIG) will continue to be paid under a New Technology APC with a rate of $75. Also, payment for blood clotting factors in the outpatient setting will be set at ASP + 6 percent, plus the updated furnishing fee of $0.15. The temporary policy of paying radiopharmaceuticals at charges reduced to costs is also being extended for one additional year since it is still considered the best proxy for radiopharmaceutical acquisition and overhead costs. However, separate payment will only apply to those radiopharmaceuticals with per-day costs greater than $55.

• *Payment for Nonpass-Through Drugs, Biologicals, and Radiopharmaceuticals With HCPC Codes, But Without OPPS Claims Data.* For CY 2007, hospitals will receive payment for nonpass-through radiopharmaceuticals without hospital claims data that have been assigned HCPCS codes as of January 1, 2007, at the hospital's charge for the radiopharmaceutical adjusted to cost using the hospital's overall cost-to-charge ratio, which will be the same methodology used in the payment for pass-through radiopharmaceuticals. For new drugs without pass-through status or hospitals claims data, payment will be made at the lesser of the ASP or competitive acquisition contract price (Part B CAP). In rare instances where a drug does not have a Part B drug CAP rate or data available for use for ASP methodology, payment will be made at 95 percent of the product's most recent AWP. Established drugs without hospital claims data that have been classified as separately payable in CY 2007 will be paid per the ASP-based methodology at a rate of ASP+ 6 percent.

New drugs, biologicals and devices which qualify for separate payment under OPPS, but have not yet been assigned to a transitional APC (i.e., assigned to a temporary APC for separate payment of an expensive drug or device) will be reimbursed under the TRICARE standard allowable charge methodology. This allowable charge payment will continue until a transitional APC has been assigned (i.e., until CMS has had the opportunity to assign the new drug, biological or device to a temporary APC for separate payment).

• *Drug Administration Coding and Payment.* For CY 2007, hospitals will be expected to report the full set of CPT drug administration codes in a manner consistent with their descriptors, CPT instructions and correct coding principles. They will no longer be able to report the alphanumeric HCPCS codes (C8950, C8951, C8952, C8954, and C8955) that were recognized prior to January 1, 2007. These newly recognized CPT codes will be assigned to six new drug administration APCs, with payment rates based on median costs for the APCs as calculated from Medicare's CY 2005 claims data.

• *Payment for Blood and Blood Products.* Since Medicare's implementation of the OPPS in August 1, 2000, separate payments have been made for blood and blood products through APCs rather than packaging them into the procedures with which they were administered. Hospital payment for the costs of blood and blood products, as well as the costs of collecting, processing, and storing blood products, are made through the OPPS payments for specific blood product APCs. For CY 2007, these blood products payments will be based on the unadjusted, simulated median costs for blood and blood products that are derived from CY 2005 Medicare claims data, with the exception of the seven products for which there will be a payment adjustment to smooth their transition to full claims-based payment in the future.

• *Other Procedures or Services Costs Not Packaged in APC Payment.* Costs for casting, splinting and strapping services, immunosuppressive drugs for patients following organ transplant, and certain other high-cost drugs that are infrequently administered are not packaged into the costs of the primary procedures with which they are normally associated. Instead, new APC

groups have been created for these items and services, which will allow separate payment.

• *Corneal Tissue Acquisition Costs.* Corneal tissue acquisition costs will not be packaged with the APC payment for corneal transplant surgical procedures. Instead, separate payment will be made based on the hospital's reasonable costs incurred to acquire corneal tissue. Corneal acquisition costs must be submitted using HCPCS code V2785 (Processing, Preserving and Transporting Corneal Tissue), indicating the actual cost of the acquisition rather than the hospital's charge on the bill.

• *Transitional Pass-Through Payment for Devices.* Transitional payments will only apply to new and innovative medical devices meeting the following criteria: (1) Were not recognized for payment as a hospital outpatient service prior to 1997 (*i.e.,* payment was not being made as of December 31, 1996) or treated as meeting the time constraints under special prescribed conditions; (2) have been approved/cleared for use by the Food and Drug Administration (FDA); (3) are determined to be reasonable and necessary for the diagnosis or treatment of an illness or injury or to improve the functioning of a malformed body part; (4) are an integral and subordinated part of the procedure performed, are used for one patient only (except for reprocessed single-use devices meeting FDA's most recent regulatory criteria on single-use devices), are surgically implanted or inserted via a natural or surgically created orifice or incision and remain with the patient after the patient is released from the hospital outpatient department; (5) are not equipment, instruments, apparatus, implements, or such items for which depreciation and financing expenses are recovered as depreciable assets; (6) are not materials and supplies such as sutures, clips or customized surgical kits furnished incidental to a service or procedure; (7) are not material such as biologicals or synthetics that are used to replace human skin; (8) no existing or previously existing device category is appropriated for the device; (9) associated cost is not insignificant in relation to the APC payment for the service in which the innovative medical equipment is packaged; and (10) must demonstrate that utilization of the device provides substantial clinical improvement for beneficiaries compared with currently available treatments, including procedures utilizing devices in existing or previously existing device categories.

The duration of transitional pass-through payments for devices is for at least two, but not more than three years. This period begins with the first date on which a transitional pass-through payment is made for any medical device that is described by the new medical category. The costs of the devices will be packaged into the costs of the procedures with which they are normally billed once they are no longer eligible for pass-through payment.

Device pass-through payments (those procedures designated with a SI ''H'') are calculated by applying the statewide cost-to-charge ratio (CCR), which is based on the geographical CBSA (2 digit = rural, 5 digit = urban), to the hospital's charges on the claims and subtracting any appropriate pass-through offset. The offset adjustment only applies when a pass-through device is billed in addition to the primary procedure with which it is normally associated.

Provisions are also in place in accordance with 1833(t)(6)(D)(ii) of the Social Security Act for reducing transitional pass-through payments by the estimated portion of each APC payment rate that could reasonably be attributed to the cost of the associated devices that are eligible for pass-through payments. Offsets are calculated by comparing the median APC cost without device packaging to the Median APC cost (including device packaging), developed from claims with device codes, to determine the percentage of median APC costs attributable to the associated pass-through device. These percentages are then applied to the APC payment amounts in order to determine the applicable amounts to be deducted from the pass-through payments, known as the ''offset'' amounts. Offset amounts are only applied when it can be determined that an APC contained cost is actually associated with the device. Currently, there is only one transitional pass-through payment offset in effect for device category C1820 (generator, neurostimulator (implantable), with rechargeable battery and charging system) with an amount of $8,668.94, which represents 77.65 percent of the CY 2007 payment rate for APC 0222.

Two new device categories have been established for pass-through payment starting in 2007: (1) L8690—auditory osseointegrated device, external sound processor, replacement; and (2) C1821—interspinous process distraction device (implantable). The offset amounts for both of these new device categories were set to $0 for CY 2007, since there were not identifiable device-related costs associated with their procedure APCs (i.e., APC 0256 for L8690 and APC 0050 for C1821).

• *Payment When Devices Are Replaced Without Cost or Where Credit for a Replacement Device Is Furnished to the Hospital.* Payments will be reduced for selected APCs in cases in which an implanted device is replaced without cost to the hospital or with full credit for the removed device in accordance with 42 CFR 419.45. The amount of the reduction to the APC rate will be calculated in the same manner as the offset amount that would be applied if the implanted device assigned to the APC had pass-through status as defined under 42 CFR 419.66. The adjustment would be made under the authority of section 1833(t)(2)(E) of the Social Security Act, which permits equitable adjustments to the OPPS payments contingent on meeting all of the following criteria: (1) All procedures assigned to the selected APCs must require implantable devices that would be reported if device replacement procedures were performed; (2) the required devices must be surgically inserted or implanted devices that remain in the patient's body after the conclusion of the procedures, at least temporarily; and (3) the offset percent for the APC (i.e., the median cost of the APC without device costs divided by the median cost of the APC *with* device costs) must be significant—significant offset percent is defined as exceeding 40 percent.

The presence of the modifier ''FB'' [''Item Provided Without Cost to Provider, Supplier, or Practitioner or Credit Received for Replacement (examples include, but are not limited to: covered under warranty, replaced due to defect, free sample)''] would trigger the adjustment in payment if the procedure code to which modifier ''FB'' was amended appeared in Table 3 and was also assigned to one of the APCs listed in Table 4 below.

TABLE 3.—DEVICES FOR WHICH THE FB MODIFIER MUST BE REPORTED WITH THE PROCEDURE WHEN FURNISHED WITHOUT COST OR AT FULL CREDIT FOR A REPLACEMENT DEVICE

Device	Description
C1721 ...	AICD, dual chamber.
C1722 ...	AICD, single chamber.
C1764 ...	Event recorder, cardiac.
C1767 ...	Generator, neurostim, imp.
C1771 ...	Rep dev, urinary, w/sling.
C1772 ...	Infusion pump, programmable.
C1776 ...	Joint device (implantable).
C1777 ...	Lead, AICD, endo single coil.
C1778 ...	Lead, neurostimulator.
C1779 ...	Lead, pmkr, transvenous VDD.
C1785 ...	Pmkr, dual, rate-resp.
C1786 ...	Pmkr, single, rate-resp.
C1813 ...	Prostheses, penile, inflatab.
C1815 ...	Pros, urinary sph, imp.

TABLE 3.—DEVICES FOR WHICH THE FB MODIFIER MUST BE REPORTED WITH THE PROCEDURE WHEN FURNISHED WITHOUT COST OR AT FULL CREDIT FOR A REPLACEMENT DEVICE—Continued

Device	Description
C1820 ...	Generator, neuro, rechg bat sys.
C1882 ...	AICD, other than sing/dual.
C1891 ...	Infusion pump, non-prog, perm.
C1895 ...	Lead, AICD, endo dual coil.
C1896 ...	Lead, AICD, non sing/dual.
C1897 ...	Lead, neurostim, test kit.

TABLE 3.—DEVICES FOR WHICH THE FB MODIFIER MUST BE REPORTED WITH THE PROCEDURE WHEN FURNISHED WITHOUT COST OR AT FULL CREDIT FOR A REPLACEMENT DEVICE—Continued

Device	Description
C1898 ...	Lead, pmkr, other than trans.
C1899 ...	Lead, pmkr/ACID combination.
C1900 ...	Lead coronary venous.
C2619 ...	Pmkr, dual, non rate-resp.
C2620 ...	Pmkr, single, non rate-resp.
C2621 ...	Pmkr, other than sing/dual.

TABLE 3.—DEVICES FOR WHICH THE FB MODIFIER MUST BE REPORTED WITH THE PROCEDURE WHEN FURNISHED WITHOUT COST OR AT FULL CREDIT FOR A REPLACEMENT DEVICE—Continued

Device	Description
C2622 ...	Prosthesis, penile, non-inf.
C2626 ...	Infusion pump, non-prog, temp.
C2631 ...	Rep dev, urinary, w/o sling
L8614	Cochlear device/system.

TABLE 4.—ADJUSTMENTS TO APCS IN CASES OF DEVICES REPORTED WITHOUT COST OR FOR WHICH FULL CREDIT IS RECEIVED

APC	SI	APC group title	CY 2007 offset amt. (percent)
0039	S	Level I Implantation of Neurostimulator	78.85
0040	S	Percutaneous Implantation of Neurostimulator Electrodes, Excluding Cranial Nerve	54.06
0061	S	Laminectomy or Incision for Implantation of Neurostimulator Electrodes, Excluded	60.06
0089	T	Insertion/Replacement of Permanent Pacemaker and Electrodes	77.11
0090	T	Insertion/Replacement of Pacemaker Pulse Generator	74.74
0106	T	Insertion/Replacement/Repair of Pacemaker and/or Electrodes	41.88
0107	T	Insertion of Cardioverter-Defibrillator	90.44
0108	T	Insertion/Replacement/Repair of Cardioverter-Defibrillator Leads	77.75
0222	T	Implantation of Neurological Device	77.65
0225	S	Implantation of Neurostimulator Electrodes, Cranial	79.04
0227	T	Implantation of Drug Infusion Devices	80.27
0229	T	Transcatheter Placement of Intravascular Shunts	46.17
0259	T	Level IV ENT Procedures	84.61
0315	T	Level II Implantation of Neurostimulator	76.03
0385	S	Level I Prosthetic Urological Procedures	83.19
0386	S	Level II Prosthetic Urological Procedures	61.16
0418	T	Insertion of Left Ventricular Pacing Elect.	87.32
0654	T	Insertion/Replacement of a Permanent Dual Chamber Pacemaker	77.35
0655	T	Insertion/Replacement/Conversion of a Permanent Dual Chamber Pacemaker	76.59
0680	S	Insertion of Patient Activated Event Recorders	76.40
0681	T	Knee Arthroplasty	73.37

If the APC to which the device code (i.e., one of the codes in Table 3 above) is assigned is on the APCs listed in Table 4 above, the unadjusted payment rate for the procedure APC will be reduced by an amount equal to the percent in Table 4 times the unadjusted payment rate. The actual adjustments can be viewed on the CMS Web site.

In cases in which the device is being replaced without cost, the hospital will report a token device charge. However, if the device is being inserted as an upgrade, the hospital will report the difference between its usual charge for the device being replaced and the credit for the replacement device. Multiple procedure reductions would also continue to apply even after the APC payment adjustment to remove payment for the device cost, because there would still be the expected efficiencies in performing the procedure if it was provided in the same operative session as another surgical procedure. Similarly, if the procedure was interrupted before administration of anesthesia (i.e., there was a modifier 52 or 73 on the same line as the procedure), a 50 percent reduction would be taken from the adjusted amount.

• *Coding and Payment of Emergency Department Visits.* The following five Type B emergency department G-codes have been established for emergency departments meeting the definition of a dedicated emergency department (DED) under the Emergency Medical Treatment and Labor Act (EMTALA) regulations in 42 CFR § 489.24, but which are not Type A emergency departments (i.e., they may meet the DED definition but are not available 24 hours a day, 7 days a week).

TABLE 5.—CY 2007 FINAL HCPCS CODES TO BE USED TO REPORT EMERGENCY DEPARTMENT VISITS PROVIDED IN TYPE B EMERGENCY DEPARTMENTS

HCPCS code	Short descriptor	Long descriptor
G0380	Level 1 hosp type B visit	Level 1 hospital emergency department visit provided in a Type B emergency department. (The ED must meet at least one of the following requirements: (1) It is licensed by the State in which it is located under applicable State law as an emergency room or emergency department; (2) It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or (3) During the calendar year immediately preceding the calendar year in which a determination under this section is being made, based on a representative sample of patient visits that occurred during that calendar year, it provides at least one-third of all of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.).
G0381	Level 2 hosp type B visit	Level 2 hospital emergency department visit provided in a Type B emergency department. (The ED must meet at least one of the following requirements: (1) It is licensed by the State in which it is located under applicable State law as an emergency room or emergency department; (2) It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or (3) During the calendar year immediately preceding the calendar year in which a determination under this section is being made, based on a representative sample of patient visits that occurred during that calendar year, it provides at least one-third of all of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.).
G0382	Level 3 hosp type B visit	Level 3 hospital emergency department visit provided in a Type B emergency department. (The ED must meet at least one of the following requirements: (1) It is licensed by the State in which it is located under applicable State law as an emergency room or emergency department; (2) It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or (3) During the calendar year immediately preceding the calendar year in which a determination under this section is being made, based on a representative sample of patient visits that occurred during that calendar year, it provides at least one-third of all of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.).
G0384	Level 4 hosp type B visit	Level 4 hospital emergency department visit provided in a Type B emergency department. (The ED must meet at least one of the following requirements: (1) It is licensed by the State in which it is located under applicable State law as an emergency room or emergency department; (2) It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or (3) During the calendar year immediately preceding the calendar year in which a determination under this section is being made, based on a representative sample of patient visits that occurred during that calendar year, it provides at least one-third of all of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.).
G0385	Level 5 hosp type B visit	Level 5 hospital emergency department visit provided in a Type B emergency department. (The ED must meet at least one of the following requirements: (1) It is licensed by the State in which it is located under applicable State law as an emergency room or emergency department; (2) It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or (3) During the calendar year immediately preceding the calendar year in which a determination under this section is being made, based on a representative sample of patient visits that occurred during that calendar year, it provides at least one-third of all of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.).

The use of these G-codes, along with the following redefinition of a Type A emergency department, will serve as a vehicle to capture median cost and resource differences among visits to Type A emergency departments, Type B emergency departments and clinics. A new G-code (G0390—Trauma response team activation associated with hospital critical care services) was also created (effective January 1, 2007) to be used in addition to CPT codes 99291 and 99292 to address the meaningful cost difference between critical care when billed with and without trauma activation. If critical care is provided without trauma activation, the hospital will bill with either CPT 99291 or 99292, receiving payment for APC 0617 with a median cost of $402.67. However, if trauma activation occurs, the hospital would be allowed to bill one unit of G-code (G0390), reported with revenue code 68x on the same date of service, thereby receiving $491.66 under APC 0618. Hospitals will continue to bill CPT codes for both clinic and Type A Emergency department visits until national guidelines have been established.

The above CPT E/M codes and other HCPCS codes currently assigned to the clinic visit APCs have been mapped in Table 6 to eleven new APCs; five for clinic visits; five for emergency department visits; and one for critical care services, based on median costs and clinical consideration.

TABLE 6.—ASSIGNMENT OF CPT E/M CODES AND OTHER HCPCS CODES TO NEW VISIT APCS FOR CY 2007

CY 2007 APC title	CY 2007 APC	HCPCS	Short descriptor
Level 1 Hospital Clinic Visits	0604	92012	Eye exam, established pat.
		99201	Office/outpatient visit, new (Level 1).
		99211	Office/outpatient visit, est (Level 1).
		G0101	CA screen; pelvic/breast exam.
		G0245	Initial foot exam pt lops.
	.....	G0241	Office consultation (Level 1).
	.....	G0271	Confirmatory consultation (Level 1).
	.....	G0264	Assmt otr CHF, CP, asthma.
Level 2 Hospital Clinic Visits	0605	92002	Eye exam, new patient.
		92014	Eye exam and treatment.
		99202	Office/outpatient visit, new (Level 2).
		99212	Office/outpatient visit, est (Level 2).
		99213	Office/outpatient visit, est (Level 3).
	.....	99243	Office consultation (Level 3).
	.....	99242	Office consultation (Level 2).
	.....	99273	Confirmatory consultation (Level 3).
	.....	99272	Confirmatory consultation (Level 2).
	.....	99431	Initial care, normal newborn.
	.....	G0246	Follow-up eval of foot pt lop.
	.....	G0344	Initial preventive exam.
Level 3 Hospital Clinic Visits	0606	92004	Eye exam, new patient.
		99203	Office/outpatient visit, new (Level 3).
		99214	Office/outpatient visit, est (Level 4).
		99274	Confirmatory consultation (Level 4).
		99244	Office consultation (Level 4).
Level 4 Hospital Clinic Visits	0607	99204	Confirmatory consultation (Level 1).
		99215	Office/outpatient visit, est (Level 5).
		99245	Office consultation (Level 5).
		99275	Confirmatory consultation (Level 5).
Level 5 Hospital Clinic Visits	0608	99205	Office/outpatient visit, new (Level 5).
		G0175	OPPS service, sched team conf.
Level 1 Type A Emergency Visits	0609	99281	Emergency department visit.
Level 2 Type A Emergency Visits	0613	99282	Emergency department visit.
Level 3 Type A Emergency Visits	0614	99283	Emergency department visit.
Level 4 Type A Emergency Visits	0615	99284	Emergency department visit.
Level 5 Type A Emergency Visits	0616	99285	Emergency department visit.
Critical Care	0617	99291	Critical care, first hour.

• *Inpatient Only Procedures.* The inpatient list on TMA's OPPS Web site at *http://www.tricare.mil/opps* specifies those services that are only paid when provided in an inpatient setting because of the nature of the procedure, the need for at least 20 hours of postoperative recovery time or monitoring before the patient can be safely discharged, or the underlying physical condition of the patient. The following criteria will be used when reviewing procedures to determine whether or not they should be moved from the inpatient list and assigned to an APC group for payment under OPPS: (1) Most outpatient departments are equipped to provide the services to the TRICARE population; (2) the simplest procedure described by the code may be performed in most outpatient departments; (3) the procedure is related to codes that have already been removed from the inpatient list; (4) the procedure is being performed in numerous hospitals on an outpatient basis; and (5) the procedure can be appropriately and safely performed in an ASC. While it is anticipated that TRICARE will be following the Medicare inpatient listing fairly closely, there may be occasions where, upon medical review, it is found that a particular inpatient procedure can be provided safely in an outpatient setting due to TRICARE's younger, healthier beneficiary population. These procedures will be removed from the TRICARE inpatient listing and will be assigned to either an existing or new APC group based on their median costs.

If a patient was not admitted as an inpatient, and the procedure designated as an inpatient-only procedure (by OPPS payment status indicator ''C'') was performed to resuscitate or stabilize a patient with an emergency, life-threatening condition and the patient dies before being admitted as an inpatient, the hospital would bill for payment under the OPPS for the services that were furnished on that date and included modifier—''CA'' on the line with the HCPCS code for the inpatient procedures. Payment for all services other than the inpatient procedure designated under OPPS by status indicator ''C'', furnished on the same date, would be bundled into a single payment under APC 0375 (Ancillary Outpatient Services the Patient Expires) whose CY 2007 median cost is $3,539.

• *Partial Hospitalization Services.* Partial hospitalization services are those services furnished by TRICARE-authorized partial hospitalization programs and authorized mental health providers for the active treatment of a mental disorder. All services must follow a medical model and patient care must be under the general direction of a licensed psychiatrist employed by the partial hospitalization program to ensure medication and physical needs of all the patients are considered. The OPPS established per diem payment for both half- and full-day partial hospitalization represents the hospital's costs for overhead, support staff and the services of clinical social workers (CSWs) and occupational therapists (OTs). For SUDRFs, the cost of alcohol and additional counselor services would also be included in the PHP per diem.

However, the OPPS does not include the cost of services for physicians, clinical psychologists, and psychiatric nurse practitioners (NPs), which will continue to be billed separately for covered mental health services. In order to receive payment under OPPS, the hospital must use specific HCPCS and revenue codes and report partial hospitalization services under bill type 13X, along with condition code 41 on the UB–04 (HCFA 1450 claim form). The claim must also include a mental health diagnosis and an authorization on file for each day of service, along with a designated H-code (i.e., either H0035 for half-day PHP or H0037 for full-day PHP) and its accompanying revenue code, prior to assigning a half- or full-day partial hospitalization APC. Specific therapy codes (e.g., coding for family, group and individual psychotherapy) will be reported in addition to the designated partial hospitalization codes H0035 and H0037 and will be packaged into a single PHP code for the same date of service, with the exception of electroconvulsive therapy (ECT). Claims that do not meet the above criteria (e.g., claims filed without condition code 41, appropriate H-coding—H0035 or H0037, and/or revenue code) will undergo further payment review to ensure that outpatient mental health procedures do not exceed the full-day partial hospitalization per diem amount; i.e., the sum of the individual mental health APC amounts on any particular day does not exceed the full-day partial hospitalization per diem amount. The half-day PHP per diem (APC T0001) will be priced at 75 percent of the full-day APC (0033) amount of $233.37 for CY 2007. Free-standing psychiatric partial hospitalization services will continue to be reimbursed the all-inclusive PHP per diem rates as established under 32 CFR 199.14(a)(2)(ix), subject to their own unique mental health copayment/cost-sharing provisions.

• *Separate Payment for Observation Stays.* Observation care is a well-defined set of specific, clinically appropriate services that include short-term treatment, assessment and reassessment before a decision can be made regarding whether patients will require further treatment as hospital inpatients, or if they are able to be discharged from the hospital. The determination of whether or not observation services are separately payable under APC 0339 (observation) has been shifted from the hospital billing department to the OPPS claims processing logic using two HCPCS codes (i.e., G0378—Hospital observation services per hour, and G0379—Direct admission of patient for hospital observation care). These HCPCS codes will be assigned status indicator ''Q'' (package service subject to separate payment based on criteria) that will trigger the OCE logic during the processing of the claim to determine if the observation service or direct admission service is packaged with the other separately payable hospital services provided, or if a separate APC payment for observation services or direct admission to observation is appropriate. Following are the criteria that must be met in order to receive separate payment under APC 0039: (1) The beneficiary must have one of four medical conditions—congestive heart failure, chest pain, asthma, or maternity—as documented by specific ICD–9–CM diagnosis codes; (2) the number of units reported with HCPCS code G0378 must be equal to or exceed 8 hours for observation stays with diagnoses of chest pain, asthma or congestive heart failure and a minimum of 4 hours for maternity observation services; (3) an emergency department visit, clinic visit, critical care visit, or direct admission to observation services using HCPCS code G037 must be provided on the same day as, or the day before the observation except for maternity observation stays; (4) ongoing physician evaluation must be provided. The FY 2007 median cost for the observation APC 0339 is $442.81.

Direct admissions to observation will continue to be paid at a rate equal to that of a Level 1 Clinic Visit (APC 0604) with a CY 2007 median cost of $50.37 when a beneficiary is seen by a physician in the community and then is directly admitted into a hospital outpatient department for observation care that does not qualify for separate payment under APC 0039, or under T00020. In order to receive separate payment for a direct admission into observation (APC 0604), the claim must show: (1) Both HCPCS codes G0378 (Hourly Observation) and G0379 (Direct Admit to Observation) with the same date of service; (2) that there are no services with status indictor ''T'' or ''V'' (clinic or emergency department visit) or critical care (APC 0620) provided on the same day of service as HCPCS code G0379; and (3) that the observation care does not qualify for separate payment under APC 0339.

If the period of observation spans more than one calendar day, hospitals should include all of the hours for the entire period of observation on a single line and enter as the date of service for that line the date the patient is admitted to observation. Also, if there are multiple maternity observation stays on the same day without condition code G0 or 27 to indicate that the visits were distinct and independent of each other, the first listed observation stay will be paid and the rest will be denied.

• *Payment for Brachytherapy Sources.* In accordance with section 1833(t)(2)(H) of the Social Security Act, brachytherapy sources are being paid separately under their own service groups (APCs) reflecting the number, isotope, and radioactive intensity of the devices of brachytherapy furnished, including separate groups for palladium-103 and iodine-125 devices. The payment for devices of brachytherapy based on hospitals' charges, adjusted to costs as prescribed under section 1833(t)(16)(C) of the Social Security Act, has been extended under the Tax Relief and Health Care Act of 2006 to January 1, 2008. As a result, brachytherapy sources will continue to be assigned to status indicator ''H'' and will not be eligible for outlier payments in CY 2007. The codes for the CY 2007 separately paid sources, long descriptors and APCs are listed in Table 7 below:

TABLE 7.—SEPARATELY PAID BRACHYTHERAPY SOURCES WITH LONG DESCRIPTORS AND ASSIGNED APCS

CPT/ HCPCS	Long descriptor	SI	APC
A9527	Iodine 1–125, sodium iodide solution, therapeutic, per millicurie	H	2632
C1716	Brachytherapy source, Gold 198, per source	H	1716
C1717	Brachytherapy source, High Dose Rate Iridium 192, per source	H	1717
C1718	Brachytherapy source, Iodine 125, per source	H	1718
C1719	Brachytherapy source, Non-High Dose Rate Iridium 192, per source	H	1719
C1720	Brachytherapy source, Palladium 103, per source	H	1720
C2616	Brachytherapy source, Yttrium-90, per source	H	2616
C2632	(See note below)	D	

TABLE 7.—SEPARATELY PAID BRACHYTHERAPY SOURCES WITH LONG DESCRIPTORS AND ASSIGNED APCS—Continued

CPT/ HCPCS	Long descriptor	SI	APC
C2633	Brachytherapy source, Cesium-131, per source	H	2633
C2634	Brachytherapy source, High Activity, Iodine-125, greater than 1.01 mCi (NIST), per source	H	2634
C2635	Brachytherapy source, High Activity, Palladium-103, greater than 2.2 mCi (NIST), per source	H	2635
C2636	Brachytherapy linear source, Palladium-103, per 1MM	H	2636
C2637	Brachytherapy source, Ytterbium-169, per source	H	2637

Note.—C2632 has been deleted and replaced by A9527, effective January 1, 2007.

• *APC for Vaginal Hysterectomy.* When billing for vaginal hysterectomies, hospitals must use procedure 58260, which will be assigned to APC 0202.

• *New Technology APCs.* A process has also been developed that will recognize new technologies that do not otherwise meet the definition of current orphan drugs, or current cancer therapy drugs and biologicals and brachytherapy, or current radiopharmaceutical drugs and biological products, and which are considered a covered benefit under TRICARE. In contrast to the other APC groups, the new technology APC groups do not take into account clinical aspects of the services they are to contain, but only their costs. This process, along with transitional pass-throughs, will provide additional payment for a significant share of new technologies. New items and services will be assigned to new technology APCs when it is determined that they cannot appropriately be placed into existing APC groups. The new technology APC groups have established payment rates based on the midpoint of ranges of possible costs providing a mechanism for initiating payment at an appropriate level within a relatively short timeframe. The cost bands for New Technology APCs range from: $0 to $50, in increments of $10; $50 to $100, in increments of $50; $100 to $2,000, in increments of $100; and $2,000 to $6,000, in increments of $500. These increments which are in two parallel sets of New Technology APCs—one with status indictor ''S'' and the other with ''T,''—allow assignment to the same APC group procedures that are appropriately subject to a multiple procedure payment reduction (T) with those that should not be discounted (S).

• *Coding Requirement for Reimbursement Under TRICARE OPPS.* To receive TRICARE reimbursement under OPPS, providers must follow, and contractors shall enforce, all Medicare specific coding requirements. TRICARE Management Activity (TMA) will develop specific APCs (those APCs beginning with a ''T'') for those services that are unique to the TRICARE beneficiary population (e.g., those TRICARE specific APCs for half-day partial hospitalization program (PHP) services and maternity observation stays).

VI. OPPS Reimbursement Methodology

• *General Overview.* Under the TRICARE OPPS, hospital outpatient services are paid on a rate-per-services basis that varies according to the APC group to which the service is assigned. The APC classification system is composed of groups of services that are comparable clinically and with respect to the use of resources. Level 1 (CPT) and Level II HCPCS codes and descriptors are used to identify and group the services within each APC. Costs associated with items or services that are directly related and integral to performing a procedure or furnishing a service have been packaged into each procedure or service within an APC group with the exception of: (1) New temporary technology APCs for certain approved services that are structured based on cost rather than clinical homogeneity; and (2) separate APCs for certain medical devices, drugs, biologicals, radiopharmaceuticals and devices of brachytherapy under transitional pass-through provisions. TRICARE is adopting Medicare's classification system, along with its nationally established APC payment amounts as prescribed in section 1833(t) of the Social Security Act and in its accompanying Medicare regulation (42 CFR part 419) for reimbursement of hospital outpatient services, to the extent practicable, in accordance with 10 U.S.C. 1079(j)(2), with the realization that there will be subtle differences occurring between the TRICARE and Medicare OPPS methodologies based on differences in the age and general health of the populations they serve (i.e., it can be assumed that the TRICARE population is younger and healthier than the population being served by Medicare). For example, TRICARE has already found it necessary to develop two new TRICARE specific APCs, one for maternity observation stays (T0002) and the other for a half-day partial hospitalization program (T001) to accommodate its unique benefit structure and beneficiary population. There may also be subtle differences in the inpatient only procedure listings being maintained by the two programs since some of the Medicare inpatient only procedures may be determined by TRICARE, upon medical review, to be safe for administration in an outpatient setting due to its younger, healthier population. This may require the development of additional APC groups, along with nationally established payment amounts based on their median costs from the previous year's claims history.

The payment rate for each APC is calculated by multiplying the APC's relative weight by the conversions factor. Weights are derived based on median hospital costs for services/ procedures assigned to the hospital outpatient APC groups. Billed charges for items integral to performing the major procedure or visit; which include packaged HCPCS codes (i.e., codes with SI = ''N'') and revenue codes appearing on the same claim, are converted to costs by multiplying each revenue center charge by the appropriate hospital-specific CCR. Centers for Medicare and Medicaid Services (CMS) currently use a four-tiered hierarchy of cost center CCRs to match a cost center to every possible revenue code appearing in the outpatient claims, with the top tier being the most common cost center and the lowest tier being the default CCR. If a hospital's cost CCR was deleted by trimming, another cost center CCR in the revenue hierarchy can be applied. If no other department CCR can be applied to the revenue code on the claim, CMS uses the hospital's overall CCR for the revenue code.

The costs of the above services/ procedures are then standardized for geographic wage variations by dividing the labor-related portion of the operating and capital costs (currently estimated at 60 percent on the average for each billed item) by the hospital inpatient prospective payment system (IPPS) wage index. The standardized labor-related cost and the nonlabor-

related cost component for each billed item are summed to derive the total standardized cost for each separately payable HCPCS code. Extreme costs outside three standard deviations from the geometric mean will be eliminated prior to calculating the median cost for each separately payable HCPCS code. The median costs of these procedures will then be mapped to their assigned APCs, and the median costs of those assigned procedures will be used in establishing the overall APC median cost.

The relative payment weights are calculated for each APC by dividing the median cost of each APC by the median cost for APC 0606 (Level 3 Clinic Visit), which is $83.88 for CY 2007, as a reconfiguration of the visit APCs. APC 0606 was chosen in order to maintain consistency in using a median for calculating unscaled weights representing the median cost of some of the most frequently provided services. The relative payment weights were further adjusted by 1.364598352 for budget neutrality, based on a comparison of aggregate payments using CY 2006 relative weights to aggregate payments using the CY 2007 final relative weights.

The other component used in establishing national APC payment amounts is the conversion factor, updated on an annual basis in accordance with section 1833(t)(3)(C)(iv) of the Social Security Act, which provides for CY 2007 an updated amount equal to the hospital inpatient market basket percentage increase applicable to hospital discharges under section 1886(b)(3)(B)(iii) of the Act. The market basket increase updated factor of 3.4 percent for CY 2007, along with the required wage index budget neutrality adjustment of approximately 0.999331979, the adjustment of 0.04 percent for the difference in the pass-through set-aside, and the adjustment for the rural payment adjustment for rural SCHs (including EACHs) of 0.999975941, resulted in a standard conversion factor for CY 2007 of $61.468.

The national unadjusted APC payment rates that were calculated by multiplying the CY 2007 scaled weight for each APC by the final CY 2007 conversion factor apply to all the services that are classified within the APC group. These national rates (i.e., the unadjusted national rates for both APCs and the HCPCS to which OPPS payment was assigned) are listed on TMA's OPPS Web site at *http://www.tricare.mil/opps.*

• *Determination of Payment.* A payment SI is provided for every code in the HCPCS to identify how the service or procedure described by the code would be paid under the hospital outpatient prospective payment system (OPPS); i.e., it indicates if a service represented by a HCPCS code is payable under the OPPS or another payment system, and also which particular OPPS payment policies apply. One, and only one, SI is assigned to each APC and to each HCPCS code. Each HCPCS code that is assigned to an APC has the same SI as the APC to which it is assigned. Following are the CY 2007 payment status indicators, along with a description of the particular services each indicator identifies.

TABLE 8.—CY 2007 PAYMENT STATUS INDICATORS FOR HOSPITAL OPPS

Indicator	Description	OPPS payment status
A	Services paid under some payment method other than OPPS (e.g., payment for non-implantable prosthetic and orthotic devices, DME, ambulance services, and individual professional services).	Not paid under OPPS. Paid by contractors under a fee schedule or payment system other than OPPS.
B	More appropriate code required for TRICARE OPPS	Not paid under OPPS.
C	Inpatient procedures	Not paid under OPPS. Admit patient. Bill as inpatient.
E	Items or services not covered by TRICARE	Not paid under OPPS.
F	Acquisition of corneal tissue, certain CRNA services and Hepatitis B vaccines.	Not paid under OPPS. Paid on allowable charge basis.
G	Pass-through drugs and biologicals	Paid separate APCs under OPPS.
H	(1) Pass-through device categories	(1) Separate cost-based pass-through payment; not subject to cost-share/co-payment.
	(2) Brachytherapy sources	(2) Separate cost-based non-pass-through payment.
	(3) Radiopharmaceutical agents	(3) Separate cost-based non-pass-through payment.
K	Non-pass-through drugs and biologicals and blood and blood products.	Paid separate APCs under OPPS.
N	Packaged incidental items and services	Packaged into the primary procedure APC payment amount to which the incidental item or service is normally associated.
P	Partial hospitalization	Per diem APC payments for both half-day and full-day partial hospitalization programs.
Q	Services either separately payable or packaged	Paid under OPPS; services either packaged or separately payable depending on the specific circumstances of the HCPCS billing. OCE logic will be applied in determining if the services will be packaged or separately payable.
S	Significant procedures allowed under the OPPS for which multiple procedure reduction does not apply.	Paid under OPPS; separate APC payment.
T	Surgical services allowed under OPPS with multiple procedure payment reduction.	Paid under OPPS; separate APC payment.
V	Medical visits (including clinic or emergency department visits).	Paid under OPPS; separate APC payment.
W	Invalid HCPCS or invalid revenue code with blank HCPCS	Not paid under OPPS.
X	Ancillary services	Paid under OPPS; separate APC payment.
Z	Valid revenue code with blank HCPCS and no other SI assigned.	Not paid under OPPS.

• *Adjustments for Specific Hospital Payment.* The hospital DRG wage adjustment factor will be used to adjust the portion of the payment rate that is attributable to labor-related costs for relative differences in labor and labor-related costs across geographic regions, with the exception of APCs with SIs ''K'' and ''G'' because of the inseparable, subordinate status of the outpatient department within the overall hospital setting. The OPPS will also adhere to the same wage index changes as the TRICARE–DRG based payment system, except the effective date for changes will be January 1 of each year instead of October 1. This way only one wage index file will have to be maintained for both the OPPS and DRG-based payment systems. Following are the steps taken in achieving this adjustment for APCs in which multiple procedure discounting is not applied:

Step 1. Calculate 60 percent (labor-related portion) of the national unadjusted payment rate.

Step 2. Determine the wage index area in which the hospital is located and identify the wage index that applies to the specified hospital. The wage index values assigned to each hospital reflect the new geographic statistical areas as a result of revised OMB standards (urban and rural) to which hospitals are assigned for FY 2007 under the IPPS.

Step 3. Adjust the wage index of hospitals located in certain qualifying counties that have a relatively high percentage of hospital employees who reside in the county, but who work in a different county with a higher wage index.

Step 4. Multiply the applicable wage index determined under Steps 2 and 3 by the amount determined in Step 1 that represents the labor-related portion of the national unadjusted payment rate.

Step 5. Calculate 40 percent (the nonlabor-related portion) of the national unadjusted payment rate and add the amount to the resulting product in step 4. The result is the wage index adjusted payment rate for the relevant wage index area in which the hospital is located.

Step 6. If the provider is a Sole Community Hospital (SCH), multiply the wage adjusted payment rate by 1.071 to calculate the total payment. This adjustment will apply to all services and procedures paid under the OPPS (i.e., SIs ''P,'' ''S,'' ''T,'' ''V,'' and ''X''), excluding drugs, biologicals and services paid subject to pass-through payment (i.e., SIs ''G,'' ''H,'' and ''K'').

Applicable deductibles and/or cost-sharing/copayment amounts will be subtracted from the wage adjusted APC payment rate based on the eligibility status of the beneficiary at the time outpatient services were rendered (i.e., those deductibles and cost-sharing/copayment amounts applicable to Prime, Extra, and Standard beneficiary categories). TRICARE will retain its current hospital outpatient deductibles, cost-sharing/copayment amounts (refer to Tables 1 and 2 above) and catastrophic loss protection under the OPPS. The ASC cost-sharing provision (i.e., assessment of a single copayment for both the professional and facility charge for a Prime beneficiary) will be adopted as long as it is administratively feasible. This will not apply to Extra and Standard beneficiaries since their cost-sharing is based on a percentage of the total allowed amount.

• *Additional APC Payment Adjustments.* OPPS payment amounts are discounted when more than one surgical procedure (SI = T) is performed during a single operative session. Under these circumstances, TRICARE will reimburse the full payment and the beneficiary will pay the full cost-share/copayment for the procedure having the highest payment rate, while the remaining surgical procedure payments will be reduced by 50 percent along with the beneficiary associated cost-share/copayment to reflect the savings associated with having to prepare the patient only once and the incremental costs associated with anesthesia, operating and recovery room use, and other services required for the second and subsequent procedures. A 50 percent discount will also be applied to the OPPS payment amounts and beneficiary copayments/cost-shares for procedures terminated before anesthesia is induced, as identified by modifiers −73 (Discounted Outpatient Procedure Prior to Anesthesia Administration) and −52 (Reduced Services). Full payment will be received for a procedure that is started but discontinued after the induction of anesthesia as reported by modifier −74 (Discounted Procedure). In this case, payment would recognize the costs incurred by the hospital to prepare the patient for surgery and the resources expended in the operating room and recovery room of the hospital. Discounting will also be applied to conditional, inherent and independent bilateral procedures.

An additional payment is provided for outpatient services for which a hospital's charges, adjusted to cost, exceed the sum of the wage adjusted APC rate plus a fixed dollar threshold and a fixed multiple of the wage adjusted APC rate. Only line item services with SIs ''P,'' ''S,'' ''T,'' ''V,'' or ''X'' will be eligible for outlier payment under OPPS. No outlier payments will be calculated for line item services with SIs ''G,'' ''H,'' ''K,'' and ''N,'' with the exception of blood and blood products.

For CY 2007, the outlier threshold is met when the cost of furnishing a service or procedure exceeds 1.75 times the APC payment amount *and* exceeds the APC payment rate plus the $1,825 fixed-dollar threshold. The fixed-dollar threshold was added to better target outliers to those high cost and complex procedures where a very costly service could present a hospital with significant financial loss. If a provider meets both of these conditions (i.e., the multiple threshold and the fixed-dollar threshold), the outlier payment is calculated at 50 percent of the amount by which the cost of furnishing the service exceeds 1.75 times the APC payment rate. The hospital would receive the normal APC payment rate along with the additional outlier amount. For example, suppose a hospital charges $26,000 for a procedure for which the APC adjusted amount is $3,000 and the overall facility CCR is 0.30. The estimated cost to the hospital is $7,800 (0.30 × $26,000). In order to determine whether the procedure is eligible for outlier payment, it first must be determined whether the cost for the service exceeds both the APC multiple outlier cost threshold of $5,250 (1.75 × $3,000) and the fixed-dollar threshold of $4,825 ($3,000 + $1,825). Since the estimated cost to the hospital ($7,800) exceeds both threshold amounts, the hospital would be eligible for 50 percent of the difference, which in this case would be $1,275 ($7,800 − $5,250/2).

• *Payment Hierarchy for Non-OPPS Procedures.* If the outpatient procedure is not assigned an APC payment amount (i.e., is not assigned SI ''G,'' ''H,'' ''K,'' ''P,'' ''S,'' ''T,'' ''V,'' or ''X''), but may be reimbursed under an existing TRICARE fee schedule or other prospectively determined rate (i.e., procedures assigned to SI ''A''), the following hierarchy will be used in pricing the procedure. The PRICER will first look to see if there is an appropriate CMAC available for pricing. If a CMAC cannot be found, it will then look to the Durable Medical Equipment Claims: Prosthetics, Orthotics, and Supplies (DMEPOS) fee schedule for pricing. If a DMEPOS fee schedule rate is not available for pricing, it will turn to statewide prevailings. If a statewide prevailing cannot be found, the PRICER will reimburse the procedure at the billed charge.

VII. Limitations on Administrative and Judicial Review

There can be no administrative or judicial review under sections 1869 and

1878 of the Social Security Act for any of the following data elements used in the development of the APC system: (1) Establishment of the groups and relative payment weights; (2) wage adjustment factors and other adjustments; (3) calculation of base amounts described in section 1833(t)(3) of the Social Security Act; (4) periodic adjustments described in section 1833(t)(9) of the Social Act, (5) the establishment of a separate conversion factor for hospitals described in section 1886(d)(1)(B)(v) of the Social Security Act; (6) the determination of the fixed multiple, or a fixed dollar cutoff amount; (7) the marginal cost of care, or applicable percentage under 42 CFR 419.43(d) or the determination of insignificance of cost; (8) the duration of the additional payment; (9) the determination of initial and new categories under 42 CFR 419.66; (10) the portion of the hospital outpatient fee schedule amount associated with particular devices, drugs, or biologicals; and (11) the application of any pro rata reduction under 42 CFR 419.62(c).

VIII. Military Readiness/Contingency Options for Payment Under OPPS

In recognition of the Department's requirement to support military readiness and contingency operations, and in response to recent congressional concerns regarding the same, the agency has developed two options for implementation of OPPS. The first option involves a three-year transitional implementation of payment adjustments that may be utilized to limit the decline in payments under OPPS for TRICARE network hospitals that are in close proximity to military bases and treat a disproportionate share of military family members and/or hospitals that provide essential network specialty care. These temporary payment adjustments would target TRICARE network hospitals that are most vulnerable to OPPS revenue reductions and that are essential for continued military readiness and support of contingency operations.

This adjustment would increase payment for primary care and emergency room visits to hospital outpatient departments (HOPDs) over a 3-year transitional period. Primary care and emergency room visits to HOPDs are categorized into 10 APC categories (APC codes 604–609 and 613–616) which represent over 600,000 hospital visits annually. On average, about one quarter of the revenues from TRICARE for HOPD services are for these 10 codes, representing the biggest payment reduction under OPPS. Under this transitional payment adjustment, the APC payment levels for network hospitals for the 5 clinical visit APCs would be set at 130 percent of the Medicare APC level, while the 5 emergency room (ER) visit APCs would be increased by 150 percent in the first year of OPPS implementation. In the second year, the APC payment levels would be set at 120 percent of the Medicare APC level for clinic visits and at 130 percent for ER APCs. In the third year, the APC visit amounts would be set at 110 and 120 percent, respectively, and in the fourth year, the TRICARE and Medicare payment levels for the 10 APC visit codes would be identical. Two sets of adjustment factors (i.e., one for clinic visits and the other for ER visits) are being used since revenue cuts for ER visits are generally greater than those associated with clinic visits. Transitional payment adjustments for these 10 visit codes would buffer the initial revenue reductions which will be experienced upon implementation of TRICARE's OPPS, providing hospitals with sufficient time to adjust and budget for potential revenue reductions for hospitals most vulnerable to implementation of OPPS.

The second option involves authority for the Director, TRICARE Management Activity, or a designee, under provisions of this rule to adopt, modify and/or extend temporary adjustments to OPPS payments for TRICARE network hospitals deemed essential for military readiness and support during contingency operations. Upon a determination by the TMA Director, or designee, at any time following implementation that it is impracticable to support military readiness or contingency operations by making OPPS payments in accordance with the same reimbursement rules implemented by Medicare, a temporary deviation may be granted. This will ensure the availability of adequate civilian healthcare resources necessary to meet all ongoing military readiness and contingencies. The criteria for adopting, modifying and/or extending temporary adjustments to OPPS payments under this authority shall be issued through TRICARE policies, instructions, procedures and guidelines as deemed appropriate by the Director, TRICARE Management Activity, or a designee, for those network hospitals essential for continued military readiness and deployment in a time of contingency operations.

IX. Regulatory Procedures

This interim final rule has been examined for its impact under Executive Order (EO) 13132 and its does not have policies that have federalism implications that would 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; therefore, consultation with State and local officials is not required.

Section 801 of title 5, United States Code, and Executive Order 12866 requires certain regulatory assessments and procedures for any major rule or significant regulatory action, defined as one that would result in an annual effect of $100 million or more on the national economy or which would have other substantial impacts.

The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This is not a major rule under 5 U.S.C. 801 since the projected reduction in TRICARE payments to affected hospitals would be below the $100 million threshold. The estimates of reduction are based on historical TRICARE costs and an assessment of potential users times average benefit costs per person for implementation of the new prospective payment system. However, it is a significant regulatory action which has been reviewed by the Office of Management and Budget as required under the provisions of EO 12866. In addition, it has been certified that this interim final rule will not significantly affect a substantial number of small entities.

The rule also does not require a regulatory flexibility analysis as the significant policy action was taken by Congress and the rule merely puts it into effect. The policy of the Regulatory Flexibility Act that agencies adequately evaluate all potential options for an action does not apply when Congress has already dictated the action.

This rule will not impose significant additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511). Existing information collection requirements of the TRICARE and Medicare programs will be utilized.

List of Subjects in 32 CFR part 199

Claims, Dental health, Health care, Health insurance, Individuals with disabilities, Military personnel.

■ Accordingly, 32 CFR part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. Chapter 55.

■ 2. Paragraph 199.2(b) is amended by adding definitions for ''Ambulatory Payment Classifications (APCs)'' and ''TRICARE Outpatient Prospective Payment System (OPPS)'' and placing them in alphabetical order to read as follows:

§ 199.2 Definitions.

* * * * *

(b) * * *

Ambulatory Payment Classifications (APCs). Payment of services under the TRICARE OPPS is based on grouping outpatient procedures and services into ambulatory payment classification groups based on clinical and resource homogeneity, provider concentration, frequency of service and minimal opportunities for upcoding and code fragmentation. Nationally established rates for each APC are calculated by multiplying the APC's relative weight derived from median costs for procedures assigned to the APC group, scaled to the median cost of the APC group representing the most frequently provided services, by the conversion factor.

* * * * *

TRICARE Outpatient Prospective Payment System (OPPS). OPPS is a hospital outpatient prospective payment system, based on nationally established APC payment amounts and standardized for geographic wage differences that includes operating and capital-related costs that are directly related and integral to performing a procedure or furnishing a service in a hospital outpatient department.

* * * * *

■ 3. Section 199.4 is amended by removing paragraph (c)(3)(i)(C)(1) and redesignating paragraphs (c)(3)(i)(C)(2) and (c)(3)(i)(C)(3) as (c)(3)(i)(C)(1) and (c)(3)(i)(C)(2).

■ 4. Section 199.14 is amended by revising paragraphs (a)(2)(ix)(A); redesignating paragraphs (a)(5)(i) through (a)(5)(xii) as (a)(5)(i)(A) through (a)(5)(i)(L); adding followed by new paragraphs (a)(5)(i) introductory text and (a)(5)(ii); and revising paragraph (d)(1) to read as follows:

§ 199.14 Provider reimbursement methods.

(a) * * *

(2) * * *

(ix) * * *

(A) *In general.* Psychiatric and substance use disorder rehabilitation partial hospitalization services authorized by § 199.4(b)(10) and (e)(4) and provided by institutional providers authorized under § 199.6 (b)(4)(xii) and (b)(4)(xiv) are reimbursed on the basis of prospectively determined, all-inclusive per diem rates pursuant to the provisions of paragraph (a)(2)(ix)(C) of this section, with the exception of hospital-based psychiatric and substance use disorder rehabilitation partial hospitalization services which are reimbursed in accordance with provisions of paragraph (a)(5)(ii) of this section. The per diem payment amount must be accepted as payment in full for all institutional services provided, including board, routine nursing service, ancillary services (includes music, dance, occupational and other such therapies), psychological testing and assessment, overhead and any other services for which the customary practice among similar providers is included as part of the institutional charges.

* * * * *

(5) * * *

(i) *Outpatient Services Not Subject to Hospital Outpatient Prospective Payment System (OPPS).* The following are payment methods for outpatient services that are either provided in an OPPS exempt hospital or paid outside the OPPS payment methodology under an existing fee schedule or other prospectively determined rates in a hospital subject to OPPS reimbursement.

* * * * *

(ii) *Outpatient Services Subject to OPPS.* Outpatient services provided in hospitals subject to Medicare OPPS as specified in 42 CFR 413.65 and 42 CFR 419.20 will be paid in accordance with the provisions outlined in sections 1833(t) of the Social Security Act and its implementing Medicare regulation (42 CFR part 419). Under the above governing provisions, CHAMPUS will recognize to the extent practicable, in accordance with 10 U.S.C. 1079(j)(2), Medicare's OPPS reimbursement methodology to include specific coding requirements, ambulatory payment classifications (APCs), nationally established APC amounts and associated adjustments (e.g., discounting for multiple surgery procedures, wage adjustments for variations in labor-related costs across geographical regions and outlier calculations). During the transition to OPPS, temporary deviations from Medicare's statutory and/or regulatory requirements and future changes arising from its continuing experience with OPPS may be granted for any TRICARE network hospital by the Director, TRICARE Management Activity, or a designee, to accommodate CHAMPUS' unique benefit structure and beneficiary population. In addition, the Director, TMA, or a designee, may at any time after implementation adopt, modify and/or extend temporary adjustments to OPPS payments for TRICARE network hospitals deemed essential for military readiness and deployment in time of contingency operations. Any temporary adjustment to OPPS payments shall be made only on the basis of a determination that it is impracticable to support military readiness or contingency operations by making OPPS payments in accordance with the same reimbursement rules implemented by Medicare. The criteria for adopting, modifying, and/or extending deviations and/or adjustments to OPPS payments shall be issued through TRICARE policies, instructions, procedures and guidelines as deemed appropriate by the Director, TMA, or a designee.

* * * * *

(d) * * *

(1) *In general.* CHAMPUS pays institutional facility costs for ambulatory surgery on the basis of prospectively determined amounts, as provided in this paragraph, with the exception of ambulatory surgery procedures performed in hospital outpatient departments, which are to be reimbursed in accordance with the provisions of paragraph (a)(5)(ii) of this section. This payment method is similar to that used by the Medicare program for ambulatory surgery. This paragraph applies to payment for freestanding ambulatory surgical centers. It does not apply to professional services. A list of ambulatory surgery procedures subject to the payment method set forth in the paragraph shall be published periodically by the Director, TMA. Payment to freestanding ambulatory surgery centers is limited to these procedures.

* * * * *

Dated: August 8, 2007.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. E7–15924 Filed 8–13–07; 8:45 am]

BILLING CODE 5001–06–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2006–1013; FRL–8447–2]

Approval and Promulgation of Air Quality Implementation Plan; Alaska

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this action EPA is approving numerous revisions to the State of Alaska State Implementation Plan (SIP). The Commissioner of the Alaska Department of Environmental Conservation (ADEC) submitted two requests to EPA dated May 6, 2005 and June 30, 2006 to revise the Alaska SIP to include certain sections of ADEC's revised air quality regulations. The revisions were submitted in accordance with the requirements of section 110 of the Clean Air Act (hereinafter the Act or CAA). Although EPA is approving most of the submitted revisions, EPA is not approving in this rulemaking a number of submitted rule provisions which are inappropriate for EPA approval.

DATES: This final rule is effective on September 13, 2007.

ADDRESSES: EPA has established a docket for this action under Docket #R10–OAR–2006–1013. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, e.g. confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at EPA Region 10, Office of Air Waste and Toxics (AWT–107), 1200 Sixth Avenue, Seattle, WA. EPA requests that if possible you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section, to schedule an appointment. Region 10 official business hours are 8:30 a.m. to 4:30 p.m. Monday through Friday, excluding legal holidays.

FOR FURTHER INFORMATION CONTACT: David Bray, Office of Air, Waste and Toxics (AWT–107), EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101; telephone number: (206) 553–4253; fax number: (206) 553–0110; e-mail address: *bray.dave@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we'', ''us'', or ''our'' is used, we mean the EPA. Information is organized as follows:

Table of Contents

I. Background of Submittal

On Monday February 5, 2007, EPA solicited public comment on a proposal to approve for inclusion in the Alaska SIP numerous revisions to the State of Alaska Implementation Plan. EPA also proposed not to approve into the SIP a number of submitted rule provisions which are inappropriate for EPA approval. A detailed description of our action was published in the **Federal Register** on February 5, 2007. The reader is referred to the proposed rulemaking (72 FR 5232, February 5, 2007) for details.

II. Response to Comments

EPA provided a 30-day review and comment period and solicited comments on our proposal published in the February 5, 2007, **Federal Register**. No adverse comments were received on the proposed rulemaking. EPA did receive one letter during the public comment period from the Alaska Oil and Gas Association (AOGA). The letter noted that EPA had proposed not to approve the version of Alaska's excess emission rule, 18 AAC 50.240, as amended by ADEC in 2004. The letter further stated that AOGA had no comment on EPA's proposal not to approve the 2004 version of 18 AAC 50.240 based on the understanding that EPA's action did not affect the SIP-approved status of the version of 18 AAC 50.240 adopted by ADEC in 1997 and approved into the SIP by EPA in 1999. EPA confirms that our decision not to approve the 2004 amendments to 18 AAC 50.240 does not affect the approval status of the 1997 version of that regulation.

III. Final Action

A. Provisions Approved by EPA and Incorporated by Reference

EPA is taking final action to approve as part of the Alaska SIP the following new and revised sections of Alaska's regulations submitted May 6, 2005 and June 30, 2006:

18 AAC 50.080 Ice Fog Standards, State effective January 18, 1997;

18 AAC 50.025 Visibility and Other Special Protection Areas; and 18 AAC 50.070 Marine Vessel Visible Emission Standards, State effective June 21, 1998;

18 AAC 50.050 Incinerator Emission Standards, State effective May 3, 2002;

18 AAC 50.005 Purpose of Chapter; 18 AAC 50.010 Ambient Air Quality Standards [except (7) and (8)]; 18 AAC 50.015 Air Quality Designations, Classifications, and Control Regions; 18 AAC 50.020 Baseline Dates and Maximum Allowable Increases, 18 AAC 50.045 Prohibitions; 18 AAC 50.055 Industrial Processes and Fuel-Burning Equipment [except (d)(2)(B)]; 18 AAC 50.100 Nonroad Engines; 18 AAC 50.200 Information Requests; 18 AAC 50.201 Ambient Air Quality Investigation; 18 AAC 50.205 Certification; 18 AAC 50.215 Ambient Air Quality Analysis Methods [except (a)(3)]; 18 AAC 50.220 Enforceable Test Methods [except (c)(2)]; 18 AAC 50.245 Air Episodes and Advisories; 18 AAC 50.250 Procedures and Criteria for Revising Air Quality Classifications; 18 AAC 50.301 Permit Continuity; 18 AAC 50.302 Construction Permits; 18 AAC 50.306 Prevention of Significant Deterioration (PSD) Permits [except (b)(2) and (b)(3)]; 18 AAC 50.311 Nonattainment Area Major Stationary Source Permits; 18 AAC 50.345 Construction and Operating Permits: Standard Permit Conditions [except (b), (c)(3), and (l)]; 18 AAC 50.508 Minor Permits Requested by the Owner or Operator [except (1) and (2)]; 18 AAC 50.546 Minor Permits: Revisions [except (b)]; 18 AAC 50.560 General Minor Permits; and 18 AAC 50.900 Small Business, State effective October 1, 2004;

18 AAC 50.542 Minor Permit: Review and Issuance [except (b)(2), (f)(4), (f)(5), and (g)(1) but only with respect to clean units and pollution control projects], State effective December 1, 2004;

18 AAC 50.225 Owner-Requested Limits; 18 AAC 50.230 Preapproved Emission Limits [except (d)]; and 18 AAC 50.544 Minor Permits: Content [except (e)], State effective January 29, 2005;

18 AAC 50.035 Documents, Procedures, and Methods Adopted By Reference [except (b)(4)]; 18 AAC 50.040 Federal Standards Adopted by Reference [except (a), (b), (c), (d), (e), (g), (h)(17), (h)(18), (h)(19), (i)(7), (i)(8), (i)(9), and (j)]; 18 AAC 50.502 Minor Permits for Air Quality Protection [except (g)(1) and (g)(2)]; 18 AAC 50.540 Minor Permit: Application [except (f)

and (g)]; and 18 AAC 50.990 Definitions [except (21), and (77)], State effective December 3, 2005.

B. Provisions Approved by EPA Into the SIP, But Not Incorporated by Reference

EPA is also approving the following new and revised section as part of the SIP, but is not incorporating it by reference into Federal law because it does not regulate air emissions, but rather, describes general authorities such as procedural and enforcement authorities: 18 AAC 50.030 State Air Quality Control Plan, State effective October 1, 2004.

C. Provisions Not Approved by EPA

EPA is not approving in this rulemaking the following sections of Alaska's regulations submitted May 6, 2005 and June 30, 2006 which are inappropriate for EPA approval:

18 AAC 50.010(7) and (8); 18 AAC 50.055(d)(2)(B); 18 AAC 50.215(a)(3); 18 AAC 50.220(c)(2); 18 AAC 50.240; 18 AAC 50.306(b)(2) and (b)(3); 18 AAC 50.345(b), (c)(3) and (l); 18 AAC 50.346(a); 18 AAC 50.508(1) and (2); 18 AAC 50.509; and 18 AAC 50.546(b), State effective October 1, 2004;

18 AAC 50.316; and 18 AAC 50.542(b)(2), (f)(4), (f)(5), and, with respect to the reference to clean units and pollution control projects only, (g)(1), State effective December 1, 2004;

18 AAC 50.544(e), State effective January 29, 2005;

18 AAC 50.035(b)(4); 18 AAC 50.040(a), (b), (c), (d), (e), (g), (h)(17), (h)(18), (h)(19), (i)(7), (i)(8), (i)(9) and (j); 18 AAC 50.502(g)(1) and (g)(2); 18 AAC 50.540(f) and (g); and 18 AAC 50.990(21) and (77), State effective December 3, 2005.

D. Provisions Removed From the SIP

EPA is approving removal of the following provisions from the Alaska SIP because they have been previously repealed by ADEC, have been replaced by more recent versions of the ADEC's regulations, or because they are not required elements of a SIP under title I of the CAA: 18 AAC 50.030 State Air Quality Control Plan, State effective September 21, 2001; 18 AAC 50.035(b)(4) Documents, Procedures and Methods Adopted by Reference, State Effective January 18, 1997; 18 AAC 50.090 Ice Fog Limitations, State effective May 26, 1972; 18 AAC 50.220(c)(2) Enforceable Test Methods, State effective January 18, 1997; 18 AAC 50.300 Permit to Operate and 18 AAC 50.400 Application Review & Issuance of Permit to Operate, State effective July 21, 1991 and April 23, 1994; 18 AAC 50.520 Emissions and Ambient Monitoring, State effective July 21, 1991; 18 AAC 50.530 Circumvention, State effective June 7, 1987; 18 AAC 50.310 Revocation or Suspension of Permit, State effective May 4, 1980; 18 AAC 50.400 Permit Administration Fees, 18 AAC 50.420 Billing Procedures, and 18 AAC 50.430 Appeal Procedures, State effective January 18, 1997; 18 AAC 50.600 Reclassification Procedures & Criteria, State effective November 1, 1982; 18 AAC 50.620 State Air Quality Control Plan, State effective January 4, 1995; and 18 AAC 50.900 Definitions, State effective July 21, 1991 and January 4, 1995.

IV. Geographic Scope of SIP Approval

The SIP approval does not extend to sources or activities located in Indian Country, as defined in 18 U.S.C. 1151. EPA will continue to implement the CAA in Indian Country in Alaska because ADEC has not adequately demonstrate authority over sources and activities located within the exterior boundaries of the Annette Island Reserve and other areas of Indian Country in Alaska.

V. 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 A, 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 October 15, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 19, 2007.

Elin D. Miller,

Regional Administrator, Region 10.

■ 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 C—Alaska

■ 2. Section 52.70 is amended by adding paragraph (c)(36) to read as follows:

§ 52.70 Identification of plan.

* * * * *

(c) * * *

(36) On May 6, 2005 and June 30, 2006, the Alaska Department of Environmental Conservation (ADEC) submitted amendments to ADEC's air quality regulations, as revision to the State of Alaska Implementation Plan.

(i) Incorporation by reference.

(A) The following new and revised sections of ADEC's air quality regulations:

(*1*) 18 AAC 50.080 Ice Fog Standards; State effective January 18, 1997.

(*2*) 18 AAC 50.025 Visibility and Other Special Protection Areas; 18 AAC 50.070 Marine Vessel Visible Emission Standards. All provisions in this paragraph are State effective June 21, 1998.

(*3*) 18 AAC 50.050 Incinerator Emission Standards; State effective May 3, 2002.

(*4*) 18 AAC 50.005 Purpose of Chapter; 18 AAC 50.010 Ambient Air Quality Standards [except (7) and (8)]; 18 AAC 50.015 Air Quality Designations, Classifications, and Control Regions; 18 AAC 50.020 Baseline Dates and Maximum Allowable Increases, 18 AAC 50.045 Prohibitions; 18 AAC 50.055 Industrial Processes and Fuel-Burning Equipment [except (d)(2)(B)]; 18 AAC 50.100 Nonroad Engines; 18 AAC 50.200 Information Requests; 18 AAC 50.201 Ambient Air Quality Investigation; 18 AAC 50.205 Certification; 18 AAC 50.215 Ambient Air Quality Analysis Methods [except (a)(3)]; 18 AAC 50.220 Enforceable Test Methods [except (c)(2)]; 18 AAC 50.245 Air Episodes and Advisories; 18 AAC 50.250 Procedures and Criteria for Revising Air Quality Classifications; 18 AAC 50.301 Permit Continuity; 18 AAC 50.302 Construction Permits; 18 AAC 50.306 Prevention of Significant Deterioration (PSD) Permits [except (b)(2) and (b)(3)]; 18 AAC 50.311 Nonattainment Area Major Stationary Source Permits; 18 AAC 50.345 Construction and Operating Permits: Standard Permit Conditions [except (b), (c)(3), and (l)]; 18 AAC 50.508 Minor Permits Requested by the Owner or Operator [except (1) and (2)]; 18 AAC 50.546 Minor Permits: Revisions [except (b)]; 18 AAC 50.560 General Minor Permits; 18 AAC 50.900 Small Business. All provisions in this paragraph are State effective October 1, 2004.

(*5*) 18 AAC 50.542 Minor Permit: Review and Issuance [except (b)(2), (f)(4), (f)(5), and (g)(1) but only with respect to clean units and pollution control projects]; State effective December 1, 2004.

(*6*) 18 AAC 50.225 Owner-Requested Limits; 18 AAC 50.230 Preapproved Emission Limits [except (d)]; 18 AAC 50.544 Minor Permits: Content [except (e)]. All provisions in this paragraph are State effective January 29, 2005.

(*7*) 18 AAC 50.035 Documents, Procedures, and Methods Adopted By Reference [except (b)(4)]; 18 AAC 50.040 Federal Standards Adopted by Reference [except (a), (b), (c), (d), (e), (g), (h)(17), (h)(18), (h)(19), (i)(7), (i)(8), (i)(9), and (j)]; 18 AAC 50.502 Minor Permits for Air Quality Protection [except (g)(1) and (g)(2)]; 18 AAC 50.540 Minor Permit: Application [except (f) and (g)];18 AAC 50.990 Definitions [except (21), and (77)]. All provisions in this paragraph are State effective December 3, 2005.

(B) Remove the following provisions from the current incorporation by reference:

(*1*) 18 AAC 50.030 State Air Quality Control Plan; State effective September 21, 2001.

(*2*) 18 AAC 50.035 (b)(4) Documents, Procedures and Methods Adopted by Reference; State Effective January 18, 1997.

(*3*) 18 AAC 50.090 Ice Fog Limitations; State effective May 26, 1972.

(*4*) 18 AAC 50.220(c)(2) Enforceable Test Methods; State effective January 18, 1997.

(*5*) 18 AAC 50.300 Permit to Operate and 18 AAC 50.400 Application Review & Issuance of Permit to Operate. The provisions in this paragraph were State effective July 21, 1991 and April 23, 1994.

(*6*) 18 AAC 50.520 Emissions and Ambient Monitoring; State effective July 21, 1991.

(*7*) 18 AAC 50.530 Circumvention; State effective June 7, 1987.

(*8*) 18 AAC 50.310 Revocation or Suspension of Permit; State effective May 4, 1980.

(*9*) 18 AAC 50.400 Permit Administration Fees; 18 AAC 50.420 Billing Procedures; and 18 AAC 50.430 Appeal Procedures. The provisions of this paragraph were State effective January 18, 1997.

(*10*) 18 AAC 50.600 Reclassification Procedures & Criteria; State effective November 1, 1982.

(*11*) 18 AAC 50.620 State Air Quality Control Plan; State effective January 4, 1995.

(*12*) 18 AAC 50.900 Definitions; State effective July 21, 1991 and January 4, 1995.

(ii) Additional Material.

(A) The following section of ADEC's air quality regulations: 18 AAC 50.030 State Air Quality Control Plan, State effective October 1, 2004.

§ 52.75 [Reserved]

■ 3. Section 52.75 is removed and reserved.

■ 4. Section 52.96 is revised to read as follows:

§ 52.96 Significant deterioration of air quality.

(a) The State of Alaska Department of Environmental Conservation Air Quality Control Regulations as in effect on December 3, 2005 (specifically 18 AAC 50.010 except (7) and (8); 50.015; 50.020; 50.030(6) and (7); 50.035(a)(4) and (5); 50.040(h) except (17), (18), and (19); 50.215 except (a)(3); 50.250; 50.306 except (b)(2) and (b)(3); 50.345 except (b), (c)(3) and (l); and 50.990 except (21) and (77)) are approved as meeting the requirements of part C for preventing significant deterioration of air quality.

(b) The requirements of sections 160 through 165 of the Clean Air Act are not met for Indian reservations since the plan does not include approvable provisions for preventing the significant deterioration of air quality on Indian reservations and, therefore, the

provisions of § 52.21 except paragraph (a)(1) are hereby incorporated and made part of the applicable plan for Indian reservations in the State of Alaska.

[FR Doc. E7–15669 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1986–0005; FRL–8454–1]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Direct final notice of deletion of the Bailey Waste Disposal Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 6 is publishing a direct final notice of deletion of the Bailey Waste Disposal Superfund Site (Site), located near Bridge City, Texas, from the National Priorities List (NPL). The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is appendix B of 40 CFR Part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This direct final deletion is being published by EPA with the concurrence of the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), because EPA has determined that all appropriate response actions under CERCLA have been completed and, therefore, further remedial action pursuant to CERCLA is not appropriate.

DATES: This direct final notice of deletion will be effective October 15, 2007 unless EPA receives adverse comments by September 13, 2007. If adverse comments are received, EPA will publish a timely withdrawal of the direct final notice of deletion in the **Federal Register** informing the public that the deletion will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–SFUND–1986–0005, by one of the following methods:

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

E-mail: walters.donn@epa.gov.

Fax: 214–665–6660.

Mail: Donn Walters, Community Involvement, U.S. EPA Region 6 (6SF–TS), 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6483 or 1–800–533–3508.

Instructions: Direct your comments to Docket ID No. EPA–HQ–SFUND–1986–0005. EPA 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, disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected. 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 automatically be 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 disclosure of which 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 at *http://www.regulations.gov* or in hard copy at the information repositories.

Information Repositories: Comprehensive information about the Site is available for viewing and copying during central standard time at the Site information repositories located at: U.S. EPA Online Library System at *http://www.epa.gov/natlibra/ols.htm*; U.S. EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, (214) 665–6617, by appointment only Monday through Friday 9 a.m. to 12 p.m. and 1 p.m. to 4 p.m.; Marion and Ed Hughes Public Library, 2712 Nederland Avenue, Nederland, Texas 77627, (409) 722–1255, Monday 1 p.m. to 9 p.m., Tuesday through Friday 10 a.m. to 6 p.m. and closed Saturday–Sunday; City of Orange Public Library, 220 N. 5th Street, Orange, Texas 77630, (409) 883–1086, Saturday and Monday 10 am to 2 p.m., Tuesday 12 p.m. to 8 p.m., Wednesday through Friday 10 a.m. to 5 p.m. and closed Sunday; Texas Commission on Environmental Quality (TCEQ), Central File Room Customer Service Center, Building E, 12100 Park 35 Circle, Austin, Texas 78753, (512) 239–2900, Monday through Friday 8 a.m. to 5 p.m.

FOR FURTHER INFORMATION CONTACT: Scott Harris, PhD, Remedial Project Manager (RPM), U.S. EPA Region 6 (6SF–RA), 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–7114 or 1–800–533–3508 or *harris.scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The EPA Region 6 office is publishing this direct final notice of deletion of the Bailey Waste Disposal Superfund Site from the NPL.

The EPA identifies sites that appear to present a significant risk to public health or the environment and maintains the NPL as the list of those sites. As described in 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for remedial actions if conditions at a deleted site warrant such action.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication of a notice of intent to delete. This action will be effective October 15, 2007 unless EPA receives adverse comments by September 13, 2007 on this document. If adverse comments are received within the 30-day public comment period on this document, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion, and the deletion will not take effect. The EPA will, as appropriate, prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section

IV discusses the Bailey Waste Disposal Superfund Site, and demonstrates how it meets the deletion criteria. Section V discusses EPA actions to delete the Site from the NPL unless adverse comments are received during the public comment period.

II. NPL Deletion Criteria

Section 300.425(e) of the NCP provides that releases may be deleted from the NPL where no further response is appropriate. In making a determination to delete a Site from the NPL, EPA shall consider, in consultation with the State, whether any of the following criteria have been met:

i. Responsible parties or other persons have implemented all appropriate response actions required;

ii. All appropriate Fund-financed (Hazardous Substance Superfund Response Trust Fund) response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

iii. The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

Even if a site is deleted from the NPL, where hazardous substances, pollutants, or contaminants remain at the deleted site above levels that allow for unlimited use and unrestricted exposure, CERCLA Section 121(c), 42 U.S.C. 9621(c) requires that a subsequent review of the site be conducted at least every five years after the initiation of the remedial action at the deleted site to ensure that the action remains protective of public health and the environment. If new information becomes available that indicates a need for further action, EPA may initiate remedial actions. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system.

III. Deletion Procedures

The following procedures apply to deletion of the Site:

(1) The EPA consulted with TCEQ on the deletion of the Site from the NPL prior to developing this direct final notice of deletion.

(2) TCEQ concurred with deletion of the Site from the NPL.

(3) Concurrent with publication of this direct final notice of deletion, a notice of availability of the parallel notice of intent to delete published today in the ''Proposed Rules'' section of the **Federal Register** is being published in a major local newspaper of general circulation at or near the Site, and is being distributed to appropriate federal, state and local government officials and other interested parties. The newspaper notice announces the 30-day public comment period concerning the notice of intent to delete the Site from the NPL.

(4) The EPA placed copies of documents supporting the deletion in the Site information repositories identified above.

(5) If adverse comments are received within the 30-day public comment period on this document, EPA will publish a timely notice of withdrawal of this direct final notice of deletion before its effective date and will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received.

Deletion of a site from the NPL does not itself create, alter or revoke any individual's rights or obligations. Deletion of a site from the NPL does not in any way alter EPA's right to take enforcement actions as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions should future conditions warrant such actions.

IV. Basis for Site Deletion

The following information provides EPA's rationale for deleting this Site from the NPL.

Site Location

The Bailey Waste Disposal Site is located approximately three (3) miles southwest of Bridge City in Orange County, Texas, and was originally part of a tidal marsh near the confluence of the Neches River and Sabine Lake. The total site area includes two rectangular ponds and occupies approximately 280 acres. However, numerous investigations provided data to minimize the areas of the site that required remediation. These areas include the North Marsh Area (approximately four acres), the North Dike Area (approximately 7.8 acres) and the East Dike Area (approximately 7.6 acres).

Site History

The Site is situated in a sparsely populated marsh area, surrounded by primarily industrial land use. Two ponds, A and B, were constructed on the property by the landowner, Mr. Joe Bailey, as part of the Bailey Fish Camp in the early 1950s by dredging the marsh and piling the sediments to form levees, which surrounded the ponds. The fish camp was active until September 1961, when it was destroyed by Hurricane Carla, which introduced saline waters into the ponds, killing the freshwater fish. Mr. Bailey operated the site pursuant to his ownership and leasehold interests from the early 1950s through March or April 1971.

Following the hurricane, Mr. Bailey allowed the disposal of industrial and municipal waste within the levees along the north and east margins of Pond A (the North Dike Area and the East Dike Area, respectively). In addition to the waste located within the North Dike Area, which includes waste contained in Pits A–l, A–2, A–3, and B, and the East Dike Area, waste was also present in the North Marsh Area. Major contaminants within the waste included ethyl benzene, styrene, benzene, chlorinated hydrocarbons and polynuclear aromatic hydrocarbons. Waste disposal operations at the Site ceased in 1971, and it was purchased by Gulf State Utilities.

The North Dike Area is currently managed as a Texas Prairie Wetlands Project in cooperation with the Texas Parks & Wildlife, Ducks Unlimited, the U.S. Department of Agriculture Natural Resources Conservation Service and the U.S. Fish and Wildlife Service. There is little likelihood of additional development.

Remedial Investigation and Feasibility Study (RI/FS)

In December 1984 the state of Texas entered into a cooperative agreement with EPA to conduct an RI/FS. Based on results from preliminary assessments, the Site was placed on the NPL on May 20, 1986, with the Texas Water Commission (TWC) as the lead agency. The TWC completed Rl activities at the Site in October 1987, concluding: The Site has had no impact on drinking water and it would take over 800 years to reach potable groundwater, but that existing site conditions could degrade through a flood or other natural occurrences, releasing the contaminants contained in the dikes into the surrounding marsh. At the time of the RI, there had been no development in the immediate vicinity of the Site, nor was it likely to be suitable for future development due to prohibitions against development in wetland areas. Upon completion of the RI, EPA assumed the role of lead agency and, under the terms of an administrative order on consent, a group of potentially responsible parties (PRPs), the Bailey Site Settlors Committee (BSSC), completed a feasibility study (FS) in April 1988.

Characterization of Risk

Data collected during the RI indicated that should hazardous substances be released from the Site that might endanger public health, welfare, or the environment, the most significant risks to human health and the environment included: Direct contact with organic compounds and heavy metals determined to be carcinogens via absorption through the skin or other routes of inadvertent intake; air emissions of volatile organic compounds; surface waters (marsh) directly contacted by the waste, including organic compounds and heavy metals; and shallow groundwater directly beneath the waste contaminated with organic compounds and heavy metals.

Record of Decision Findings

Based on the FS, EPA selected an in-situ stabilization and capping remedy, issuing the site ROD in June 1988. In July 1988 EPA, pursuant to section 122 of CERCLA, issued special notice letters to the PRPs providing them an opportunity to enter into an agreement to perform the remedial action. In September 1988 the BSSC submitted to EPA its ''Good Faith Offer,'' and an agreement to conduct the remedial action was reached. This agreement provided that the Settlors, as defined in the Consent Decree, would carry out the remedy selected by EPA, and that EPA would reimburse the Settlors for a portion of the costs to implement the remedy. However, because of demonstrated difficulties in achieving in-situ stabilization specifications and the finding that successful implementation of the original remedy would, if possible at all, be significantly more difficult, more time-consuming and more costly to implement than was contemplated at the time the original Record of Decision (ROD) was issued, EPA requested that the BSSC conduct a Focused Feasibility Study (FFS). FFS activities commenced in June 1995, and were completed in October 1996. The Revised Remedial Action was developed as a result of the FFS, and the ROD was amended in December 1996 consistent with the conclusions of the FFS. The amended ROD replaced the in-situ stabilization component of the original remedy with lightweight composite caps and the removal of certain wastes. February 8, 1996 and May 1, 1996 Explanations of Significant Difference (ESDs) documented the removal and offsite disposal of wastes, which was not specified in the original remedy.

Cleanup Standards

The remedial action objectives were to minimize the potential for waste migration, protect human health and the environment, prevent future contamination of surface water and groundwater and minimize short-term air emissions resulting from remedial activities.

Response Actions

After numerous in-situ stabilization attempts, subsequent investigations and a stabilization field pilot study, it was determined that the waste stabilization performance standards established in the ROD and the remedial design would, if possible at all, be significantly more difficult, more time-consuming, and more costly to implement than was contemplated at the time the original ROD was issued. Due to these difficulties, outlined in the Amended ROD (1996), implementation of the original remedy was not completed. Before that determination was made, the original action accomplished: Waste/soil interface evaluation; consolidation and relocation of shallow wastes; construction of clay dikes; construction of access roads; stabilization of approximately one-third of the East Dike Area; south drum disposal area remediation; and construction of a wastewater treatment plant. Between February and May 1996, additional actions taken included excavation of approximately 20,000 cubic yards of waste and affected sediments and transportation of this material to an off-site industrial landfill for disposal, excavation and onsite relocation of waste and affected sediments and placement of interim soil covers. Final removal activities included: Relocation and consolidation of wastes within the limits of the area to be capped; installation of a temporary water collection system to intercept and remove groundwater; construction of lightweight composite caps; installation of riprap along the cap perimeter for erosion and scour protection; installation of storm water management controls; construction of maintenance roads; and installation of a passive gas venting system.

The EPA and the Texas Natural Resource Conservation Commission (TNRCC) conducted a pre-final site inspection on July 31, 1997, and on August 20, 1997 the EPA conducted a final site inspection. All items noted in the pre-final site inspection were found to have been satisfactorily addressed with the exception of the removal of the silt fences, which were left in place until the establishment of vegetative growth on the cap surface. During the third quarterly site inspection conducted on May 29, 1998, EPA noted that the silt fences had been removed. The Preliminary Close Out Report signed on September 14, 1998 notes that the remedy had been constructed in accordance with the remedial design plans and specifications and was operational and functional.

On May 4, 1998, the EPA approved the Final Remedial Action Report for the Site. The final report documents that the remedial action for the site was completed in accordance with the ROD, Explanations of Significant Differences and the ROD Amendment for the site, and that the final site inspection had been conducted for construction activities. This action initiated the Operation and Maintenance phase under EPA oversight, with site O&M activities required of the BSSC.

Operation and Maintenance (O&M)

In September 1997 EPA approved the Final Inspection, Maintenance and Monitoring Plan (IMMP) for the Site. The purpose of the IMMP is to document procedures to be used to assess and maintain the long-term protectiveness of the remedy while minimizing adverse natural or man-made impacts on the Site. The Plan requires of the BSSC (1) regular inspection of the Site, including grounds, fencing, signs, access roads, bridge, vegetative cover, erosion control (riprap), evidence of erosion, gas vents, free movement of water and soil depression or settlement, (2) visits to the Site as needed to check site security and evaluate damage from severe weather events such as hurricanes, (3) maintenance, including regular mowing and clearance of trees and weeds from the capped and riprapped areas, repair of animal burrow damage, clearance of gas vent obstructions, silt removal if impeding the free flow of water within the diked area, repair or replacement of fences and signs, road and bridge repairs and periodic bridge recertification and (4) regular reporting of these activities to EPA through a formal Site Inspection Report. These reports are reviewed by the Remedial Program manager (RPM) when received, and are one component of the ongoing five-year reviews.

Institutional controls (ICs) are a necessary component of maintaining the long-term protectiveness of the remedy. ICs are legal and administrative measures that prevent exposure to contaminants that may remain at a site at concentrations above health-based risk levels. They are typically designed to limit activities at or near the Site, and

include requirements for providing notice (i.e., deed recordation) in the real property records for properties where residual contamination will remain. For this Site, the ICs include a deed recordation with a notice that buried contaminants remain on the property, and a prohibition against any reuse, development or other activities that might disturb or damage the affected areas without the approval of EPA, TCEQ and the property owner. The requirement for institutional controls was met through the August 2, 2006 deed recordation in the Official Public Records of Real Property of Orange County, Texas for each of the two capped areas.

Five-Year Review

Hazardous substances remain at the Site above levels that allow for unlimited use and unrestricted exposure. Therefore, the EPA must conduct a statutory five-year review of the remedy no less than every five years after the initiation of the remedial action pursuant to CERCLA Section 121(c), and as provided in the current guidance on Five Year Reviews (OSWER Directive 9355.7–03B–P, Comprehensive Five-Year Review Guidance, June 2001). Based on the five-year reviews, EPA will determine whether human health and the environment continue to be adequately protected by the implemented remedy. Five-year reviews for this Site were completed in September 2000 and September 2005. The reviews found that the remedy remains protective of human health and the environment, and that the Site appears to have been properly maintained during the period between reports. The next five-year review will occur no later than September 2010.

Community Involvement

Public participation activities required in CERCLA Section 113(k), 42 U.S.C. 9613(k), and CERCLA Section 117, 42 U.S.C. 9617, have been satisfied, and documents which EPA generated and/or relied on are available to the public in these information repositories.

V. Deletion Action

The EPA, with concurrence of the State of Texas, has determined that all appropriate responses under CERCLA have been completed, and that no further response actions under CERCLA, other than O&M and five-year reviews, are necessary. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective October 15, 2007 unless EPA receives adverse comments by September 13, 2007. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion and it will not take effect. The EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: July 19, 2007.

Richard E. Greene,

Regional Administrator, EPA Region 6.

■ For the reasons set out in this document, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

Appendix B—[Amended]

■ 2. Table 1 of Appendix B to Part 300 is amended under Texas (''TX'') by removing the entry for ''Bailey Waste Disposal.''

[FR Doc. E7–15891 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1243

[STB Ex Parte No. 661 (Sub-No. 1)]

Rail Fuel Surcharge Reporting

AGENCY: Surface Transportation Board, Department of Transportation.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board is amending its regulations to require Class I railroads to report certain data concerning fuel costs and fuel surcharges billed. The data reported pursuant to this rule will provide an overall picture of the use of fuel surcharges and will permit the Board to monitor the fuel surcharge practices of Class I carriers. The new rule will be codified as 49 CFR 1243.3. The reporting form can be found in an Appendix to this section.

DATES: This rule is effective November 12, 2007.

ADDRESSES: Comments and material received from the public, as well as documents referred to herein, are part of the Board's docket in STB Ex Parte No. 661 (Sub-No. 1) and are available for inspection or copying at the Board's Public Docket Room, Room 131, 395 E Street, SW., Washington, DC 20423–0001, are posted on the Board's Web site, at *http://www.stb.dot.gov*, and are available from the Board's contractor, ASAP Document Solutions (mailing address: Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: *asapdc@verizon.net*; telephone number: 202–306–4004).

FOR FURTHER INFORMATION, CONTACT: Joseph H. Dettmar at 202–245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Board instituted this proceeding, in conjunction with our decision in *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan. 26, 2007), to solicit comments, pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (PRA) and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), regarding the Board's proposal to require all Class I (large) railroads to submit a monthly report containing the following information: (1) Total monthly fuel cost; (2) gallons of fuel consumed during the month; (3) increased or decreased cost of fuel over the previous month; and (4) total monthly revenue from fuel surcharges. In *Rail Fuel Surcharges*, STB Ex Parte No. 661 (Sub-No. 1) (STB served Jan. 26, 2007) (published at 72 FR 4676 on Feb. 1, 2007), the Board sought comments regarding: (1) Whether the particular collection of information described above is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

Comments

The Board received comments on the proposed rules from the following shipper interests: Edison Electric Institute (EEI); National Grain and Feed Association (NGFA); North Dakota Grain Dealers Association (NDGDA); Snavely King Majoros O'Connor & Lee, Inc. (Snavely); Total Petrochemicals, USA, Inc. (Total). The Board also received comments from the following rail carriers: Canadian National Railway Company (CN); CSX Transportation, Inc. (CSX); Norfolk Southern Railway Company (NS); and Union Pacific Railroad Company (UP). All but NS support the reporting requirement. Railroads suggest several ways to minimize their reporting burden. In contrast, shippers suggest additional data that they assert should be collected to increase the report's utility. No comments were received on burden estimates.

CN, CSXT, and UP suggest that the report be submitted quarterly, rather than monthly, to reduce the degree to which the data might be misinterpreted and to be consistent with reporting periods used by the Securities and Exchange Commission (SEC), as well as periods used by the STB for other reports. CSXT and UP also suggest that the deadline for submitting a report should be 30 days after the end of the reporting period (rather than 20 days, as proposed) to be more consistent with other STB reporting deadlines.

CN, CSXT, and UP also ask the Board to clarify whether the report is intended to include data on both regulated and unregulated traffic. CN and CSXT argue that it would be difficult to segregate revenue by tariff, exempt, or contract traffic, while UP states that aggregated reporting (at least as to revenue derived from its numerous separate/distinct fuel surcharge programs) may be more burdensome and may lead to confusion and misinterpretation. In addition, CSXT asks the Board to clarify whether reported rail fuel surcharge revenue should include all revenue earned/billed during the time period or only revenue collected, and whether reported fuel costs should include state fuel taxes.

NS opposes this reporting requirement, arguing that Class I railroads must already submit extensive financial reports to the SEC. NS also argues that a carrier that does not impose a fuel surcharge on STB-regulated traffic should be exempt from this reporting requirement because its report would have no relation to any Board function.

Shippers are generally concerned that the proposed Fuel Surcharge Report would not provide sufficient transparency to enable the Board and the public to monitor the fairness of the rail fuel-cost recovery practices. Additional data requested includes: Fuel consumption per the same unit (whether mile, ton-mile, car-mile, etc.) used by the carrier to assess the fuel surcharge; total ton-miles and/or car-miles; total recovery of fuel costs, whether by fuel surcharge or any other means; commodity-specific data; and data that distinguishes between freight that is subject to fuel surcharges and freight that is not.[1]

In addition, EEI and TOTAL ask the Board to direct that the report reference a single fuel index and a single, objective source of railroad miles. Snavely asks the Board to direct that the fuel surcharge data also be reported in the Waybill Sample (in the accessorial field) and to clarify that ''total fuel cost'' should exclude gains or losses from fuel hedging.

The proposed rule was submitted to OMB for review as required under the PRA, 5 U.S.C. 3507(d) and 5 CFR 1320.11. No comments were received from OMB, which has tentatively approved the reporting requirement, pending publication and review of the final rule. OMB has 60 days to review the final rule. The Board will publish a separate notice of OMB's final action. This collection has been assigned Control Number 2140–0014.[2]

The Final Rule

Under 49 U.S.C. 10702, the Board has authority to address the reasonableness of a rail carrier's practices. The Board also has specific authority under 49 U.S.C. 11145(a)(1) to require regulated rail carriers to file annual, periodic, and special reports with the Board. This rule to require the Report of Fuel Cost, Consumption, and Surcharge Revenues will provide an overall picture of the use of fuel surcharges and will permit the Board to monitor the current fuel surcharge practices of Class I carriers.

Scope of the Report

The four line items originally proposed are intended to reflect aggregate data on fuel costs and fuel surcharge revenue. Although the underlying ruling adopted in STB Ex Parte No. 661—that the use of rate-based calculations to determine a fuel surcharge is an unreasonable practice—is applicable only to regulated traffic, several carriers argue that it would be unduly burdensome to require railroads to segregate the fuel costs and revenue for regulated traffic. We can discern no practical method for allocating fuel costs for regulated traffic alone. Therefore, we will not require railroads to segregate fuel costs.

However, upon further reflection and review of the comments received, we believe that carriers should be required to segregate and separately report the total fuel-surcharge revenue collected from regulated traffic. Our decision to require these data is consistent with our concerns, as detailed in our decisions in STB Ex Parte No. 661, regarding the potentially disparate impact of fuel surcharges on regulated shippers. Requiring these additional data, as urged by several commenters, will increase the utility of the report as a tool for monitoring the use of these surcharges on regulated traffic and should not unduly burden reporting railroads. This information should be readily available to reporting railroads because railroads bill shippers on an individual basis. If in practice this added requirement is more burdensome for a carrier than we anticipate, that carrier may bring that to our attention by seeking an individual exemption.

We also clarify that the costs reported in lines 1 and 3 should include state fuel taxes, and that the revenue reported in line 4 should be the revenue billed in that period rather than the revenue collected in that period.

Who Must Report

All Class I carriers, even those that impose no fuel surcharges on regulated traffic, will be required to submit this report. This approach will better enable the Board to monitor industry-wide fuel surcharge practices. Moreover, unregulated traffic includes traffic that has been exempted under 49 U.S.C. 10502. Were these reports to suggest that a carrier was imposing fuel surcharges that over-recovered for its actual fuel costs, a shipper could file a complaint asking the Board to investigate and revoke an exemption under section 10502(d).

[1] WCTL would further separate the data between interchange and non-interchange traffic and would require data on mis-aligned surcharge threshold recovery (i.e., when the base rate for the fuel surcharge is below the fuel cost in the underlying rail rate, so that the carrier is ''double-dipping''), as well as the amount of fuel surcharge credits provided to shippers for months in which fuel costs fall below the level at the time the existing rate was established. Snavely argues that additional reporting would not burden carriers because they already submit fuel cost data to the Association of American Railroads as part of the Rail Cost Adjustment Factor.

[2] Unless reapproved, OMB approval for this report expires 3 years after the date of approval of the final rules.

Frequency and Due Date of Reports

Based on the comments received, we will require these reports to be submitted on a quarterly basis, due 30 days after the end of the reporting period. As the railroads point out, these changes will make this reporting requirement more consistent with other financial reporting to the Board and to the SEC. These changes will decrease the reporting burden on carriers while retaining the utility of the reports. The aggregated nature of the data, combined with the longer reporting interval, will provide a more useful and reliable regulatory tool for monitoring the relationship between changes in revenues and costs.

Suggestions To Require Additional Data

With the one exception noted above, we will not require carriers to submit additional data in this report.[3] The Fuel Surcharge Report is intended to provide an overall picture of the use of fuel surcharges. It is not intended as a substitute for evidence brought in an individual case.

[3] Any suggestion to add information on fuel surcharge data into the Waybill Sample would be more properly addressed in a petition for a rulemaking involving the Waybill Sample.

Regulatory Flexibility Analysis

The Board concludes that this action will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1243

Railroads, Reporting and recordkeeping requirements.

Authority: 49 U.S.C. 721, 49 U.S.C. 11145.

Decided: August 8, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams,

Secretary.

■ For the reasons set forth in the preamble, the Surface Transportation Board amends part 1243 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1243—QUARTERLY OPERATING REPORTS—RAILROADS

■ 1. The authority citation for part 1243 continues to read as follows:

Authority: 49 U.S.C. 721, 49 U.S.C. 11145.

■ 2. Add a new § 1243.3 to read as follows:

§ 1243.3 Report of fuel cost, consumption, and surcharge revenue.

Commencing with reports for the 3 months beginning October 1, 2007, all Class I railroads are required to file quarterly a Report of Fuel Cost, Consumption, and Surcharge Revenue, in accordance with the Board's reporting form. Such reports shall be filed, in duplicate, with the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423–0001, within 30 days after the end of the quarter reported.

Appendix to Section 49 CFR 1243.3

OMB Control No. 2140–0014
Expires ____, 2010

Railroad Name _____

QUARTERLY REPORT OF FUEL COST, CONSUMPTION, AND SURCHARGE REVENUE FOR THE QUARTER ENDING ____, 20__

[Instructions: The report shall contain data only for the reported quarter. Cost and revenue are defined as accrued or earned that quarter. The report shall be filed with the Surface Transportation Board on or before 30 days after the end of that quarter.]

Line No.	Data (a)	Amount (in thousands) (b)
1	Total fuel cost [1]	
2	Total gallons of fuel consumed [1]	
3	Total increase or decrease in cost of fuel [2]	
4	Total revenue from fuel surcharges [3]	
5	Revenue from fuel surcharges on regulated traffic	

[1] Include fuel for freight, yard and work train locomotives. Include fuel charged to train and yard service (function 67—Locomotive Fuels). Include all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment not charged to function 67—Locomotive Fuels.

[2] Show the total increase or decrease in fuel cost over previous quarter.

[3] Show Fuel surcharges billed for all traffic (line 4) and for only regulated traffic (line 5).

I, the undersigned, _____, Title: _____, state that this report was prepared by me or under my supervision and that I have carefully examined it and on the basis of my knowledge, belief, and verification declare it to be full, true and correct.

Supplemental Information About the Fuel Surcharge Report

The following information is provided in compliance with OMB requirements, pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.:*

Information in this report is intended to permit the Board to monitor the fuel surcharge practices of Class I carriers.

The estimated annual hourly, per respondent burden for filing this report is 12 hours.

This report is mandatory for Class I carriers.

Information collected through this report is published on the Board's website and is maintained by the agency for at least 2 years.

The display of a currently valid OMB control number for this collection is required by law. Under 5 CFR 1320.5(b), persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.

[FR Doc. E7–15863 Filed 8–13–07; 8:45 am]

BILLING CODE 4915–01–P

Proposed Rules

Federal Register
Vol. 72, No. 156
Tuesday, August 14, 2007

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.

OFFICE OF SPECIAL COUNSEL

5 CFR Part 1830

Privacy Act of 1974; Implementation

AGENCY: U.S. Office of Special Counsel.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Special Counsel (OSC) proposes to revise its regulations at 5 C.F.R. Part 1830, dealing with the agency's implementation of the Privacy Act, at 5 U.S.C. 552a. The regulation, as revised, would provide additional information about access to OSC records under the Privacy Act.

DATES: Comments on the proposed rule must be received by September 13, 2007.

FOR FURTHER INFORMATION CONTACT: Kathryn Stackhouse, General Law Counsel, in writing at: U.S. Office of Special Counsel, Legal Counsel and Policy Division, 1730 M Street, N.W., Suite 218, Washington, DC 20036–4505; by telephone at (202) 254–3690; or by facsimile at (202) 653–5151.

SUPPLEMENTARY INFORMATION: OSC proposes to revise its regulations governing implementation of the Privacy Act, primarily by: (1) revising and updating contact information for requests and appeals to OSC, adding fax delivery as a means by which they may be sent, and specifying the OSC point of receipt for such matters; (2) modifying the description of information needed for effective processing of requests and appeals; (3) revising the description of proof of identity information needed by OSC (including by deletion of the requirement that all requests must include a date and place of birth and a Social Security number, while retaining the option for OSC to request some or all of that data if needed to confirm a requester's identity); (4) clarifying that Privacy Act requests for records may also be processed under the Freedom of Information Act; (5) extending the appeal period for requests and revising the description of the response time for appeals; (6) clarifying that exempt material in OSC case files includes all matters within OSC's jurisdiction (including alleged violations of the Uniformed Services Employment and Reemployment Rights Act) and information included in background investigations conducted for OSC employees and others; (7) adding two new sections (on general provisions and other rights and services), moving updated information about fees to a new section, and revising section headings throughout the regulation.

Procedural Determinations

Congressional Review Act (CRA): OSC has determined that these revisions are non-major under the Congressional Review Act, and will submit a report on this final rule to Congress and the Government Accountability Office pursuant to the act.

Regulatory Flexibility Act (RFA) Certification (5 U.S.C. 605): I certify that this regulation will not have a significant economic impact on a substantial number of small entities. The OSC primarily handles matters involving individuals who are current or former Federal government employees, applicants for federal employment, certain state or local government employees, and representatives of these individuals. These revised regulations affect only the implementation of the Privacy Act at OSC. These proposed revisions will not cause significant additional impact.

Unfunded Mandates Reform Act (UMRA): This proposed revision does not impose any Federal mandates on State, local, or tribal governments, or on the private sector within the meaning of the UMRA.

Paperwork Reduction Act (PRA): This revision does not impose any new recordkeeping, reporting or other information collection requirements on the public.

Executive Order 12866 (Regulatory Planning and Review): While OSC is not required to do so, OSC has reviewed this revision under Executive Order 12866 and anticipates that the economic impact of this revision will be insignificant. Thus this proposed revision is not a significant regulatory action under §3(f) of Executive Order 12866, and does not require an assessment of potential costs and benefits under § 6(a)(3) of the order.

Executive Order 13132 (Federalism): This proposed revision does not have new federalism implications under Executive Order 13132. The Hatch Act, at title 5 of the U.S. Code, chapter 15, prohibits certain political activities of covered state and local government employees. OSC has jurisdiction to issue advisory opinions on political activity by those employees, and to bring an enforcement action before the Merit Systems Protection Board for prohibited activity by a covered state or local government employee. These revised regulations affect only the implementation of the Privacy Act at OSC and do not significantly change the rights of state and local government employees.

Executive Order 12988 (Civil Justice Reform): This proposed rule meets applicable standards of §§ 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 5 CFR Part 1830

Administrative practice and procedure, Government employees, Privacy.

For the reasons stated in the preamble, OSC proposes to revise 5 CFR Part 1830 to read as follows:

PART 1830—PRIVACY

Sec.
1830.1 General provisions.
1830.2 Requirements for making Privacy Act requests.
1830.3 Medical records.
1830.4 Requirements for requesting amendment of records.
1830.5 Appeals.
1830.6 Exemptions.
1830.7 Fees.
1830.8 Other rights and services.

Authority: 5 U.S.C. 552a(f), 1212(e).

§ 1830.1 General provisions.

This part contains rules and procedures followed by the Office of Special Counsel (OSC) in processing requests for records under the Privacy Act (PA), at 5 U.S.C. 552a. Further information about access to OSC records generally is available on the agency's web site (http://www.osc.gov/foia.htm).

§ 1830.2 Requirements for making Privacy Act requests.

(a) How made and addressed. A request for OSC records under the Privacy Act should be made by writing to the agency. The request should be sent by regular mail addressed to: Privacy Act Officer, U.S. Office of

Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036–4505. Such requests may also be faxed to the Privacy Act Officer at the number provided on the FOIA/PA page of OSC's web site (see 1830.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked ''Privacy Act Request.'' A Privacy Act request may also be delivered in person at OSC's headquarters office in Washington, DC. Whether sent by mail or by fax, or delivered in person, a Privacy Act request will not be considered to have been received by OSC until it reaches the Privacy Act Officer.

(b) Description of records sought. Requesters must describe the records sought in enough detail for them to be located with a reasonable amount of effort. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter.

(c) Proof of identity. Requests received by mail, fax, or personal delivery should contain sufficient information to enable OSC to determine that the requester and the subject of the record are one and the same. To assist in this process, an individual should submit his or her name and home address, business title and address, and any other known identifying information such as an agency file number or identification number, a description of the circumstances under which the records were compiled, and any other information deemed necessary by OSC to properly process the request. An individual delivering a request in person may be required to present proof of identity, preferably a government-issued document bearing the individual's photograph.

(d) Freedom of Information Act processing. OSC also processes all Privacy Act requests for access to records under the Freedom of Information Act, 5 U.S.C. 552, following the rules contained in part 1820 of this chapter, which gives requesters the benefit of both statutes.

§ 1830.3 Medical records.

When a request for access involves medical records that are not otherwise exempt from disclosure, the requesting individual may be advised, if it is deemed necessary by OSC, that the records will be provided only to a physician designated in writing by the individual. Upon receipt of the designation, the physician will be permitted to review the records or to receive copies by mail upon proper verification of identity.

§ 1830.4 Requirements for requesting amendment of records.

(a) How made and addressed. Individuals may request amendment of records pertaining to them that are subject to amendment under the Privacy Act and this part. The request should be sent by regular mail addressed to: Privacy Act Officer, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036–4505. Such requests may also be faxed to the Privacy Act Officer at the number provided on the FOIA/PA page of OSC's web site (see 1830.1). For the quickest handling, both the request letter and envelope or any fax cover sheet should be clearly marked ''Privacy Act Amendment Request.'' Whether sent by mail or by fax, a Privacy Act amendment request will not be considered to have been received by OSC until it reaches the Privacy Act Officer. A Privacy Act amendment request may also be delivered by person at OSC's headquarters office in Washington, DC.

(b) Description of amendment sought. Requests for amendment should include identification of records together with a statement of the basis for the requested amendment and all available supporting documents and materials. Requesters must describe the amendment sought in enough detail for the request to be evaluated.

(c) Proof of identity. Rules and procedures set forth in 1830.2(c) apply to requests made under this section.

(d) Acknowledgement and response. Requests for amendment shall be acknowledged by OSC not later than 10 days (excluding Saturdays, Sundays, and legal holidays) after receipt by the Privacy Act Officer and a determination on the request shall be made promptly.

§ 1830.5 Appeals.

(a) Appeals of adverse determinations. A requester may appeal a denial of a Privacy Act request for access to or amendment of records to the Legal Counsel and Policy Division, U.S. Office of Special Counsel, 1730 M Street, N.W. (Suite 218), Washington, DC 20036–4505. The appeal must be in writing, and sent by regular mail or by fax. The appeal must be received by the Legal Counsel and Policy Division within 45 days of the date of the letter denying the request. For the quickest possible handling, the appeal letter and envelope or any fax cover sheet should be clearly marked ''Privacy Act Appeal.'' An appeal will not be considered to have been received by OSC until it reaches the Legal Counsel and Policy Division. The appeal letter may include as much or as little related information as the requester wishes, as long as it clearly identifies the OSC determination (including the assigned request number, if known) being appealed. An appeal ordinarily will not be acted on if the request becomes a matter of litigation.

(b) Responses to appeals. The agency decision on an appeal will be made in writing. A final determination will be issued within 30 days (excluding Saturdays, Sundays, and legal holidays), unless, for good cause shown, OSC extends the 30–day period.

§ 1830.6 Exemptions.

OSC will claim exemptions from the provisions of the Privacy Act at subsections (c)(3) and (d) as permitted by subsection (k) for records subject to the act that fall within the category of investigatory material described in paragraphs (2) and (5) and testing or examination material described in paragraph (6) of that subsection. The exemptions for investigatory material are necessary to prevent frustration of inquiries into allegations in prohibited personnel practice, unlawful political activity, whistleblower disclosure, Uniformed Services Employment and Reemployment Rights Act, and other matters under OSC's jurisdiction, and to protect identities of confidential sources of information, including in background investigations of OSC employees, contractors, and other individuals conducted by or for OSC. The exemption for testing or examination material is necessary to prevent the disclosure of information which would potentially give an individual an unfair competitive advantage or diminish the utility of established examination procedures. OSC also reserves the right to assert exemptions for records received from another agency that could be properly claimed by that agency in responding to a request. OSC may also refuse access to any information compiled in reasonable anticipation of a civil action or proceeding.

§ 1830.7 Fees.

Requests for copies of records shall be subject to duplication fees set forth in part 1820 of this chapter.

§ 1830.8 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

Dated: August 8, 2007.

Scott J. Bloch,

Special Counsel.

[FR Doc. E7–15839 Filed 8–13–07; 8:45 am]

BILLING CODE 7405–01–S

FARM CREDIT ADMINISTRATION

12 CFR Part 620

RIN 3052–AC37

Disclosure to Shareholders—Annual Report to Shareholders

AGENCY: Farm Credit Administration.

ACTION: Proposed rule.

SUMMARY: The Farm Credit Administration (FCA, Agency, we), proposes to amend § 620.4 of our regulations to allow Farm Credit System (System) institutions 90 calendar days to prepare and distribute annual reports to shareholders, while retaining the 75 calendar day requirement for electronic reporting and distribution to the FCA.

DATES: You may send comments on or before September 13, 2007.

ADDRESSES: We offer a variety of methods to receive your comments. For accuracy and efficiency reasons, commenters are encouraged to submit comments by e-mail or through the Agency's Web site or the Federal eRulemaking Portal. As faxes are difficult for us to process and achieve compliance with section 508 of the Rehabilitation Act, please consider another means to submit your comment if possible. Regardless of the method you use, please do not submit your comment multiple times via different methods. You may submit comments by any of the following methods:

- *E-mail:* Send us an e-mail at *reg-comm@fca.gov*.
- *Agency Web site: http://www.fca.gov*. Select ''Legal Info,'' then ''Pending Regulations and Notices.''
- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail:* Gary K. Van Meter, Deputy Director, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090.
- *Fax:* (703) 883–4477. Posting and processing of faxes may be delayed. Please consider another means to comment, if possible.

You may review copies of all comments we receive at our office in McLean, Virginia, or from our Web site at *http://www.fca.gov*. Once you are in the Web site, select ''Legal Info,'' and then select ''Public Comments.'' We will show your comments as submitted, but for technical reasons we may omit items such as logos and special characters. Identifying information you provide, such as phone numbers and addresses, will be publicly available. However, we will attempt to remove electronic-mail addresses to help reduce Internet spam.

FOR FURTHER INFORMATION CONTACT: Christopher D. Wilson, Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4414, TTY (703) 883–4434; or Bob Taylor, Attorney Advisor, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020; or Jane Virga, Senior Attorney, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4020.

SUPPLEMENTARY INFORMATION:

I. Objectives

Our objectives in this proposed rule are to:

- Extend the time for System institutions to prepare and distribute their annual reports to shareholders from 75 calendar days to 90 calendar days; and
- Promote high quality and timely reporting and disclosure by System institutions to shareholders and the FCA.

II. Background

A. Annual Report Distribution Under FCA Regulations

Part 620, Disclosure to Shareholders, establishes the requirements for financial reports for Farm Credit banks and associations. In pertinent part, § 620.4 establishes the time requirements for System institutions to prepare and provide to their shareholders an annual report.

On March 14, 2006, the FCA proposed to amend our regulations at part 620. Among other things, we proposed to amend § 620.4(a) so that all annual reports would be filed within 75 calendar days of the end of an institution's fiscal year. At that time, institutions had a 90-day deadline. The FCA stated that significant technological advances had occurred in the last 10 years that both increased the market's demand for more timely information and improved the ability of institutions to capture, process, and disseminate this information. Additionally, the FCA stated that accelerating the time to report the financial condition of a System institution to shareholders, investors, and the general public would improve information flow and facilitate shareholder and investor decisionmaking. Finally, the FCA stated that the proposed timeframes were a reasonable compromise between industry practices and the unique cooperative structure of the System.

Our amendments to part 620 were published as a final rule on December 20, 2006, and became effective on February 16, 2007. However, the final rule provided that compliance with all provisions of the rule must be achieved by the start of the fiscal year immediately following the effective date of the rule. Thus, the 2007 annual report would be the first annual report distributed under the accelerated filing guidelines.

B. System's Concerns

During the past few months, System institutions have raised concerns regarding the new 75-day filing requirement. System institutions have stated that they believed the 75-day requirement adopted in December 2006 only applied to the electronic filing of the report with FCA, similar to the accelerated electronic filings of reports of public companies with the Securities and Exchange Commission.

System institutions have also raised concerns regarding the report sent to shareholders. Typically, System institutions send hard copy annual reports to their shareholders and electronic reports to the FCA. Based on the System's current processes and requirements for preparation and distribution of their annual reports, they have indicated that they would not be able to comply with the 75-calendar-day accelerated distribution requirement to their shareholders and still meet the objectives of providing them timely, accurate, and high quality disclosures. Specifically, System institutions have collectively stated that it will be extremely onerous for them to comply with the 75-calendar-day accelerated distribution requirement for the annual report to shareholders because of the prohibitive costs and time needed for: (1) The external audit process; (2) the audit committee review; and (3) printing and distribution of the report. Due to the perceived ambiguity of the prior rulemaking and the difficulties involved in producing high quality annual reports to shareholders, System institutions have requested that FCA require the annual report be sent to shareholders within 90 days rather than 75 days.

C. FCA Response

FCA has reviewed the System's concerns and is proposing an amendment to § 620.4(a). The amended rule would allow System institutions 90 calendar days after the end of a fiscal year to provide their annual reports to shareholders, while retaining the 75-calendar-day requirement to send an electronic copy of the report to us.

To ensure accelerated disclosure, the FCA would require that each System

institution: (1) Publish a copy of its annual report on its Web site when it sends the report to us electronically, and (2) provide prior written notification to its shareholders and other interested persons that the institution will publish its annual report on the institution's Web site when the report is sent electronically to the FCA. A System institution must develop procedures to ensure that prior written notification to the shareholders is prominent and conspicuous so that there is effective shareholder notice that the annual report will be published on its Web site and that shareholders will be provided a copy of such report within 90 calendar days of the end of its fiscal year. The notification can be at the time a loan is made to the shareholder, when the annual meeting information notice is sent to each shareholder, by a postcard to all shareholders, or at any other time before the annual report is published. After effective notice is provided to a shareholder, further notification to that shareholder is not required.

In addition, the reports filed with the FCA and posted on the institutions' Web sites would be available for public inspection as required by § 620.2(b). This would allow shareholders and other interested persons to have access to the annual report at that time. We believe that this bifurcated approach resolves any ambiguity from the prior rulemaking and fully addresses the System's logistical issues of providing an attractive, high quality annual report to shareholders, while meeting the goal of accelerated filing and disclosure.

Additionally, the copy of the annual report sent to the FCA electronically and the annual report provided to the shareholders must be substantively identical. The FCA realizes that the annual report sent electronically to the FCA may lack photographs or other ''glossy'' pictures, graphs, or covers. The FCA also realizes that System institutions may want to simplify the format of the annual reports sent to shareholders and not use photographs or other elaborate graphics.

D. Methods of Accelerated Reporting

To achieve accelerated reporting to both the FCA and shareholders, System institutions can provide electronic annual reports to their shareholders, as they do to the FCA. Under E–SIGN,[1] electronic reports have the same legal effect as paper reports. Part 609 of the FCA regulations summarizes the pertinent provisions of E–SIGN.

In order to provide electronic notices to a customer, both the System institution and the customer must agree to electronic reporting. E–SIGN establishes different technological and other standards for a System institution conducting E-commerce with a ''business'' or a ''consumer''.[2] Some System loans qualify as consumer transactions, while others are business transactions. Thus, System institutions must determine whether a loan qualifies as a consumer transaction or a business transaction to comply with E–SIGN.

In order to effectively use electronic disclosures, if they so choose, System institutions must begin planning now on how to achieve compliance with E–SIGN and the FCA's regulations. A System institution cannot decide to send electronic disclosures to a shareholder without the shareholder's consent, nor can an institution institute electronic disclosures to all shareholders on the basis of a majority vote of the shareholders. We intend to provide further guidance on electronic disclosures in an informational memorandum or similar communication. For additional background information on the delivery of electronic communications, see our informational memoranda dated October 23, 2001 regarding electronic communications on our Web site.

E. Technical Amendment

We are also proposing a technical amendment to § 620.2(c). We are proposing to omit the second sentence of that paragraph to avoid duplication with § 620.2(d).

III. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the FCA hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Each of the banks in the System, considered together with its affiliated associations, has assets and annual income in excess of the amounts that would qualify them as small entities. Therefore, System institutions are not ''small entities'' as defined in the Regulatory Flexibility Act.

[1] E–SIGN stands for the ''Electronic Signatures in Global and National Commerce Act'' (Pub. L. 106–229) which became effective October 1, 2000. Electronic contracts, signatures, and recordkeeping, in most instances, have the legal effect of their paper counterparts.

[2] A ''consumer'' is an individual who obtains, through a transaction, products or services that are used primarily for personal, family, or household purposes.

List of Subjects in 12 CFR Part 620

Accounting, Agriculture, Banks, banking, Reporting and recordkeeping requirements, Rural areas.

For the reasons stated in the preamble, part 620 of Chapter VI, title 12 of the Code of Federal Regulations is proposed to be amended as follows:

PART 620—DISCLOSURE TO SHAREHOLDERS

1. The authority citation for part 620 continues to read as follows:

Authority: Secs. 4.19, 5.9, 5.17, 5.19, 8.11 of the Farm Credit Act (12 U.S.C. 2207, 2243, 2252, 2254, 2279aa–11); sec. 424 of Pub. L. 100–233, 100 Stat. 1568, 1656.

Subpart A—General

§ 620.2 [Amended]

2. Amend § 620.2(c) by removing the second sentence.

Subpart B—Annual Report to Shareholders

3. Revise § 620.4(a) to read as follows:

§ 620.4 Preparing and providing the annual report.

(a) Each institution of the Farm Credit System must:

(1) Prepare and send to the Farm Credit Administration an electronic copy of its annual report within 75 calendar days of the end of its fiscal year;

(2) Publish a copy of its annual report on its Web site when it sends the report electronically to the Farm Credit Administration;

(3) Provide prior written notification to its shareholders and other interested persons that the institution will publish its annual report on the institution's Web site when the report is sent electronically to the Farm Credit Administration; and,

(4) Within 90 calendar days of the end of its fiscal year, prepare and provide to its shareholders an annual report substantively identical to the copy of the report sent to the Farm Credit Administration under paragraph (a)(1) of this section.

* * * * *

Dated: August 8, 2007.

Roland E. Smith,

Secretary, Farm Credit Administration Board.

[FR Doc. E7–15842 Filed 8–13–07; 8:45 am]

BILLING CODE 6705–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 3

RIN 3038–AC45

Termination of Associated Persons and Principals of Futures Commission Merchants, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators and Leverage Transaction Merchants

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is proposing to amend Commission Regulations 3.12 and 3.31 (''Proposed Amendments'') to extend the period during which a registered futures commission merchant (''FCM''), introducing broker (''IB), commodity trading advisor (''CTA''), commodity pool operator (''CPO'') or leverage transaction merchant (''LTM'') must file a notice with the National Futures Association (''NFA'') to report the termination of any associated person (''AP'') or principal of the registered intermediary. Under existing regulations, such intermediaries must file notices within 20 days after the termination of the AP or principal. The Commission's proposal (''Proposal'') would provide 30, rather than 20, days for the filing of a termination notice.

DATES: Comments must be received on or before September 13, 2007.

ADDRESSES: Comments on the Proposal should be sent to David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be sent by facsimile transmission to (202) 418–5521, or by e-mail to *secretary@cftc.gov*. Reference should be made to ''Proposal Regarding the Termination of Associated Persons and Principals of Futures Commission Merchants, Introducing Brokers, Commodity Trading Advisors, Commodity Pool Operators and Leverage Transaction Merchants.'' Comments also may be submitted by connecting to the Federal eRulemaking Portal at *http://www.regulations.gov* and following the comment submission instructions.

FOR FURTHER INFORMATION CONTACT: Helene D. Schroeder, Special Counsel, Compliance and Registration Section, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, telephone number: (202) 418–5450; facsimile number: (202) 418–5528; and electronic mail: *hschroeder@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 4k of the Commodity Exchange Act (''Act'') [1] makes it unlawful for persons to be associated in certain specified capacities with an FCM, IB, CPO or CTA unless the person is registered with the entity or intermediary as an AP thereof.[2] Section 19 of the Act grants the Commission plenary authority over leverage transactions, and this authority includes the registration of APs of an LTM.[3]

Commission Regulation 3.12(a) makes it unlawful for any person to be associated with an FCM, IB, CTA, CPO or LTM in the capacity of an AP unless the person has registered under the Act as an AP of that sponsoring intermediary.[4] Pursuant to Commission Regulation 3.12(c), application for registration as an AP must be on a Form 8–R and accompanied by the applicant's fingerprints as well as a sponsor certification that meets the requirements set forth in that Regulation.

Commission Regulations 3.12(b) and 3.31(c)(1) provide for the termination of an AP's registration. Specifically, Section 3.31(c)(1) requires the sponsoring FCM, IB, CPO, CTA or LTM to file a Form 8–T notice [5] with NFA within 20 days of either of the following events: (1) The person fails to become associated with the sponsoring FCM, IB, CTA, CPO or LTM; or (2) the association with the sponsoring firm is otherwise terminated. Commission Regulation 3.31(c)(2) provides for the termination of any principal of an FCM, IB, CPO, CTA or LTM, and it also requires the filing of a Form 8–T within 20 days after the termination of the principal's affiliation.

NFA Registration Rule 214(a) likewise specifies that such termination notices must be filed within 20 days after the termination of the affiliation of the AP or principal, and it imposes a $100 fee upon sponsoring firms that fail to file termination notices on a timely basis. By contrast, Article V, Section 3(a) of the Bylaws of the National Association of Securities Dealers, Inc. (''NASD'') specifies that NASD members must file termination notices with respect to registered persons, including varied securities representatives and principals thereof, within 30, rather than 20, days.[6]

II. NFA's Petition

NFA recently sought input from its members regarding possible enhancements to its online registration process. Several large NFA members that are dually registered as FCMs or IBs and securities broker-dealers (''BDs'') identified as a particular problem the aforementioned disparate regulatory timelines for filing termination notices. The dual registrants asserted that it is an undue regulatory burden for them to file within the 20-day period for some APs, while for the majority of their APs the NASD allows a 30-day period. The dual registrants also maintained that the 20-day period is difficult to comply with when a termination notice contains disclosure information that must be reviewed at the branch office level and then by the legal and/or registration departments of a firm. They also stated that, on occasion, an attorney representing an AP will review the notice prior to filing.

In light of the difficulties identified by dual registrants, NFA petitioned the Commission to amend Regulation 3.31(c)(1) to increase the number of days in which a firm must file a termination notice from 20 to 30 days. NFA claims that such an extension will provide sponsoring firms the time needed to properly review the termination notices and will conform the futures industry requirements to the securities industry's time allowance. Given the disparate regulatory requirements applicable to firms that are dual registrants and the burden that complying with the 20-day period presents, the Commission believes it is appropriate to propose amendments to the relevant regulatory requirements.

III. Proposal

In accordance with the foregoing, the Proposed Amendments would extend the period of time in which a registered FCM, IB, CPO, CTA or LTM must file a notice with NFA to report the termination of any AP or principal of the registered intermediary. Under existing regulations, such intermediaries must file notices within 20 days after the termination of the AP or principal. The Proposed Amendments would

[1] 7 U.S.C. 1 *et seq.* (2000). The Act can be accessed at *http://www.access.gpo.gov/uscode/title7/chapter1_.html*.

[2] 7 U.S.C. 6k(1)–(3).

[3] 7 U.S.C. 23.

[4] 17 CFR 3.12(a). The Commission's regulations can be accessed at *http://www.access.gpo.gov/nara/cfr/waisidx_06/17cfrv1_06.html*.

[5] Commission Regulation 3.31(c)(3) permits the filing of a Uniform Termination Notice for Securities Industry Registration (Form U–5) in lieu of a Form 8–T to report the termination of any AP or principal of the sponsoring intermediary.

[6] The termination notice filed by NASD members is the Form U–5.

allow termination notices to be filed within 30 days after the AP or principal is terminated. These Proposed Amendments are intended to conform the futures industry requirements to the securities industry's time allowance.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'')[7] requires that agencies, in proposing regulations, consider the impact of those regulations on small businesses. The Proposed Amendments would affect persons that are registered as FCMs, IBs, CPOs, CTAs and LTMs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on such entities in accordance with the RFA.[8] The Commission previously determined that registered FCMs, CPOs and LTMs are not small entities for the purpose of the RFA.[9] With respect to the remaining persons, CTAs and IBs, the Commission does not believe that the Proposed Amendments would place any additional burdens upon such persons inasmuch as these registrants already are subject to the requirement to file termination notices. Moreover, because the Proposed Amendments would provide these intermediaries with additional time in which to file termination notices, the Amendments actually would lessen the relevant regulatory burden. Accordingly, and based on Section 3(a) of the RFA,[10] the Acting Chairman, on behalf of the Commission, certifies that the Proposed Amendments would not have a significant economic impact on a substantial number of small entities. However, the Commission invites the public to comment on this certification.

B. Cost-Benefit Analysis

Section 15(a) of the Act[11] requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, Section 15(a) simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission, in its discretion, may choose to give greater weight to any one of the five enumerated areas and determine that, notwithstanding its costs, a particular regulation is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Proposed Amendments concern the filing of termination notices by registered intermediaries, in particular, FCMs, IBs, CPOs, CTAs and LTMs. Specifically, the Proposed Amendments would extend the period during which these registered intermediaries must file a notice with NFA to report the termination of any AP or principal of the sponsoring intermediary.

The Proposed Amendments should have no effect on the protection of market participants and the public because they would not alter or modify the type or nature of information that must be filed with the Commission. Rather, they would provide registrants with additional time in which to file information that is already required to be filed and would conform the futures industry requirements to the securities industry's time allowance for filing termination notices.

The Proposed Amendments should enhance the efficiencies experienced by intermediaries because they would lessen burdens that make it difficult for intermediaries to comply with the time allowance provided for futures firms filing termination notices.

The Proposed Amendments should have no effect on the following three enumerated areas: (1) Competitiveness or the financial integrity of futures markets; (2) price discovery; and (3) sound risk management practices.

After considering these factors, the Commission has determined to publish the Proposed Amendments discussed above. The Commission invites public comment on its application of the cost-benefit provision. Commenters also are invited to submit any data that they may have quantifying the costs and benefits of the Proposed Amendments with their comment letters.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (''PRA'') imposes certain obligations on federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA.[12] The Proposed Amendments will not require a new collection of information on the part of any entities subject to the Proposed Amendments. Specifically, the Proposed Amendments will modify existing regulatory requirements by extending the period during which registered intermediaries are required to file notices with NFA to report the termination of APs and principals of the registered intermediary. Although the Proposed Amendments would alter the timeframe during which information is required to be collected, the estimated burden associated with the collection is not expected to increase or decrease as a result. All affected entities already must comply with a requirement to file termination notices. Accordingly, for purposes of the PRA, the Commission certifies that the Proposed Amendments will not impact the total annual reporting or recordkeeping burden associated with the above-referenced collection of information, which has been approved previously by OMB.

Pursuant to the PRA, the Commission has submitted a copy of this certification to the Office of Management and Budget (''OMB'') for its review. Copies of the information collection submission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW., Washington, DC 20581 (202) 418–5160.

List of Subjects in 17 CFR Part 3

Administrative practice and procedure, Brokers, Commodity futures, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, the Commission proposes to amend 17 CFR part 3 as follows:

PART 3—REGISTRATION

1. The authority citation for part 3 continues to read as follows:

Authority: 5 U.S.C. 522, 522b; 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6m, 6n, 6o, 6p, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, 23.

2. Section 3.12 is proposed to be amended by revising paragraph (b) to read as follows:

§ 3.12 Registration of associated persons of futures commission merchants, introducing brokers, commodity trading advisors, commodity pool operators and leverage transaction merchants.

* * * * *

(b) *Duration of registration.* A person registered in accordance with

[7] 5 U.S.C. 601 *et seq.*

[8] 47 FR 18618 (Apr. 30, 1982).

[9] 47 FR 18618, 18619.

[10] 5 U.S.C. 605(b).

[11] 7 U.S.C. 19(a).

[12] 44 U.S.C. 3501 *et seq.*

paragraphs (c), (d), (f), (i), or (j) of this section and whose registration has not been revoked will continue to be so registered until the revocation or withdrawal of the registration of each of the registrant's sponsors, or until the cessation of the association of the registrant with each of his sponsors. Such person will be prohibited from engaging in activities requiring registration under the Act or from representing himself to be a registrant under the Act or the representative or agent of any registrant during the pendency of any suspension of his or his sponsor's registration. In accordance with § 3.31(c) of this part, each of the registrant's sponsors must file a notice with the National Futures Association on Form 8–T or on a Uniform Termination Notice for Securities Industry Registration reporting the termination of the association of the associated person within thirty days thereafter.

* * * * *

3. Section 3.31 is proposed to be amended by revising paragraphs (c)(1) introductory text and (c)(2) to read as follows:

§ 3.31 Deficiencies, inaccuracies, and changes, to be reported.

* * * * *

(c)(1) After the filing of a Form 8–R or a Form 3–R by or on behalf of any person for the purpose of permitting that person to be an associated person of a futures commission merchant, commodity trading advisor, commodity pool operator, introducing broker, or a leverage transaction merchant, that futures commission merchant, commodity trading advisor, commodity pool operator, introducing broker or leverage transaction merchant must, within thirty days after the occurrence of either of the following, file a notice thereof with the National Futures Association indicating:

* * * * *

(2) Each person registered as, or applying for registration as, a futures commission merchant, commodity trading advisor, commodity pool operator, introducing broker or leverage transaction merchant must, within thirty days after the termination of the affiliation of a principal with the registrant or applicant, file a notice thereof with the National Futures Association.

* * * * *

Issued in Washington, DC, on August 8, 2007, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. E7–15869 Filed 8–13–07; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–116215–07]

RIN 1545–BG60

Public Inspection of Material Relating to Tax-Exempt Organizations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that amend existing regulations issued under sections 6104 and 6110 of the Internal Revenue Code. The purpose of the proposed regulations is to clarify rules relating to information that is made available by the IRS for public inspection under section 6104(a) and materials that are made publicly available under section 6110. The changes reflect IRS practice as well as the United States Court of Appeals for the District of Columbia Circuit's decision in *Tax Analysts* v. *IRS*, 350 F.3d 100 (D.C. Cir. 2003). The *Tax Analysts* decision invalidated the portions of §§ 301.6104(a)–1(i) and 301.6110–1(a) that excepted rulings that denied or revoked an organization's tax exempt status from the public disclosure provisions of both sections 6104 and 6110. The proposed regulations will affect organizations exempt from Federal income tax under section 501(a) or 527, organizations that were exempt but are no longer exempt from Federal income tax, and organizations that were denied tax-exempt status.

DATES: Written or electronic comments and requests for a public hearing must be received by November 13, 2007.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–116215–07), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–116215–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–116215–07).

FOR FURTHER INFORMATION CONTACT: Concerning submission of comments, Kelly Banks, (202) 622–7180 (not a toll-free number); concerning the proposed regulations, Mary Ellen Keys, (202) 622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Since 1950, the Internal Revenue Code has provided for the public inspection of information that is submitted to the IRS by certain exempt organizations and certain trusts. Under section 6104(a), the IRS makes available for public inspection approved applications for exemption from Federal income tax for organizations described in section 501(c) or (d) and exempt under section 501(a), notices of status filed under section 527(i) by political organizations exempt from taxation under section 527, and certain related documents. Section 6104(a) also permits the IRS to disclose whether an organization is currently recognized as exempt and the subsection and paragraph number of section 501 under which it is recognized. Section 6104(b) imposes an additional obligation on the IRS to make available for public inspection annual information returns filed by organizations exempt from Federal income tax. Section 6104(c) governs when the IRS may disclose certain information about charitable and certain other exempt organizations to state officials. Section 6104(d) imposes a parallel obligation on organizations and trusts to make available for public inspection annual returns, applications for exemption and notices of status. The proposed regulations do not address the obligations imposed by subsections (b), (c) and (d).

The decision in *Tax Analysts* v. *IRS*, 350 F.3d 100 (D.C. Cir. 2003), invalidated the portions of existing § 301.6104(a)–1(i)(1), (2), and (3) and § 301.6110–1(a) that excluded rulings that denied or revoked an organization's tax exempt status from the public disclosure provisions of both sections 6104 and 6110. Sections 301.6104(a)–1(i)(1), (2) and (3) excluded from disclosure by the IRS unfavorable rulings or determination letters in response to exemption applications, rulings or determination letters that make or modify a favorable determination letter, and technical advice memoranda that relate to a disapproved exemption application or the revocation or modification of a favorable determination letter. Thus,

because § 301.6110–1(a) provided that the disclosure of such rulings, determination letters and technical advice memoranda is to be determined under section 6104, they also were not available under section 6110. The IRS has already modified its administrative practice to follow the court's holding by making these documents available to the public. See AOD 2004–02, 2004–29 IRB 42, § 601.601(d)(2)(ii)(a). The Treasury Department and IRS now propose to revise the existing regulations at § 301.6104(a)–1 and § 301.6110–1(a) to conform to the court's holding in *Tax Analysts*.

Explanation of Provisions

The proposed regulations remove existing § 301.6104(a)–1(i) and portions of § 301.6110–1(a), in light of the holding in *Tax Analysts*. The proposed regulations clarify that the term ''application'' includes information submitted to the IRS relating to group exemption applications. The proposed regulations provide that notices of status filed under section 527(i) and the documents comprising the notices are available for public inspection under section 6104(a). The proposed regulations also add to the material that is available for public inspection the letters or documents filed with or issued by the IRS relating to an organization's status as an organization described in sections 509(a), 4942(j)(3), or 4943(f), including a final determination letter that the organization is or is not a private foundation.

The proposed regulations clarify that the IRS may disclose, in response to or in anticipation of a request, the subsection and paragraph number of section 501 under which an organization or group has been determined, on the basis of its application, to qualify for exemption from Federal income tax, and whether an organization or group is currently recognized as exempt.

Section 6104(a) applies to the publication of certain information related to organizations that are exempt from Federal income taxation under section 501(a). The information covered by section 6104(a) includes material for any taxable year during which the organization was exempt. Under the proposed regulations, written determinations issued by the IRS, including, for example, unfavorable rulings or determination letters issued in response to applications for tax exemption and rulings or determination letters revoking or modifying a favorable determination letter, are made available for public inspection under section 6110.

Other Changes to the Existing Regulations

The proposed regulations reorganize or revise certain provisions of the existing regulations to eliminate redundancy and/or to provide greater clarity. First, § 301.6104(a)–1(a) is revised to clarify that applications for exemption from Federal income tax and supporting documents shall be open for public inspection, even if the IRS subsequently revokes the organization's exempt status.

Second, new § 301.6104(a)–1(b) is added to clarify that notices of status filed by political organizations described in section 527 are open for public inspection.

Third, § 301.6104(a)–1(c) (formerly § 301.6104(a)–1(b)) is revised to clarify that group exemption letters are included among the information that is available for public inspection under section 6104(a).

Fourth, § 301.6104(a)–1(d) (formerly § 301.6104(a)–1(c)) is revised to clarify that, where an organization is determined to be exempt for any taxable year, material shall not be withheld on the basis that the organization is determined not to be exempt for any other taxable year.

Fifth, § 301.6104(a)–1(g) (formerly § 301.6104(a)–1(e)), which defines the term ''supporting document'' with respect to an application for exemption from Federal income tax, is revised to clarify that there are no supporting documents with respect to notices of status filed by political organizations.

Sixth, new § 301.6104(a)–1(h) is added to clarify that the IRS may disclose, in response to or anticipation of a request, the subsection and paragraph number of section 501 under which an organization or group has been determined to be exempt from Federal income taxation, whether an organization or group is exempt, or whether the IRS has revoked an organization's or group's exemption under section 501(c)(3).

Finally, new § 301.6104(a)–1(i) is added to refer the reader to section 6033(j), added to the Code by the Pension Protection Act of 2006, Pub. L. 109–280, 120 Stat. 780, which is an additional statutory provision that requires disclosure of information by the IRS regarding organizations formerly exempt from Federal income tax. Section 6033(j) governs the publication and maintenance of a list of organizations whose tax exempt status was revoked for failure to file required returns or notices for three consecutive years. Likewise, this paragraph cross-references section 7428(c), which relates to the revocation of a determination of exempt status, and section 501(p), added to the Code by the Military Family Tax Relief Act of 2003, Pub. L. 108–121, 117 Stat. 1335, which relates to suspension of the tax-exempt status of terrorist organizations, including public notice of suspensions.

Special Analyses

It has been determined that the proposed regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to the regulations, and, therefore, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small businesses.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and 8 copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of the regulations is Mary Ellen Keys, Office of the Associate Chief Counsel (Procedure & Administration).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. § 301.6104(a)–1 is revised to read as follows:

§ 301.6104(a)–1 Public inspection of material relating to tax-exempt organizations.

(a) *Applications for exemption from Federal income tax, applications for a group exemption letter and supporting documents.* If the Internal Revenue Service determines that an organization described in section 501(c) or (d) is exempt from Federal income tax for any taxable year, the application upon which the determination is based, together with any supporting documents, shall be open to public inspection. Such applications and supporting documents shall be open for public inspection even after any revocation of the Internal Revenue Service's determination that the organization is exempt from Federal income tax. Some applications have been destroyed and therefore are not available for inspection. For purposes of determining the availability for public inspection, a claim for exemption from Federal income tax filed to reestablish exempt status after denial thereof under the provisions of section 503 or 504 (as in effect on December 31, 1969), or under the corresponding provisions of any prior revenue law, is considered an application for exemption from Federal income tax.

(b) *Notices of status filed by political organizations.* If, in accordance with section 527(i), an organization notifies the Internal Revenue Service that it is a political organization as described in section 527, exempt from Federal income tax for any taxable year, the notice of status filed by the political organization shall be open to public inspection.

(c) *Letters or documents issued by the Internal Revenue Service with respect to an application for exemption from Federal income tax.* If an application for exemption from Federal income tax is filed with the Internal Revenue Service after October 31, 1976, and is open to public inspection under paragraph (a) of this section, then any letter or document issued to the applicant by the Internal Revenue Service that relates to the application is also open to public inspection. For rules relating to when a letter or document is issued, see § 301.6110–2(h). Letters or documents to which this paragraph applies include, but are not limited to—

(1) Favorable rulings and determination letters, including group exemption letters, issued in response to applications for exemption from Federal income tax;

(2) Technical advice memoranda issued with respect to the approval, or subsequent approval, of an application for exemption from Federal income tax;

(3) Letters issued in response to an application for exemption from Federal income tax (including applications for a group exemption letter) that propose a finding that the applicant is not entitled to be exempt from Federal income tax, if the applicant is subsequently determined, on the basis of that application, to be exempt from Federal income tax; and

(4) Any letter or document issued by the Internal Revenue Service relating to an organization's status as an organization described in sections 509(a), 4942(j)(3), or 4943(f), including a final determination letter that the organization is or is not a private foundation.

(d) *Requirement of exempt status.* An application for exemption from Federal income tax (including applications for a group exemption letter), supporting documents, and letters or documents issued by the Internal Revenue Service that relate to the application shall not be open to public inspection before the organization is determined, on the basis of that application, to be exempt from Federal income tax for any taxable year. If an organization is determined to be exempt from Federal income tax for any taxable year, these materials shall not be withheld from public inspection on the basis that the organization is subsequently determined not to be exempt for any other taxable year.

(e) *Documents included in the term ''application for exemption from Federal income tax.''* For purposes of this section—

(1) *Prescribed application form.* If a form is prescribed for an organization's application for exemption from Federal income tax, the application includes the form and all documents and statements that the Internal Revenue Service requires to be filed with the form, any amendments or revisions to the original application, or any resubmitted applications where the original application was submitted in draft form or was withdrawn. An application submitted in draft form or an application submitted and later withdrawn is not considered an application.

(2) *No prescribed application form.* If no form is prescribed for an organization's application for exemption from Federal income tax, the application includes the submission by letter requesting recognition of tax exemption and any statements or documents as prescribed by Revenue Procedure 2007–52, 2007–30 IRB 222, and any successor guidance. (See § 601.201(n)(7)(i) of the Statement of Procedural Rules, 26 CFR part 601.)

(3) *Application for a Group Exemption Letter.* The application for a group exemption letter includes the letter submitted by or on behalf of subordinate organizations that seek exempt status pursuant to a group exemption letter and any statements or documents as prescribed by Revenue Procedure 80–27, 1980–1 CB 677, and any successor guidance. (See § 601.201(n)(8)(i) of the Statement of Procedural Rules, 26 CFR part 601.)

(4) *Notice of status filed under section 527(i).* For purposes of this section, documents included in the term ''notice of status filed under section 527(i)'' include—

(i) Form 8871, Political Organization Notice of Section 527 Status;

(ii) Form 8453–X, Declaration of Electronic Filing of Notice of Section 527 Status; and

(iii) Any other additional forms or documents that the Internal Revenue Service may prescribe.

(f) *Material open to public inspection under section 6110.* Under section 6110, certain written determinations issued by the Internal Revenue Service are made available for public inspection. Section 6110 does not apply, however, to material that is open to public inspection under section 6104. See section 6110(l)(1).

(g) *Supporting documents defined.* For purposes of this section, ''supporting documents,'' with respect to an application for exemption from Federal income tax, means any statement or document not described in paragraph (e) of this section that is submitted by the organization or group in support of its application prior to a determination described in paragraph (c) of this section. Items submitted in connection with an application in draft form, or with an application submitted and later withdrawn, are not supporting documents. There are no supporting documents with respect to Notices of Status filed by political organizations.

(h) *Statement of exempt status.* For efficient tax administration, the Internal Revenue Service may publish, in paper or electronic format, the names of organizations currently recognized as exempt from Federal income tax, including organizations recognized as exempt from Federal income tax under

particular paragraphs of section 501(c) or section 501(d). In addition to having the opportunity to inspect material relating to an organization exempt from Federal income tax, a person may request a statement, or the Internal Revenue Service may disclose, in response to or in anticipation of a request, the following information—

(1) The subsection and paragraph of section 501 (or the corresponding provision of any prior revenue law) under which the organization or group has been determined, on the basis of an application open to public inspection, to qualify for exemption from Federal income tax; and

(2) Whether an organization or group is currently recognized as exempt from Federal income tax.

(i) *Publication of non-exempt status.* (1) For publication of the notice of the revocation of a determination that an organization is described in section 501(c)(3), see section 7428(c).

(2) For publication of a list including any organization the tax exemption of which is revoked for failure to file required returns or notices for three consecutive years, see section 6033(j).

(3) For publication of notice of suspension of tax exemption of terrorist organizations, see section 501(p).

(j) *Withholding of certain information from public inspection.* For rules relating to certain information contained in an application for exemption from Federal income tax and supporting documents that will be withheld from public inspection, see § 301.6104(a)–5(a).

(k) *Procedures for inspection.* For rules relating to procedures for public inspection of applications for exemption from Federal income tax and supporting documents, see § 301.6104(a)–6.

(l) *Effective/applicability date.* The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 3. § 301.6110–1 is amended by:

1. Revising paragraph (a).

2. Adding paragraph (d).

The addition and revision read as follows:

§ 301.6110–1 Public inspection of written determinations and background file documents.

(a) *General rule.* Except as provided in § 301.6110–3, relating to deletion of certain information, § 301.6110–5(b), relating to actions to restrain disclosure, paragraph (b)(2) of this section, relating to technical advice memoranda involving civil fraud and criminal investigations, and jeopardy and termination assessments, and paragraph (b)(3) of this section, relating to general written determinations relating to accounting or funding periods and methods, the text of any written determination (as defined in § 301.6110–2(a)) issued pursuant to a request postmarked or hand delivered after October 31, 1976, shall be open to public inspection in the places provided in paragraph (c)(1) of this section. The text of any written determination issued pursuant to a request postmarked or hand delivered before November 1, 1976, shall be open to public inspection pursuant to section 6110(h) and § 301.6110–6, when funds are appropriated by Congress for such purpose. The procedures and rules set forth in §§ 301.6110–1 through 301.6110–5 and § 301.6110–7 do not apply to written determinations issued pursuant to requests postmarked or hand delivered before November 1, 1976, unless § 301.6110–6 states otherwise. There shall also be open to public inspection in each place of public inspection an index to the written determinations subject to inspection at such place. Each such index shall be arranged by section of the Internal Revenue Code, related statute or tax treaty and by subject matter description within such section in such manner as the Commissioner may from time to time provide. The Commissioner shall not be required to make any written determination or background file document open to public inspection pursuant to section 6110 or refrain from disclosure of any such documents or any information therein, except as provided by section 6110 or with respect to a discovery order made in connection with a judicial proceeding. The provisions of section 6110 shall not apply to material that is open to public inspection under section 6104. See section 6110(l)(1).

* * * * *

(d) *Effective/applicability date.* The rules of paragraph (a) of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

[FR Doc. E7–15952 Filed 8–13–07; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[Docket No. EPA–R02–OAR–2004–TR–0001, FRL–8453–9]

Approval and Promulgation of Saint Regis Mohawk's Tribal Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of the proposed St. Regis Mohawk Tribe's (SRMT or the Tribe) tribal implementation plan (TIP) to improve air quality within the exterior boundaries of the St. Regis Mohawk Reservation (the Reservation) that are in accordance with federal requirements. EPA previously approved the Tribe for treatment-in-the-same-manner-as-a-state (TAS) under the Clean Air Act (Act) for purposes of administering a TIP on March 5, 2003. The proposed TIP establishes Tribal ambient air quality standards; includes an emissions inventory; provides regulations for permitting, source surveillance, open burning and enforcement; and defines the Tribe's program for review of state permits and regional haze planning. This action will make federally enforceable the approvable portions of the SRMT's proposed TIP.

DATES: Comments must be received on or before September 13, 2007.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R02–OAR–2004–TR–0001, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: Werner.Raymond@epa.gov.*
- *Fax:* 212–637–3901.
- *Mail:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866.
- *Hand Delivery:* Raymond Werner, Chief, Air Programs Branch, Environmental Protection Agency, Region 2 Office, 290 Broadway, 25th Floor, New York, New York 10007–1866. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding Federal holidays.

Instructions: Direct your comments to Docket No. EPA–R02–OAR–2004–TR–0001. EPA's policy is that all comments

received 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 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 *www.regulations.gov* or e-mail. The *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 *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 or any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Gavin Lau, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3708 or *Lau.Gavin@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. EPA Action Being Proposed Today

EPA is proposing approval of the St. Regis Mohawk Tribe's TIP submission which contains programs to address: Ambient air quality standards for sulfur dioxide (SO_2), particulate matter (PM), nitrogen dioxide (NO_2), ozone (O_3), fluoride, and heavy metals; Emissions Inventory; Permitting; Synthetic Minor Facilities; Source Surveillance; Open Burning; Enforcement; Review of State Permits; and Regional Haze Planning.

II. Introduction

The St. Regis Mohawk Tribe (SRMT) is an Indian tribe federally recognized by the U.S. Secretary of the Interior. See 70 FR 71194, 71196 (November 25, 2005). Beginning in 2001, the SRMT, with assistance from EPA, began developing a draft TIP and its various elements with the goal of eventually submitting the TIP to EPA for approval. On December 10, 2001, the SRMT requested that EPA find the Tribe eligible for TAS, pursuant to section 301(d) of the Clean Air Act and Title 40 part 49 of the Code of Federal Regulations (CFR), for the purpose of developing and carrying out a TIP. On March 5, 2003, EPA determined that the Tribe is eligible for TAS for that purpose. Having found that the SRMT is eligible for TAS, EPA is now proposing approval of the Tribe's TIP. The Tribe did not apply for TAS eligibility for the area known as the Hogansburg Triangle, and EPA made no determination with respect to that area. Therefore, the proposed TIP would not apply to the Hogansburg Triangle. The St. Regis Mohawk Tribe Tribal Implementation Plan, revision 003, was formally submitted to EPA on February 26, 2004.

The SRMT's TIP has been developed to protect the Reservation populace from air pollution by controlling or abating existing and new sources. The TIP includes ambient air quality standards for SO_2, PM, NO_2, O_3, fluoride, and heavy metals. Other programs in the TIP include emissions inventory, permitting, synthetic minor facilities, source surveillance, open burning, enforcement, review of state permits, and regional haze planning.

III. Background

A. What is the Clean Air Act and its Relationship to Indian tribes?

The Clean Air Act (Act) was originally passed in 1970 and has been the subject of substantial amendments, most recently in 1990. Among other things, the Act: Requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for certain pollutants; requires the EPA to develop programs to address specific air quality problems; establishes the EPA's enforcement authority; and provides for air quality research. As part of the 1990 amendments, Congress added section 301(d) to the Act authorizing EPA to treat eligible Indian tribes in the same manner as states and directing EPA to promulgate regulations specifying those provisions of the Act for which TAS is appropriate. In February of 1998, EPA implemented this requirement by promulgating the Tribal Authority Rule (TAR) (63 FR 7254 (February 12, 1998), codified at 40 CFR part 49). EPA included relevant provisions relating to implementation plans among the provisions for which TAS is appropriate (exceptions are identified in 40 CFR 49.4).

Under the provisions of the Act and EPA's regulations, Indian tribes must demonstrate that they meet the eligibility criteria in section 301(d) of the Act and the TAR in order to be treated in the same manner as a state. The eligibility criteria are: (1) The Indian tribe is federally-recognized; (2) the Indian tribe has a governing body carrying out substantial governmental duties and powers; (3) the functions the Indian tribe is applying to carry out pertain to the management and protection of air resources within the exterior boundaries of the reservation (or other areas within the Indian tribe's jurisdiction); and, (4) the Indian tribe is reasonably expected to be capable of performing the functions the Indian tribe is applying to carry out in a manner consistent with the terms and purposes of the Act and all applicable regulations.

1. What is an implementation plan?

An implementation plan is a set of programs and regulations developed by the appropriate regulatory agency in order to assure healthy air quality through the attainment and maintenance of the NAAQS. These plans can be developed by states, eligible Indian tribes, or the EPA, depending on the entity with jurisdiction and EPA approval in a particular area. For states, such plans, once approved by EPA, are referred to as State Implementation Plans or SIPs.

Similarly, for eligible Indian tribes these plans, once approved, are called Tribal Implementation Plans or TIPs. Occasionally, EPA will develop an implementation plan for a specific area or source. This is referred to as a Federal Implementation Plan or a FIP. Once final approval is published in the **Federal Register**, the provisions of an implementation plan become federally enforceable. An applicable implementation plan may be comprised of both TIPs and FIPs and/or SIPs and FIPs.

The contents of a typical implementation plan may fall into three categories: (1) Agency-adopted control measures, which consist of rules, regulations or source-specific requirements (*e.g.*, orders, consent decrees or permits); (2) agency-submitted ''non-regulatory'' components (*e.g.*, attainment plans, rate of progress plans, emission inventories, transportation control measures, statutes demonstrating legal authority, monitoring programs); and (3) additional requirements promulgated by the EPA (in the absence of a commensurate agency provision) to satisfy a mandatory Clean Air Act section 110 or part D requirement. The implementation plan is a living document which can be revised by the state or eligible Indian tribe as necessary to address air pollution problems. Accordingly, the EPA from time to time must take action on implementation plan revisions which may contain new and/or revised regulations that will become part of the implementation plan.

Upon submittal to EPA, the Agency reviews implementation plans for conformance with federal policies and regulations. If the implementation plan conforms, the State's or eligible Indian tribe's regulations become federally enforceable upon EPA approval. The codification is usually accomplished by first announcing the EPA's findings in the **Federal Register** through a Proposed Rulemaking, with an appropriate public comment period. After evaluating comments received on the proposal, a Final Rulemaking Action will be published by EPA, which will incorporate the implementation plan, if approved, into the CFR.

2. How do Tribal Implementation Plans compare to State Implementation Plans?

The Act requires each state to develop, adopt, and submit an implementation plan for EPA approval into the SIP. Several sections of Title I of the Act provide structured schedules and mandatory requirements for SIP preparation and contents. These are further developed in 40 CFR part 51. The SIP program reflects each state's particular needs and air quality issues. At a minimum, SIPs must meet minimum federal standards. If a state fails to submit an approvable SIP within the schedules provided in the Act, sanctions can be imposed on the state, and if the state still does not submit an approvable implementation plan, the EPA is required to develop and enforce a FIP to implement the applicable Act requirements for that state.

Sections 110 and 301(d) of the Act and EPA's implementing regulation at 40 CFR part 49 provide for tribal implementation of various Act programs including TIPs. Eligible Indian tribes can choose to implement certain Act programs by developing and adopting a TIP and submitting the TIP to EPA for approval. TIPs: (1) Are optional; (2) may be modular; (3) have flexible submission schedules; and (4) allow for joint tribal and EPA management as appropriate.

- Optional—The Act requires each state to develop, adopt and submit a proposed SIP for EPA approval. Unlike states, Indian tribes are not required to adopt an implementation plan. In the TAR, the EPA recognized that not all Indian tribes will have the need or the desire for an air pollution control program, and EPA specifically determined that it was not appropriate to treat tribes in the same manner as states for purposes of plan submittal and implementation deadlines. See 40 CFR 49.4.
- Modular—The TAR offers eligible Indian tribes the flexibility to include in a TIP only those implementation plan elements that address their specific air quality needs and that they have the capacity to manage. Under this modular approach, the TIP elements the eligible Indian tribe adopts must be ''reasonably severable'' from the package of elements that can be included in a whole TIP. ''Reasonably severable'' means that the parts or elements selected for the TIP are not necessarily connected or interdependent to parts that are not included in the TIP, and are consistent with applicable Act and regulatory requirements. TIPs are fundamentally different than SIPs because while the Act requires States to prepare an implementation plan that meets all of the requirements of section 110 of the Act, an Indian tribe may adopt TIP provisions that address only some elements of section 110.
- Have Flexible Submission Schedules—Neither the Act nor the TAR requires Indian tribes to develop TIPs. Therefore, unlike states, Indian tribes are not required to meet the implementation plan submission deadlines or attainment dates specified in the Act. Indian tribes can establish their own schedules and priorities for developing TIP elements (*e.g.*, regulations to limit emissions of a specific air pollutant) and submitting them to the EPA. Indian tribes will not face sanctions for failing to submit or for submitting incomplete or deficient implementation plans. See 40 CFR 49.4.
- Allow for Joint Tribal and EPA Management—Consistent with the Act and the TAR, eligible Indian tribes can revise a TIP to include appropriate new programs or return programs to EPA for Federal implementation as necessary or appropriate based on changes in tribal need or capacity. The EPA may regulate emission sources that the Indian tribe chooses not to include in a TIP if it is necessary or appropriate to adequately protect air quality. This type of joint management is expected to result in a program fully protective of tribal air resources.

IV. Tribal Implementation Plan Requirements

What is required for the approval of a Tribal Implementation Plan?

For a tribe to receive EPA approval of a TIP, the tribe must, among other things:

- Obtain a determination from EPA that the tribe is eligible for TAS for purposes of the TIP;
- Submit to EPA a TIP that satisfies requirements of the Act and relevant regulations that apply to the plan elements and functions the tribe seeks to carry out.

To be found eligible for TAS for the purpose of carrying out an implementation plan under the Act, the tribe must meet the requirements of section 301(d) of the Act and 40 CFR 49.6:

- The Indian tribe must be federally recognized;
- The Indian tribe must have a governing body carrying out substantial governmental duties and powers over a defined area;
- The functions to be exercised by the tribe must pertain to the management and protection of air resources within the exterior boundaries of the tribe's reservation or other areas within the tribe's jurisdiction;
- The Indian tribe must be reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and all applicable regulations.

The following technical elements may be included in a TIP:

• A list of regulated pollutants affected by the plan;
• Locations of affected sources and the air quality designation (*i.e.*, attainment, unclassifiable, nonattainment) of the source location;
• Projected estimates of changes in current actual emissions from affected sources;
• Modeling information (*i.e.*, input and output data, justification of models used, data and assumptions used);
• Documentation that the plan contains emission limitations, work practice standards, and recordkeeping/reporting requirements;
• Regulations.

The TAR allows tribes to develop, adopt, and submit an implementation plan for approval as a TIP in a modular fashion, so it may not be necessary to meet all of the requirements identified above.

The EPA has the authority, under the Act, to enforce the regulations in an approved TIP. The EPA will work cooperatively with the Indian tribe in exercising its enforcement authority. The EPA recognizes that, in certain circumstances, eligible Indian tribes have limited criminal enforcement authority. The TAR specifically provides that such limitations on an Indian tribe's criminal enforcement authority do not prevent a TIP from being approved. Where implementation of the TIP requires criminal enforcement authority, and to the extent a tribe is precluded from asserting such authority, the federal government will exercise primary criminal enforcement responsibility. A memorandum of agreement between an Indian tribe and the EPA is an appropriate way to address circumstances in which the tribe is incapable of exercising applicable enforcement requirements as described in 40 CFR 49.7(a)(6) and 40 CFR 49.8. The memorandum of agreement shall include a process by which the tribe will provide potential investigative leads to EPA and/or other appropriate federal agencies in an appropriate and timely manner.

V. St. Regis Mohawk Tribe's TIP Submittal

A. What did EPA determine in finding the St. Regis Mohawk Tribe Eligible for TAS?

On December 10, 2001, SRMT requested an EPA determination under the provisions of 40 CFR 49.7 that the Tribe is eligible for TAS for the purpose of developing a TIP for air quality. On March 5, 2003, EPA determined that the Tribe meets the eligibility requirements of section 301(d) of the Act and 40 CFR 49.6 for the purposes of developing and carrying out an implementation plan under the Act. As noted above, the Tribe did not request an eligibility determination for the area known as the Hogansburg Triangle, and EPA made no determination with respect to that area. This proposed TIP approval pertains only to lands within the exterior boundaries of the St. Regis Mohawk Reservation covered by the March 3, 2003 determination and thus does not apply to the Hogansburg Triangle.

The TAS determination fully addressed the four criteria of 49 CFR 49.6. In summary: (1) The Indian tribe must be federally recognized: The U.S. Secretary of the Interior has recognized SRMT. See 70 FR 71194, 71196 (November 25, 2005);

(2) The Indian tribe must have a governing body carrying out substantial governmental duties and powers over a defined area: The SRMT governing body is embodied in its Tribal Council. The Tribal government enacts laws and legislation within the jurisdiction of the SRMT Reservation. The Tribal government administers health, education, environmental, and welfare programs. EPA determined that the Tribe has a governing body carrying out substantial duties and powers under the provisions of 40 CFR 49.6 and made a similar determination in a previous TAS eligibility determination for the purposes of section 105 and section 505(a)(2) of the Act;

(3) The functions to be exercised by the tribe must pertain to the management and protection of air resources within the exterior boundaries of the tribe's reservation or other areas within the tribe's jurisdiction: The SRMT applied for TAS, and EPA found the Tribe eligible, for lands within the exterior boundaries of the St. Regis Mohawk Reservation, excluding the area known as the Hogansburg Triangle. New York State was given the opportunity to review the TAS application and to provide any comments on the Reservation boundaries, pursuant to 40 CFR 49.7. The Reservation is located in the northern portion of New York adjacent to the St. Lawrence River. The specific Reservation boundaries, and the exclusion of the Hogansburg Triangle area, were described in the Tribe's December 10, 2001 application and referenced in EPA's TAS eligibility determination; and,

(4) The Indian tribe must be reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and all applicable regulations: SRMT's TAS application contains substantial information regarding the Tribe's capability to carry out the functions in the proposed TIP. As discussed fully in the TAS decision, EPA considered this information in determining that the Tribe meets this requirement for TAS eligibility. In particular, SRMT's Air Quality Program has staff with degrees ranging from an Associates Science to a Masters Degree. They have received extensive training including but not limited to training in TIP development and permit issuance. The staff has also demonstrated considerable capabilities in the programmatic, administrative, and legal spheres since 1990. The TIP will be implemented by Air Quality Program staff, Conservation Officers, Environmental Lawyers, and an on-site legal advisor, with technical support through EPA Region 2 and EPA's Tribal Air Monitoring center in Las Vegas. All SRMT agencies, including but not limited to the Tribal Police Force, will assist in compliance activities and (as appropriate) the enforcement of the TIP in accordance with applicable law.

Based on information submitted by the Tribe, summarized above, other relevant information, and our knowledge of the Tribe's programs, EPA determined that the SRMT met all requirements for TAS eligibility. The determination and cover letter were sent to the Tribal Council with a courtesy copy to New York State.

In addition to the approval for TAS for the purpose of developing a TIP for air quality, the Tribe was deemed eligible for the purpose of establishing a minor source permitting program in a separate determination on March 25, 2001.

B. What authority does the St. Regis Mohawk Tribe Environment Division have?

The SRMT Tribal Council gave the SRMT Environment Division Clean Air Quality Program authority to administer Clean Air Act programs on behalf of the Tribe in a Tribal Council Resolution (TCR 99–43) dated December 3, 1999. This Resolution authorizes the Air Quality Program to submit applications for Federal assistance and to administer Clean Air Act programs, as allowed under the Act and EPA's regulations.

C. What role does EPA have in criminal enforcement?

Consistent with 49 CFR 49.7(a)(6) and 49 CFR 49.8, on November 20, 2003, the SRMT entered into a Memorandum of Agreement (MOA) with the EPA Region 2 and EPA's Criminal Investigations Division concerning criminal enforcement of air pollution rules and

regulations. Under the terms of this agreement, the SRMT and its agencies would refer to the appropriate EPA or U.S. Department of Justice Office alleged criminal violations of the Act where the alleged violator is a non-Indian as well as all alleged criminal activity where the potential fine is greater than $5,000 or the penalty would require imprisonment for more than one year in accordance with 25 U.S.C. 1302. Criminal enforcement issues relating to implementation of the TIP outside of this agreement may be pursued, as appropriate, by SRMT's Environmental Conservation Officers and Tribal Officers.

D. When did SRMT adopt the Tribal Implementation Plan under Tribal Law?

The SRMT developed and proposed rules comprising the proposed TIP to its Tribal community in 2002. A public notice announcing availability of the proposed TIP and inviting public comments was published in the local newspaper (Watertown Daily Times on June 29, 2002). In addition, the SRMT has posted the proposed TIP on the Tribe's Web site and for public review at the Tribal environmental health center. The comments received from the public review on the proposed TIP were minor. Based on the comments received, revisions were made to the proposed TIP. The St. Regis Tribal Council adopted the rules comprising the proposed TIP on October 3, 2002 (TCR 2002–183) as part of Tribal Law, and it became effective under Tribal Law 30 days thereafter. In order to satisfy the public hearing requirements of 40 CFR 51.102, the Tribe offered the opportunity for a public hearing upon request. The notice of opportunity was published on April 5, 2007 in the Indian Times and the proposed TIP was made available at the SRMT Environmental Division and on their Web site. The notice indicated that a public hearing would be held on May 16, 2007, upon request. EPA and New York State Department of Environmental Conservation (NYSDEC) were notified of the opportunity for a public hearing by the Tribe on April 11, 2007. SRMT provided EPA a package, dated May 16, 2007, which included copies of the public notice of the availability of the proposed TIP for comment, e-mails reserving and confirming a location for the public hearing, and a letter notifying NYSDEC of the opportunity for a public hearing. No requests for a public hearing were made nor were any comments received. All comments and responses made concerning the proposed TIP during the comment periods are on file with the SRMT Environmental Division (ED) and EPA. EPA found that the Tribe satisfied public hearing requirements.

E. What is included in the SRMT TIP submittal?

The SRMT TIP submittal includes ambient air quality standards for sulfur dioxide, particulate matter, nitrogen dioxide, ozone, fluoride, and heavy metals, and provisions for emissions inventory, permitting for major sources and for synthetic minor facilities, source surveillance, open burning, enforcement, review of state permits, and regional haze planning.

1. Ambient Air Quality Standards

EPA has established primary and secondary National Ambient Air Quality Standards (NAAQS) for six common air pollutants: CO, lead, NO_2, ozone, particulate matter, and SO_2. Most pollutants regulated by the NAAQS have two limits. The ''primary'' standard is designed to protect the public—including children, people with asthma, and the elderly—from health risks. The ''secondary'' standard is to prevent unacceptable effects on the public welfare, *e.g.*, damage to crops and vegetation, buildings and property, and ecosystems.

SRMT established ambient threshold standards and measuring methods in section 9 of the proposed TIP for the following air pollutants:

Pollutant	Threshold	Measuring method
SO_2 primary standard	Annual 0.030 ppm 24-hr 0.14 ppm.	40 CFR part 50 App A or 40 CFR part 53.
SO_2 secondary standard	3-hr 0.5 ppm	40 CFR part 50 App A or 40 CFR part 53.
PM_{10} primary and secondary standard	Annual 50 μg/m^3 24 hr 150 μg/m^3.	40 CFR part 50 App J or 40 CFR part 53.
$PM_{2.5}$ primary and secondary standard	Annual mean 15.0 μg/m^3 24 hr 65 μg/m^3.	40 CFR part 50 App L.
NO_2 primary and secondary standard	Annual mean 0.053 ppm	40 CFR part 50 App F or 40 CFR part 53.
O_3 1 hr primary and secondary standard	0.12 ppm	40 CFR part 50 App D or 40 CFR part 53.
O_3 8 hr primary and secondary standard	0.08 ppm annual 4th highest daily maximum	40 CFR part 50 App D or 40 CFR part 53.
Fluoride forage standard	Growing season—10 ppm 60 day—15 ppm. 30 day—20 ppm.	None.
Fluoride ambient standard	12 hr—1.13 ppb 24 hr—0.88 ppb. 1 wk—0.50 ppb. 1 mo—0.25 ppb.	Methods set by SRMT Environment Division.
Heavy Metals standard		40 CFR part 50 App B.
Beryllium	4.2×10^{-4} μg/m^3.	
Cadmium	2.4×10^{-2} μg/m^3.	
Chromium	1.2 μg/m^3.	
Lead	7.5×10^{-1} μg/m^3.	
Nickel	4.0×10^{-3} μg/m^3.	
Zinc	50.0 μg/m^3.	

The Act requires the NAAQS to be met everywhere. Accordingly, the SRMT standards and measuring methods for SO_2, PM, NO_2, and O_3, which are the same as the EPA standards, are approvable for incorporation into the TIP. The EPA is proposing to approve the SRMT air quality standards and measurement methods included in the proposed TIP for these pollutants. The standards for fluoride, beryllium, cadmium, chromium, nickel and zinc in the SRMT's proposed TIP are unique. These pollutants are listed in the Act as hazardous air pollutants. While EPA has standards regulating the emissions of these pollutants from stationary sources,

the Agency has not established ambient standards for hazardous air pollutants. Consequently, EPA is not proposing to incorporate the fluoride and heavy metal standards into the federally approved TIP. EPA is also not proposing to approve the SRMT standard for lead, as the standard in the proposed SRMT TIP are not equivalent to EPA's ambient air quality standard. EPA is proposing to approve into the proposed TIP the other ambient air quality standards and test methods. Measurements for approvable standards will be made in accordance with the techniques listed in 40 CFR part 50, appendix A, D, F, J, L, or by equivalent methods designated in accordance with 40 CFR part 53.

2. Emissions Inventory

An emissions inventory is a quantitative list of the amounts and types of pollutants that are entering the air from each source in a given area. The inventory may be comprehensive, looking at all pollutants, or focused on only selected pollutants of concern. The fundamental elements in an emissions inventory are the characteristics and locations of the air emissions sources, as well as the amounts and types of pollutants emitted. Periodic inventories are used to track changes in emissions over time, estimate the effectiveness of emission reduction strategies, and track the progress of air quality.

The SRMT has chosen periodic emission inventories as its approach to listing the pollutants emitted by sources. An initial emissions inventory titled Emission Inventory Report was submitted to EPA on December 30, 1999 utilizing a baseline year of 1995 and including sources within the St. Regis Mohawk Reservation's exterior boundaries. The boundaries for the emissions inventory did not include the area known as the Hogansburg Triangle. There is currently no timetable for updating the emissions inventory. The EPA finds that the method used by SRMT to produce the emissions inventory is acceptable and is proposing to approve the emissions inventory. The SRMT emissions inventory and the Tribe's process are based on guidance established in EPA's Procedures for Emission Inventory Preparation Volumes I–V, U.S. EPA Air Pollution–42 (AP–42), Emissions Inventory Improvement Program Volumes I–VII, and MOBILE 5/6.

3. Permits

Owners and/or operators of existing or proposed sources of air contaminants within the exterior boundaries of SRMT are required to submit applications and obtain permits from the SRMT Air Quality Program for the operation of such sources. However, owners and/or operators of major stationary sources subject to 40 CFR part 71 and located within the area covered by this proposed TIP must continue to obtain a title V permit from the EPA, in accordance with part 71.

Permitting procedures for minor sources are specified in sections 11 and 12 of the SRMT proposed TIP. Applications for construction and operating permits for minor sources must be obtained from the SRMT ED. The SRMT Air Quality Program will make a determination of facility status within 60 days of receipt of a complete application. A 30-day period for public comment and EPA review will be provided prior to final action by SRMT. The Air Quality Program will publish a notice of complete applications. Minor sources are required to seek renewal of the SRMT permit every 5 years from the date of original issuance. Owners or operators of affected facilities must submit their applications for renewal no later than 180 days before the date of expiration.

The issuance of construction permits follows the procedures listed in 40 CFR 51.160–51.163. Construction permits require that proposed facilities or activities do not lead to any subsequent exceedence of SRMT ambient air quality standards or NAAQS. Air quality modeling, in accordance to 40 CFR part 51, appendix W, is required for facilities or activities that will emit more than 20 tons per year (tpy) of PM_{10}, or 40 tpy of SO_2, NO_X, or O_3. Permits will be issued if the SRMT Air Quality Program determines that Reasonably Available Control Technology will be applied and the applicant has adequately demonstrated that reasonable further progress toward the attainment of air quality standards is not impaired. The Air Quality Program may modify the production/process rate, hours of operation, or other permit conditions in order to create enforceable permit conditions. Violations of permit conditions will lead to enforcement penalties that include permit revocation. EPA is proposing to approve the conditions and procedures the SRMT has established for its minor source permitting program.

Section 13 of the proposed TIP provides for permits to synthetic minor sources. Owners or operators of stationary sources that would otherwise be major sources but whose permits limit operation or emissions with pollution control devices to less than major source thresholds may request and accept Tribally- and Federally-enforceable emission limits sufficient to allow the source to be considered ''synthetic minor sources.'' A synthetic minor source is not subject to the Clean Air Act Title V—Federal Operating Permit Program, unless it is subject to that rule for any reason other than being a major source. EPA is proposing approval of the SRMT's synthetic minor source permit program.

4. Source Surveillance

Section 14 of the SRMT TIP addresses source surveillance. Source surveillance includes: (1) Emission reports and recordkeeping; (2) testing; (3) enforcement, inspection and complaints; (4) continuous emissions monitoring; and (5) quality assurance/quality control plans. In summary, the proposed TIP requires the following:

Emission reports and recordkeeping—Emission reports are to include facility, emission point, and process level information. These reports should be submitted on March 1 each year based on one of the following methods: Stack samples or other emission measurements; material balance using knowledge of the process; AP–42 emission factors; or best engineering judgment (including manufacturer's guarantees). All required records must be maintained on-site for a period of five years, and the owners or operators must make them available to representatives of the SRMT Air Quality Program upon request.

Testing—For the purpose of ascertaining compliance or non-compliance with any air pollution control plan, rule or regulation, the Air Quality Program requires the source owner or operator to report results of testing within 30 days of testing. A source owner or operator shall notify the Air Quality Program in writing, not less than 30 days prior to the test, of the time and date of the test. The notification should include procedures for stack test sampling and analytical procedures. Acceptable methods of testing are in 40 CFR part 60, appendix A and 40 CFR part 61, appendix B. For the purpose of ascertaining compliance or non-compliance with any air pollution control regulation, the Air Quality Program may conduct separate or additional emission tests on behalf of the SRMT. A source owner or operator shall provide sampling ports, scaffolding and other pertinent equipment required for emission testing.

Enforcement—Enforcement of these rules and regulations is performed by St. Regis Mohawk Conservation Officers, with EPA exercising certain primary criminal enforcement authorities as described in the November 20, 2003 Memorandum of Agreement between

the Tribe and EPA. The Conservation Officers are also responsible for inspecting facilities based on any complaints received. Findings shall be recorded and a copy given to both the facility and the Air Quality Program. The Air Quality Program representative is responsible for annual facility inspections and any unannounced audits. As noted earlier, the TIP provisions approved by EPA are also federally enforceable, and therefore EPA may also exercise its civil enforcement authorities, as appropriate, and in consultation with the SRMT.

Continuous emissions monitoring requirements are provided in Section 14.3 of the proposed TIP. The owners and operators of any source conducting source surveillance shall be required to install and operate Continuous Emission Monitors on each affected unit at the source, and to assure the quality of data for sulfur dioxide, nitrogen oxides, opacity and volumetric flow at each such unit. All units over 25 megawatts and new units under 25 megawatts that use fuel with a sulfur content greater than 0.05 percent by weight are required to measure and report emissions. New units under 25 megawatts using clean fuels are required to certify their eligibility for an exemption every five years.

Quality assurance/quality control—The owner or operator must develop and implement a written quality assurance/quality control plan for each system. The quality control plan must include complete, step-by-step procedures and operations for calibration checks and adjustments, preventive maintenance, audits, and record keeping and reporting. The quality assurance plan must include procedures for conducting periodic performance tests.

EPA is proposing to approve the methods, requirements and procedures for source surveillance in the SRMT's proposed TIP.

5. Open Burning

Section 15 of the proposed TIP contains the open burning program. The SRMT incorporated the Tribal Burn Regulation into Tribal Council Resolution 2002–59 (appendix I of the proposed TIP) and reaffirmed it in Tribal Council Resolution 2003–06 (appendix K of the proposed TIP) on January 13, 2003. The Tribal Burn Regulation is located in appendix J of the proposed TIP. The regulation prohibits burning of solid waste, food garbage, municipal solid waste, hazardous waste, household hazardous waste, refuse, rubbish from salvage, land clearing, or generated by residential or commercial activities as a means of on-site disposal, field fires, and tires. Some types of burning (land clearing, community burning, burning in specifically designated areas) may be allowed by a permit issued by the Air Quality Program, if it is not contrary to other Tribal laws. This may include burning, at appropriate designated sites, of toxic, explosive, or dangerous materials for a specific period. Permits for planned burning are required for the purposes of weed abatement, prevention of fire hazard, and disease and pest prevention.

Permits are not required for fires for the cooking of food, providing of warmth for human beings, recreational purposes, religious or ceremonial purposes, orchard heaters for the purpose of frost protection in farming or nursery operations, fire department and criminal enforcement training, and emergency control fires.

All burning permits are valid for the date specified on the permit. Violators of open burning regulations are subject to financial penalties, fines, and/or other forms of penalties which will be levied by the Tribal Court. EPA is proposing approval of the proposed SRMT TIP's open burning regulations.

6. Enforcement

Through the Safety and Civil Obedience Plan (appendices L, M, and N of the proposed TIP), the St. Regis Mohawk Tribal Police respond to complaints, requests for assistance, reports of problems and/or any other type of inquiry reasonably related to their official duties as police officers. The St. Regis Mohawk Tribal Police and Conservation Officers will assume enforcement activities for the purpose of air regulations compliance. Individuals or owners of sources of air contaminants will be advised of their activities and issued a summons which will detail the exact provision of the TIP that was allegedly violated and the date and time of violation. The Peacemakers Court-Civil Disobedience Division (Court) shall be the arbiter of all summons and complaints filed by tribal authorities under this proposed TIP. Air contamination sources may be sealed if they have not complied within the time period allotted by the Court. Sealing a source means labeling or tagging a source in order to notify any person that operating the source is prohibited and includes physical means of preventing the source from operating. The physical means are non-destructive and include, but are not limited to, bolting, chaining, and wiring shut control panels. Sources that are sealed will not be operated until modifications are made to sources so that they meet requirements. Sources that are sealed will only be unsealed by persons authorized by the Court. EPA finds the SRMT has adequately established an enforcement mechanism to compliment its regulations, and EPA proposes to approve it.

7. Review of State Permits

The Air Quality Program will evaluate and comment on air permit notices and draft permits for facilities located in contiguous areas where the air emissions may affect the Reservation's air quality and/or facilities located within 50 miles of the area covered by this proposed TIP. This is consistent with EPA's September 19, 2000 determination that the Tribe is eligible for TAS for the purpose of performing such reviews in accordance with Section 505(a)(2) of the Act.

8. Regional Haze Planning

Regional haze planning is incorporated into the proposed TIP in section 20. The purpose of regional haze plans is to improve visibility in mandatory Federal Class I areas (primarily national parks and wilderness areas). In 1999, EPA issued regional haze regulations that require states to work together to address this air quality concern. The final regional haze rule provides for eventually reaching natural background condition in Class I areas by 2064. Because emissions that cause haze are emitted over wide areas and haze precursors are transported by winds, a regional program to implement the EPA's final rule helps to improve visibility not only in parks and wilderness areas, but in many other areas of the ozone transport region as well.

The regional haze rule also started a process for the EPA to develop implementation plans for regional haze. Given the regional nature of the problem, in addition to endorsing regional planning, the rule endorsed the role of states and Indian tribes within regional planning organizations. The Mid-Atlantic Northeast Visibility Union was formed on July 24, 2001, and is the organization that encompasses the SRMT reservation (appendix E of the proposed TIP).

The SRMT Air Quality Program in conjunction with the Ozone Transport Commission, Mid-Atlantic States for Regional Air Management, the Northeast States for Coordinated Air Use Management, eleven states and the Penobscot Indian Nation of Maine are committed to a long-term strategy for implementing the final regional haze rule. EPA is proposing approval into the

TIP of the SRMT's commitment and planning as it applies to regional haze.

VI. What EPA action is being taken today?

With the exceptions below, the EPA is proposing approval of the proposed SRMT TIP, which contains programs to address: Ambient air quality standards for SO_2, PM, NO_2, and O_3; Emissions Inventory; Permitting; Synthetic Minor Facilities; Source Surveillance; Open Burning; Enforcement; Review of State Permits; and Regional Haze Planning. The EPA is not taking action on the SRMT TIP regarding fluoride and other metal standards because the EPA has not promulgated ambient air quality standards for these metals that can be enforced through a federally-approved SIP or TIP. EPA is not taking action on the SRMT TIP lead standard because it is not equivalent to the EPA air quality standard. The public docket contains SRMT's proposed TIP, TAS Eligibility determination, and enforcement MOA with EPA. Contact the For Further Information Contact for additional information on the materials contained in the docket.

Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)), this proposed 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 proposed action merely proposes to approve laws of an eligible Indian tribe as meeting Federal requirements and imposes no additional requirements beyond those imposed by Tribal law. Accordingly, the Administrator certifies that this proposed 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 proposes to approve pre-existing requirements under Tribal law and does not impose any additional enforceable duty beyond that required by Tribal 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).

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.'' EPA has concluded that this proposed rule will have tribal implications in that it will have substantial direct effects on the SRMT. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. EPA is proposing to approve the SRMT's TIP at the request of the Tribe. Tribal law will not be preempted as the SRMT has already incorporated the TIP into Tribal Law on October 3, 2002. The Tribe has applied for, and fully supports, the proposed approval of the TIP. If it is finally approved, the TIP will become federally enforceable.

EPA worked and consulted with officials of the SRMT early in the process of developing this proposed regulation to permit them to have meaningful and timely input into its development. In order to administer an approved TIP, tribes must be determined eligible (40 CFR part 49) for TAS for the purpose of administering a TIP. During the TAS eligibility process, the Tribe and EPA worked together to ensure that the appropriate information was submitted to EPA. SRMT and EPA also worked together throughout the process of development and Tribal adoption of the TIP. The Tribe and EPA also entered into an enforcement MOA.

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 proposes to approve a Tribal rule implementing a TIP over areas within the exterior boundaries of the St. Regis Mohawk Reservation, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed 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.

The requirements of section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (15 U.S.C. 272) do not apply to this proposed rule. In reviewing TIP submissions, the EPA's role is to approve an eligible tribe's submission, provided that it meets the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the Tribe to use voluntary consensus standards (VCS), the EPA has no authority to disapprove a TIP submission for failure to use VCS. It would thus be inconsistent with applicable law for the EPA, when it reviews a TIP submission, to use VCS in place of a TIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the NTTAA do not apply. This proposed 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.*).

List of Subjects in 40 CFR Part 49

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: August 6, 2007.

Alan J. Steinberg,

Regional Administrator, Region 2.

[FR Doc. E7–15921 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–1986–0005; FRL–8454–2]

National Oil and Hazardous Substance Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Bailey Waste Disposal Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 6 is issuing a notice of intent to delete the Bailey Waste Disposal Superfund Site located in Bridge City, Texas from the National Priorities List (NPL) and requests public comments on this notice of intent. The NPL, promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is found at Appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Texas, through the Texas Commission on Environmental Quality (TCEQ), have determined that all appropriate response actions under CERCLA, other than operation and

maintenance and five-year reviews, have been completed. However, this deletion does not preclude future actions under Superfund.

In the ''Rules and Regulations'' Section of this **Federal Register**, we are publishing a direct final notice of deletion of the Bailey Waste Disposal Superfund Site without prior notice of intent to delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this deletion in the direct final deletion. If we receive no adverse comment(s) on this notice of intent to delete or the direct final notice of deletion, we will not take further action on this notice of intent to delete. If we receive adverse comment(s), we will withdraw the direct final notice of deletion, and it will not take effect. We will, as appropriate, address all public comments in a subsequent final deletion notice based on this notice of intent to delete. We will not institute a second comment period on this notice of intent to delete. Any parties interested in commenting must do so at this time. For additional information see the direct final notice of deletion located in the Rules section of this **Federal Register**.

DATES: Comments concerning this Site must be received by September 13, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–SFUND–1986–0005, by one of the following methods:

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

E-mail: walters.donn@epa.gov.

Fax: 214–665–6660.

Mail: Donn Walters, Community Involvement, U.S. EPA Region 6 (6SF–TS), 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6483 or 1–800–533–3508.

Instructions: Direct your comments to Docket ID No. EPA–HQ–SFUND–1986–0005. EPA 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, disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected. 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 automatically be 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 disclosure of which 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 at *http://www.regulations.gov* or in hard copy at the information repositories.

FOR FURTHER INFORMATION CONTACT: Scott Harris, PhD, Remedial Project Manager (RPM), U.S. EPA Region 6 (6SF–RA), 1445 Ross Avenue, Dallas, TX 75202–2733, *harris.scott@epa.gov* or (214) 665–7114 or 800–533–3508.

SUPPLEMENTARY INFORMATION: For additional information see the Direct Final Notice of Deletion located in the ''Rules'' section of this **Federal Register**.

Information Repositories: Repositories have been established to provide detailed information concerning this decision at the following locations: U.S. EPA Online Library System at *http://www.epa.gov/natlibra/ols.htm;* U.S. EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, (214) 665–6617, by appointment only Monday through Friday 9 a.m. to 12 p.m. and 1 p.m. to 4 p.m.; Marion and Ed Hughes Public Library, 2712 Nederland Avenue, Nederland, Texas, 77627, (409) 722–1255, Monday 1 p.m. to 9 p.m., Tuesday through Friday 10 a.m. to 6 p.m. and closed Saturday–Sunday; City of Orange Public Library, 220 N. 5th Street, Orange, Texas, 77630, (409) 883–1086, Saturday and Monday 10 a.m. to 2 p.m., Tuesday 12 p.m. to 8 p.m. Wednesday through Friday 10 a.m. to 5 p.m. and closed Sunday; Texas Commission on Environmental Quality (TCEQ), Central File Room Customer Service Center, Building E, 12100 Park 35 Circle, Austin, Texas, 78753, (512) 239–2900, Monday through Friday 8 a.m. to 5 p.m.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: July 19, 2007.

Richard E. Greene,

Regional Administrator, EPA Region 6.

[FR Doc. E7–15897 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 232 and 252

RIN 0750–AF63

Defense Federal Acquisition Regulation Supplement; Mandatory Use of Wide Area WorkFlow (DFARS Case 2006–D049)

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

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require use of the Wide Area WorkFlow-Receipt and Acceptance (WAWF–RA) electronic system for submitting and processing payment requests under DoD contracts. DoD-wide use of WAWF–RA will increase the efficiency of the payment process.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 15, 2007, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2006–D049, using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: dfars@osd.mil.* Include DFARS Case 2006–D049 in the subject line of the message.
- *Fax:* (703) 602–7887.

• *Mail:* Defense Acquisition Regulations System, Attn: Mr. John McPherson, OUSD (AT&L) DPAP (CPF), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

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

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Mr. John McPherson, (703) 602–0296.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends DFARS Subpart 232.70, and the contract clause at DFARS 252.232–7003, to require use of the WAWF–RA electronic system for submission and processing of payment requests under DoD contracts. DFARS Subpart 232.70 presently identifies three accepted electronic forms of transmitting payment requests under DoD contracts. Those are (1) American National Standards Institute (ANSI) X.12 Electronic Data Interchange (EDI); (2) Web Invoicing System; and (3) WAWF–RA. The proposed rule will still allow a contractor to submit a payment request through an electronic means other than WAWF–RA, or in a non-electronic format, if authorized by the contracting officer. In addition, the proposed rule will allow contractors to submit ANSI X.12 EDI transactions through WAWF–RA.

The proposed changes will reduce the problems created by DoD's nonintegrated financial systems, by facilitating the electronic transmission of payment documents and related data. WAWF–RA, when fully implemented and utilized, will eliminate paper documents, eliminate redundant data entry, improve data accuracy, reduce the number of lost or misplaced documents, and ultimately, result in more timely payments to contractors.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

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

The objective of the proposed rule is to fully automate the payment process, including receiving reports, to significantly improve the timeliness of payments and to reduce DoD's interest charges for late payments. The proposed rule continues DoD's implementation of the electronic invoicing requirements of 10 U.S.C. 2227, as added by Section 1008 of the National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398).

American National Standards Institute (ANSI) X.12 Electronic Data Interchange (EDI) and Web Invoicing System (WInS) cannot process all DoD payment request types, nor can they process receiving reports. In addition, EDI and WInS information cannot be made available to all interested Government offices and organizations. WAWF–RA is the only DoD system that can process all payment request types as well as receiving reports. WAWF–RA keeps historical files that are readily available for both contractor and Government use. In addition, the use of WAWF–RA has contributed significantly to improving the timeliness of payments and to DoD's goal of reducing interest charges for late payments.

The proposed rule changes the electronic systems available for submitting invoices to DoD. Approximately 1,000 small entities will be required to switch from the existing WInS to the WAWF–RA system, used by over 20,000 small entities. Both systems involve submission of invoices through the World Wide Web. Approximately 1 hour is needed to learn the new system. No reporting, recordkeeping, or compliance records will be required from small entities. All such records will be generated by DoD as a by-product of the use of the required systems.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2006–D049.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 232 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 232 and 252 as follows:

1. The authority citation for 48 CFR parts 232 and 252 continues to read as follows:

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

PART 232—CONTRACT FINANCING

2. Section 232.7002 is amended in paragraph (b) by revising the last sentence to read as follows:

232.7002 Policy.

* * * * *

(b) * * * Scanned documents are acceptable for processing supporting documentation other than receiving reports and other forms of acceptance.

* * * * *

3. Section 232.7003 is revised to read as follows:

232.7003 Procedures.

(a) The accepted electronic form for submission of payment requests is Wide Area WorkFlow-Receipt and Acceptance (see Web site—*http://wawf.eb.mil/*).

(b) If the payment office and the contract administration office concur, the contracting officer may authorize a contractor to submit a payment request using an electronic form other than Wide Area WorkFlow-Receipt and Acceptance. However, with this authorization, the contractor and the contracting officer shall agree to a plan, which shall include a timeline, specifying when the contractor will transfer to Wide Area WorkFlow-Receipt and Acceptance.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 252.232–7003 is amended as follows:

a. By revising the clause date;

b. In paragraph (a)(2), by revising the last sentence; and

c. By revising paragraphs (b) and (c) to read as follows:

252.232–7003 Electronic Submission of Payment Requests.

* * * * *

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (XXX 2007)

(a) * * *

(2) * * * However, scanned documents are acceptable when they are

part of a submission of a payment request made using Wide Area WorkFlow-Receipt and Acceptance (WAWF–RA) or another electronic form authorized by the Contracting Officer.

* * * * *

(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests using WAWF–RA, in one of the following electronic formats that WAWF–RA accepts: Electronic Data Interchange, Secure File Transfer Protocol, or World Wide Web input. Information regarding WAWF–RA is available on the Internet at *https://wawf.eb.mil/.*

(c) The Contractor may submit a payment request using other than WAWF–RA only when—

(1) The Contracting Officer authorizes use of another electronic form. With such an authorization, the Contractor and the Contracting Officer shall agree to a plan, which shall include a timeline, specifying when the Contractor will transfer to Wide Area WorkFlow-Receipt and Acceptance;

(2) DoD is unable to receive a payment request in electronic form; or

(3) The Contracting Officer administering the contract for payment has determined, in writing, that electronic submission would be unduly burdensome to the Contractor. In such cases, the Contractor shall include a copy of the Contracting Officer's determination with each request for payment.

* * * * *

[FR Doc. E7–15928 Filed 8–13–07; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AU80

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Arenaria ursina (Bear Valley Sandwort), Castilleja cinerea (Ash-gray Indian Paintbrush), and Eriogonum kennedyi var. austromontanum (Southern Mountain Wild-buckwheat)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, notice of availability of draft economic analysis, and amended Required Determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed designation of critical habitat for *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonumkennedyi* var. *austromontanum* under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis for the proposed critical habitat designation and an amended Required Determinations section of the proposal. The draft economic analysis forecasts future costs associated with conservation efforts for the three listed plants in the areas proposed for designation to be $1.95 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is $1.45 million ($0.10 million annualized); or $1.03 million, using a discount rate of 7 percent ($0.10 million annualized). The amended Required Determinations section provides our determination concerning compliance with applicable statutes and Executive Orders that we deferred until the information from the draft economic analysis of this proposal was available. We are reopening the comment period to allow all interested parties to comment simultaneously on the proposed rule, the associated draft economic analysis, and the amended Required Determinations section.

DATES: We will accept public comments until September 13, 2007.

ADDRESSES: Written comments and materials may be submitted to us by any one of the following methods:

(1) E-mail: Please submit electronic comments to *fw8cfwocomments@fws.gov*. Include ''pebble plains plants'' in the subject line. Please see the Public Comments Solicited section under **SUPPLEMENTARY INFORMATION.**

(2) Facsimile: You may send your comments to 760–431–5901.

(3) U.S. mail or hand-delivery: You may submit written comments and information to Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Carlsbad, CA 92011.

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

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the address listed in **ADDRESSES** (telephone: 760–431–9440). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We will accept written comments and information during this reopened comment period. We solicit comments on the proposed critical habitat designation for *Arenariaursina* (Bear Valley sandwort), *Castillejacinerea* (Ash-gray Indian paintbrush), and *Eriogonumkennedyi* var. *austromontanum* (southern mountain wild-buckwheat) (also collectively referred to herein as three pebble plains plants), published in the **Federal Register** on November 22, 2006 (71 FR 67712), and on our draft economic analysis of the proposed designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why habitat should or should not be designated as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation will outweigh threats to these species caused by designation, such that designation of critical habitat is prudent;

(2) Specific information on the amount and distribution of *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* habitat, and what areas that were occupied at the time of listing that contain features essential for the conservation of the species should be included in the designation and why, and what areas that were not occupied at the time of listing are essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Information on the extent to which any State and local environmental protection measures referred to in the draft economic analysis may have been adopted largely as a result of the listing of *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum*;

(5) Information on whether the draft economic analysis identifies all State and local costs attributable to the proposed critical habitat designation, and information on any costs that have been inadvertently overlooked;

(6) Information on whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(7) Information on whether the draft economic analysis correctly assesses the effect on regional costs associated with any land use controls that may derive from the designation of critical habitat;

(8) Information on areas that could potentially be disproportionately impacted by designation of critical habitat for *Arenariaursina*, *Castillejacinerea*, or *Eriogonumkennedyi* var. *austromontanum*;

(9) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation of critical habitat, and in particular, any impacts on small entities; and the benefits of including or excluding areas that exhibit these impacts;

(10) Information on whether the draft economic analysis appropriately identifies all costs that could result from the designation;

(11) Information on whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments;

(12) Economic data on the incremental effects that would result from designating any particular area as critical habitat; and

(13) Information on whether there are any quantifiable economic benefits that could result from the designation.

Pursuant to section 4(b)(2) of the Act, an area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

All previous comments and information submitted during the initial comment period from November 22, 2006, to January 22, 2007, for the proposed rule (71 FR 67712) need not be resubmitted. If you wish to comment, you may submit your comments and materials concerning the draft economic analysis and the proposed rule by any one of several methods (see **ADDRESSES**). Our final designation of critical habitat will take into consideration all comments and any additional information we have received during both comment periods. On the basis of public comment on this analysis, the critical habitat proposal, and the final economic analysis, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

If submitting comments electronically, please also include ''Attn: pebble plains plants'' and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

You may obtain copies of the proposed rule and draft economic analysis by mail from the Carlsbad Fish and Wildlife Office (see **ADDRESSES**) or by visiting our website at *http://www.fws.gov/carlsbad/SBMP.htm*.

Background

On September 13, 2004, the Center for Biological Diversity and the California Native Plant Society filed a joint lawsuit challenging the Service's failure to designate critical habitat for six California plant species, including *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* (*Center for Biological Diversity, et al.* v. *Norton, No. ED CV–04–1150 RT (SGLx)*). In an April 14, 2005, settlement agreement, the Service agreed to submit to the **Federal Register** a proposed rule to designate critical habitat, if prudent, on or before November 9, 2006, and a final rule by November 9, 2007.

On November 4, 2006, a proposed rule to designate critical habitat for A. *ursina*, C. *cinerea*, and E. k. var. *austromontanum* was signed; it was published on November 22, 2006 (71 FR 67712). The proposal includes approximately 1,511 acres (ac) (611 hectares (ha)) of land in San Bernardino County, California.

Critical habitat is defined in section 3 of the Act as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis based on the November 22, 2006, proposed rule to designate critical habitat for *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* (71 FR 67712).

The draft economic analysis is intended to quantify the economic impacts of all potential conservation efforts for the three pebble plains plants; some of these costs will likely be incurred regardless of whether critical habitat is designated. According to the draft economic analysis, activities associated with the conservation of the three listed pebble plains plants are likely to primarily impact unauthorized off-highway vehicle use, control of invasive, nonnative plants, and dispersed recreation. The draft economic analysis forecasts future costs associated with conservation efforts for the three pebble plains plants in the areas proposed for designation to be $1.95 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is $1.45 million ($0.10 million annualized); or $1.03 million, using a discount rate of 7 percent ($0.10 million annualized). The analysis quantifies economic impacts associated with the conservation efforts on each affected entity—typically landowners or managers—associated with the following: (1) vehicle use off designated routes; (2) the presence of nonnative plant species; and (3) dispersed recreation activities.

The draft economic analysis considers the potential economic effects of actions relating to the conservation of *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum*, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable

to the designation of critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for A. *ursina*, C. *cinerea*, and E. k. var. *austromontanum* in areas containing features essential to the conservation of the species. The draft analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the ''opportunity costs'' associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. This information can be used by decision-makers to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this draft analysis looks retrospectively at costs that have been incurred since the date *Arenariaursina*, *Castillejacinerea*, and *Eriogonumkennedyi* var. *austromontanum* were listed as threatened (63 FR 49006; September 14, 1998), and considers those costs that may occur in the 20 years following the designation of critical habitat.

As stated earlier, we solicit data and comments from the public on this draft economic analysis, as well as on all aspects of the proposal. We may revise the proposal or its supporting documents to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

Required Determinations—Amended

In our November 22, 2006, proposed rule (71 FR 67712), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders was available in the draft economic analysis. Those data are now available for our use in making these determinations. In this notice we are affirming the information contained in the proposed rule concerning Executive Order (E.O.) 13132; E.O. 12988, the Paperwork Reduction Act; and the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments (59 FR 22951). Based on the information made available to us in the draft economic analysis, we are amending our Required Determinations, as provided below, concerning E.O. 12866 and the Regulatory Flexibility Act, E.O. 13211, E.O. 12630, and the Unfunded Mandates Reform Act.

Regulatory Planning and Review

In accordance with E.O. 12866, this document is a significant rule because it may raise novel legal and policy issues. Based on our draft economic analysis of the proposed designation of critical habitat for *Arenariaursina*, *Castillejacinerea*, or *Eriogonumkennedyi* var. *austromontanum*, costs related to conservation activities for these species pursuant to sections 4, 7, and 10 of the Act are estimated to be approximately $1.95 million (undiscounted) over the next 20 years. The present value of these impacts, applying a 3 percent discount rate, is $1.45 million ($0.10 million annualized); or $1.03 million, using a discount rate of 7 percent ($0.10 million annualized). Therefore, based on our draft economic analysis, we do not anticipate that the proposed designation of critical habitat for *A. ursina*, C. *cinerea*, and E. k. var. *austromontanum* would result in an annual effect on the economy of $100 million or more or affect the economy in a material way. Due to the necessary timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the proposed rule or accompanying economic analysis.

Further, E.O. 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (OMB Circular A–4, September 17, 2003). Pursuant to Circular A–4, once it has determined that the Federal regulatory action is appropriate, the agency will then need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)) (SBREFA), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based upon our draft economic analysis of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments received, this determination is subject to revision as part of the final rulemaking.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic

impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonum kennedyi* var. *austromontanum* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (such as residential development and dispersed recreation activities). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and thus will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

If this proposed critical habitat designation is made final, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our draft economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Arenaria ursina*, *Castilleja cinerea*, or *Eriogonum kennedyi* var. *austromontanum* and proposed designation of its critical habitat. The analysis is based on the estimated impacts associated with the proposed rulemaking as described in Chapters 2 through 4 of the analysis and evaluates the potential for economic impacts related to three categories: unauthorized vehicle activities; invasive, nonnative plant species management; and dispersed recreation activities.

The U.S. Forest Service (USFS), the California Department of Fish and Game, and the Boy Scouts of America are not considered small entities by the Small Business Administration. They do not meet the criteria because the first two entities are governments serving more than 50,000 people, and the Boy Scouts of America is a civic or social organization having annual receipts greater than $6.5 million. The private landowners are unlikely to be business entities. Accordingly, the small business analysis contained in Appendix A of the economic analysis focuses on economic impacts of controlling unauthorized off-highway vehicles and nonnative plant species on land owned by The Wildlands Conservancy.

The Wildlands Conservancy (TWC) is a nonprofit, public benefit organization. It was unaware of the presence of the three listed species and their habitat on its land and, to date, has not undertaken actions specific to the conservation of the plants. Potential impacts to TWC of managing unauthorized off-road vehicle use and controlling invasive, nonnative plant species are based on cost-per-acre estimates from the USFS. Annualized impacts to TWC at a 3 percent discount rate are expected to be $4,504. However, since only one entity meeting the definition of a small business owns land within the area proposed as critical habitat, we do not anticipate that this regulation, if finalized as proposed, will result in a significant impact to a substantial number of small business entities. Please refer to our draft economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether this proposed rule would result in a significant economic effect on a substantial number of small entities. For the above reasons and based on currently available information, we certify that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

Executive Order 13211 – Energy Supply, Distribution, and Use

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed designation of critical habitat for *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonumkennedyi* var. *austromontanum* is considered a significant regulatory action under E.O. 12866 due to its potentially raising novel legal and policy issues. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared without the regulatory action under consideration. The draft economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on the information in the draft economic analysis, energy-related impacts associated with A. *ursina*, C. *cinerea*, and E. k. var. *austromontanum* conservation activities within proposed critical habitat are not expected. As such, the proposed designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use and a Statement of Energy Effects is not required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)-(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments,'' with two exceptions. It excludes ''a condition of federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only

regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. As discussed in the draft economic analysis, the majority (92 percent) of the lands proposed as critical habitat are federally owned by the USFS, which does not qualify as a small government. Of the remaining eight percent, seven percent is privately owned land and one percent is State land. Consequently, we do not believe that critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630 - Takings

In accordance with E.O. 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of proposing critical habitat for *Arenaria ursina*, *Castilleja cinerea*, and *Eriogonum kennedyi* var. *austromontanum* in a takings implications assessment. The takings implications assessment concludes that this proposed designation of critical habitat for the three listed pebble plains plants does not pose significant takings implications.

Author

The primary author of this notice is the Carlsbad Fish and Wildlife Office.

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: August 3, 2007.

Todd Willens,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7–15765 Filed 8–13–07; 8:45 am]

Billing Code: 4310–55–S

Notices

Federal Register
Vol. 72, No. 156
Tuesday, August 14, 2007

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

August 9, 2007.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Agricultural Marketing Service

Title: Reporting Forms under Milk Marketing Order Programs.

OMB Control Number: 0581–0032.

Summary of Collection: Agricultural Marketing Service (AMS) oversees the administration of the Federal Milk Marketing Orders authorized by the Agricultural Marketing Agreement Act of 1937, as amended. The Act is designed to improve returns to producers while protecting the interests of consumers. The Federal Milk Marketing Order regulations require places certain requirements on the handling of milk in the area it covers. Currently, there are 10 milk marketing orders regulating the handling of milk in the respective marketing areas.

Need and Use of the Information: The information collected is needed to administer the classified pricing system and related requirements of each Federal Order. Forms are used for reporting purposes and to establish the quantity of milk received by handlers, the pooling status of the handler, and the class-use of the milk used by the handler and the butterfat content and amounts of other components of the milk. Without the monthly information, the market administrator would not have the information to compute each monthly price nor know if handlers were paying producers on dates prescribed in the order. Penalties are imposed for order violation, such as the failure to pay producers by the prescribed dates.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; Individuals or households; Farms.

Number of Respondents: 740.

Frequency of Responses: Recordkeeping; Reporting: On occasion; Quarterly; Monthly; Annually.

Total Burden Hours: 21,819.

Agricultural Marketing Service

Title: Reporting and Recordkeeping Requirements for 7 CFR, Part 29.

OMB Control Number: 0581–0056.

Summary of Collection: The Fair and Equitable Tobacco Reform Act of 2004 (7 U.S.C. 518) eliminated price supports and marketing quotas for all tobacco beginning with the 2005 crop year. Mandatory inspection and grading of domestic and imported tobacco was eliminated as well as the mandatory pesticide testing of imported tobacco and the tobacco Market News Program. The Tobacco Inspection Act (U.S.C. 511) requires that all tobacco sold at designated auction markets in the U.S. be inspected and graded. Provision is also made for interested parties to request inspection, pesticide testing and grading services on an ''as needed'' basis.

Need and Use of the Information: Information is collected through various forms and other documents for the inspection and certification process. Upon receiving request information from tobacco dealers and/or manufacturers, tobacco inspectors will pull samples and apply U.S. Standard Grades to samples to provide a Tobacco Inspection Certificate (TB–92). Also, samples can be submitted to a USDA laboratory for pesticide testing and a detailed analysis is provided to the customer.

Description of Respondents: Business or other for-profit;

Number of Respondents: 50.

Frequency of Responses: Recordkeeping; Reporting; On occasion,

Total Burden Hours: 3,851.

Agricultural Marketing Service

Title: Lamb Promotion, Research and Information Program.

OMB Control Number: 0581–0198.

Summary of Collection: The authority for Lamb Promotion, Research, and Information Order is established under the Commodity Promotion, Research, and Information Act of 1996. These programs carry out projects relating to research, consumer information, advertising, producer information, market development, and product research with the goal of maintaining and expanding their existing markets and uses and strengthening their position in the marketplace.

Need and Use of the Information: Various forms will be used to collect information for reporting, background, certification, and nomination and is the minimum information necessary to effectively carry out the requirements of the program. The information is not available from other sources because it relates specifically to individual lamb producers, feeders, seed stock producers, exporters and first handlers.

Description of Respondents: Farms; Farms; Business or other for-profit; Not-for-profit institutions.

Number of Respondents: 3,953.

Frequency of Responses: Recordkeeping; Reporting: Monthly.

Total Burden Hours: 8,066.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E7–15931 Filed 8–13–07; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

Notice of the National Agricultural Research, Extension, Education, and Economics Advisory Board Specialty Crop Meeting and Executive Committee Meeting

AGENCY: Research, Education, and Economics, USDA.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, 5 U.S.C. App 2, the United States Department of Agriculture announces a meeting of the National Agricultural Research, Extension, Education, and Economics Advisory Board Specialty Crop Committee and Executive Committee.

DATES: The National Agricultural Research, Extension, Education, and Economics Advisory Board Specialty Crop Committee will meet on August 29, 2007 and the Executive Committee will hold a meeting on August 29–30, 2007 at the Double Tree Hotel, 1150 Ninth Place, Modesto, California.

ADDRESSES: The public may file written comments before or up to two weeks after the meeting with the contact person. You may submit comments by any of the following methods: E-mail: *smorgan@csrees.usda.gov*; Fax: (202) 720–6199; Mail/Hand-Delivery or Courier: The National Agricultural Research, Extension, Education, and Economics Advisory Board; Research, Education, and Economics Advisory Board Office, Room 344–A, Jamie L. Whitten Building, United States Department of Agriculture, STOP 2255, 1400 Independence Avenue, SW., Washington, DC 20250–2255.

FOR FURTHER INFORMATION CONTACT: Shirley Morgan-Jordan, Program Support Coordinator, National Agricultural Research, Extension, Education, and Economics Advisory Board; telephone: (202) 720–8408.

SUPPLEMENTARY INFORMATION: On Wednesday, August 29, 2007, from 9 a.m. to 2 p.m., the Specialty Crop Committee will hold a listening session to study the scope and effectiveness of research, extension, and economics programs affecting the specialty crop industry. The purpose of this Specialty Crop meeting is to obtain regional input on research and education issues of high priority focusing on ''Measures to Improve the Efficiency, Productivity and Profitability of Specialty Crop Production in the United States'' and ''Measures Designed to Improve Competitiveness to Research, Extension, and Economics Programs Affecting the Specialty Crop Industry.'' Particular emphasis will be placed on further elaborating on the committee's last report entitled ''U.S. Specialty Crops: An Update on Opportunities and Challenges'', which was released May 9, 2007.

On Wednesday, August 29, 2007 at 9 a.m., the general meeting will begin with introductory remarks provided by the Chair of the Specialty Crop Committee. The REE Under Secretary of Agriculture, Dr. Gale Buchanan, has been invited to provide opening remarks. Distinguished leaders and experts, organizations or institutions, local producers, or other groups interested in the issues with which the Specialty Crop Committee is charged are invited to provide comments on two or three of the most important recommendations from their perspective by which USDA can enhance its research, extension, education, and economic programs to address needs of our nation's specialty crop sector. Following the adjournment of the National Agricultural Research, Extension, Education, and Economics Advisory Board Specialty Crop Committee Listening Session on August 29, 2007, the Executive Committee will hold their meeting on Wednesday, 4 p.m. to 6:30 p.m. at the Double Tree Hotel, 1150 Ninth Place, Modesto, California. On Thursday, August 30, 2007, the Executive Committee will reconvene at 7:30 a.m. and complete all discussions to adjourn by 9:30 a.m. The Executive Committee will be discussing a number of issues relating to the Specialty Crop Committee and other forthcoming National Agricultural Research, Extension, Education, and Economics Advisory Board concerns.

Written comments by attendees or other interested stakeholders will be welcomed for the public record before and up to two weeks following the Board meeting (by close of business Wednesday, September 12, 2007). The findings of the Specialty Crop Committee and Executive Committee will be based on input from speakers, other stakeholders, the general public, and Board discussions. These findings will be forwarded to the Advisory Board, which in turn will provide recommendations to the Secretary of Agriculture and the House and Senate agriculture-related committee/subcommittees of the U.S. Congress, as well as the land-grant colleges and universities, as mandated. All statements will become a part of the official record of the National Agricultural Research, Extension, Education, and Economics Advisory Board and will be kept on file for public review in the Research, Extension, Education, and Economics Advisory Board Office.

Done at Washington, DC this 7th day of August, 2007.

Merle Pierson,

Deputy Under Secretary, Research, Education, and Economics.

[FR Doc. E7–15918 Filed 8–13–07; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2007–0021]

Louisiana State University; Availability of an Environmental Assessment and Finding of No Significant Impact for a Field Test of Two Non-Pathogenic, Genetically Engineered Strains of *Burkholderia glumae*.

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has prepared an environmental assessment for a proposed field test involving two genetically engineered strains of the bacteria, *Burkholderia glumae. Burkholderia glumae* is a plant pathogen that causes panicle blight in rice (*Oryza sativa*). The purpose of this field test is to conduct experiments that will provide information on the pathogenicity of *Burkholderia glumae* and will assist in the development of control methods to reduce yield loss caused by panicle blight. After assessing the application, reviewing pertinent scientific information, and considering public comment, we have concluded that this field test will not present a plant pest risk, nor will it have a significant impact on the quality of the human environment. Based on its

finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared for this field test.

DATES: *Effective Date:* August 6, 2007.

ADDRESSES: You may read the environmental assessment (EA), finding of no significant impact (FONSI), and our response to the one the comment we received on the EA in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming. The EA, FONSI and decision notice, and our response to the public comment are available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/06_11101r_ea.pdf*.

FOR FURTHER INFORMATION CONTACT: Dr. Andrea Huberty, Biotechnology Regulatory Services, APHIS, 4700 River Road, Unit 147, Riverdale, MD 20737–1236; (301) 734–0659. To obtain copies of the EA, FONSI and decision notice, and our response to the public comment, contact Ms. Cynthia Eck at (301) 734–0667; e-mail: *cynthia.a.eck@aphis.usda.gov*.

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, ''Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests,'' regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered ''regulated articles.'' A permit must be obtained or a notification acknowledged before a regulated article may be introduced. The regulations set forth the permit application requirements and the notification procedures for the importation, interstate movement, or release in the environment of a regulated article.

On April 21, 2006, the Animal and Plant Health Inspection Service (APHIS) received a permit application (APHIS No. 06–111–01r) from Louisiana State University, in Baton Rouge, LA for a field test using strains of the bacterium *Burkholderia glumae*. Permit application 06–111–01r describes four *Burkholderia glumae* strains—two wild-type strains, one of which is disease-causing and the other naturally non-pathogenic, endemic to the United States, and two genetically engineered, non-pathogenic strains that share the same avirulent phenotype. The transgenic strains were created by placing base pairs of a methyltransferase gene into the cloning vector. The introduced vector, along with the methyltransferase gene, will integrate into the bacterial chromosome by homologous recombination.

The subject *Burkholderia glumae* is considered a regulated article under the regulations in 7 CFR part 340 because it is the causal pathological agent of panicle blight in rice, a plant disease occurring in the United States.

On June 19, 2007, APHIS published a notice [1] in the **Federal Register** (72 FR 33735–33736, Docket No. APHIS–2007–0021) announcing the availability of an environmental assessment (EA) for a field test of two non-pathogenic, genetically engineered strains of *Burkholderia glumae*. During the 30-day comment period, which ended on June 19, 2007, APHIS received one comment, from an academic professional who opposed APHIS granting the permit. APHIS has addressed the issues raised in the comment and has provided a response as an attachment to the finding of no significant impact (FONSI).

Pursuant to the regulations in 7 CFR part 340 promulgated under the Plant Protection Act, APHIS has determined that this field test will not pose a risk of introducing or disseminating a plant pest. Additionally, based upon analysis described in the EA, APHIS has determined that the action proposed in Alternative C of the EA, issue the permit with supplemental permit conditions, will not have a significant impact on the quality of the human environment. You may read the FONSI and decision notice on the Internet or in the APHIS reading room (see **ADDRESSES** above). Copies may also be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**.

The EA and FONSI were prepared in accordance with (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Authority: 7 U.S.C. 7701–7772 and 7781–7786; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 8th day of August 2007.

Cindy Smith,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E7–15932 Filed 8–13–07; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, the EA, and the comment we received, go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2007-0021.*

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Assessment of Fees for Dairy Import Licenses for the 2008 Tariff-Rate Import Quota Year

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice.

SUMMARY: This notice announces that the fee to be charged for the 2008 tariff-rate quota (TRQ) year for each license issued to a person or firm by the Department of Agriculture authorizing the importation of certain dairy articles, which are subject to tariff-rate quotas set forth in the Harmonized Tariff Schedule of the United States (HTS), will be $150.00 per license.

DATES: *Effective Date:* January 1, 2008.

FOR FURTHER INFORMATION CONTACT: Jorge Martinez, Dairy Import Licensing Program, Import and Trade Support Programs Division, STOP 1021, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250–1021 or telephone at (202) 720–9439 or e-mail at *Jorge.Martinez@usda.gov.*

SUPPLEMENTARY INFORMATION: The Dairy Tarrif-Rate Import Quota Licensing Regulation promulgated by the Department of Agriculture and codified at 7 CFR 6.20–6.37 provides for the issuance of licenses to import certain dairy articles that are subject to TRQs set forth in the HTS. Those dairy articles may only be entered into the United States at the in-quota TRQ tariff-rates by or the account of a person or firm to whom such licenses have been issued and only in accordance with the terms and conditions of the regulation.

Licenses are issued on a calendar year basis, and each license authorizes the license holder to import a specified quantity and type of dairy article from a specified country of origin. The use of licenses by the license holder to import dairy articles is monitored by the Import and Trade Support Programs Division, Foreign Agricultural Service, U.S.

Department of Agriculture, and the U.S. Customs and Border Protection, U.S. Department of Homeland Security.

The regulation at 7 CFR 6.33(a) provides that a fee will be charged for each license issued to a person or firm by the Licensing Authority in order to reimburse the Department of Agriculture for the costs of administering the licensing system under this regulation.

The regulation at 7 CFR 6.33(a) also provides that the Licensing Authority will announce the annual fee for each license and that such fee will be set out in a notice to be published in the **Federal Register**. Accordingly, this notice sets out the fee for the licenses to be issued for the 2008 calendar year.

Notice

The total cost to the Department of Agriculture of administering the licensing system for 2008 has been estimated to be $360,000, and the estimated number of licenses expected to be issued is 2,400. Of the total cost, $230,000 represents staff and supervisory costs directly related to administering the licensing system, and $130,000 represents other miscellaneous costs, including travel, postage, publications, forms, Internet software development, and ADP system contractors.

Accordingly, notice is hereby given that the fee for each license issued to a person or firm for the 2008 calendar year, in accordance with 7 CFR 6.33, will be $150.00 per license.

Dated: Issued at Washington, DC the 31st day of July, 2007.

Ronald Lord,

Licensing Authority.

[FR Doc. 07–3944 Filed 8–13–07; 8:45 am]

BILLING CODE 3410–10–M

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Guideline Change Involving Volume Discounts in Tariffs

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: We are announcing a change in policy to accept non-tiered volume-based rate discounts in tariffs.

DATES: *Effective Date:* August 14, 2007.

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, Packers and Stockyards Program, Grain Inspection, Packers and Stockyards Administration, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Grain Inspection, Packers and Stockyards Administration (GIPSA) enforces the Packers and Stockyards Act, 1921 (7 U.S.C. 181–229) (P&S Act). Under the P&S Act, market agencies selling on commission (market agencies) at stockyards posted by GIPSA as public livestock sales facilities operating in interstate commerce (posted stockyards) must file a tariff with GIPSA. These tariffs list the rates charged for stockyard services the market agency provides, including selling commissions (7 U.S.C. 207(a)). The use of discriminatory rates in tariffs is prohibited (7 U.S.C. 206). Neither the Packers and Stockyards Act, nor regulations promulgated thereunder, describe specifically what constitutes a discriminatory rate. Since 1978, GIPSA has investigated the reasonableness of rates only in response to specific complaints or other compelling circumstances. This general policy with regards to GIPSA investigation of rates is published at 9 CFR 203.17.

Current Policy

Currently, GIPSA policy permits volume-based rate discounts in tariffs, but the policy historically has considered non-tiered volume discounts to be discriminatory and therefore prohibited. Tiered discounts involve commission rate structures with lower selling commission rates per head above a specified number of head threshold, or lower selling commissions above a certain dollar threshold of gross proceeds. For example, in a tiered volume-based discount rate system, the commission would be the standard rate for the first 10 cows, then a discounted rate for the next ten, or it might be the standard rate for the first $10,000 in gross proceeds, then a discounted rate for the next $10,000 in gross proceeds. GIPSA currently requires that the discounted rate be applied only to that portion of a consignment above the specified number of head or dollar threshold, although GIPSA doesn't set what the threshold must be. The current policy is that those animals in the same consignment group below the specified number or dollar threshold must be assessed the non-discounted rate. Allowing the application of non-tiered volume-based discounted rates to all the animals consigned in large consignments could in some circumstances result in large volume consignors paying less in total selling commissions than small volume consignors. For example, a standard commission rate of $10 per cow for 10 cows and a non-tiered discounted rate of $9 per cow for larger sales could result in the seller of 11 cows paying less in commission ($99) than the seller of 10 cows ($100). Historically, GIPSA believed this practice to be discriminatory. The prohibition on non-tiered application of volume-based rate discounts prevented a reduction in the total amount of commissions paid as the number of animals consigned increased.

New Policy

Representatives from livestock industry groups including the Livestock Marketing Association requested that GIPSA examine its prohibition of non-tiered commission discounts. Allowing the non-tiered commission discounts to all animals consigned in large groups affords qualifying consignors significant reductions in selling cost on a per head basis. Livestock industry stakeholders have presented a number of reasons why allowing non-tiered volume discounting of commissions would benefit the industry as a whole. Primarily, the argument presented by industry groups in favor of the new policy is that non-tiered discounts are fair because they more accurately reflect the market agencies' actual cost of the transaction. Most of the cost accrued by the market agency is per transaction, not per animal. Also, the industry groups argue that stockyards now face competition from markets that did not exist in 1921, such as satellite video and internet auctions, which are not required to file tariffs with GIPSA. Livestock industry groups believe that prohibiting non-tiered volume discounts discriminates against market agencies at posted stockyards.

Stakeholders have told us that small volume consignors are not harmed when consignors of larger groups of animals receive volume-based discounts even if the discount is applied in a non-tiered manner because the same volume-based discounts are available to small volume consignors whenever they have the opportunity to consign in larger volumes. An examination of tiered tariffs conducted by the GIPSA Midwest regional office found that in some cases, the threshold for obtaining the volume discount was as small as five (5) head or $3000. Market agencies stated that the effort and cost to sell a large group of animals as a unit is comparable to that for small consignments, which is why they are willing to offer a discount on a per-animal basis for volume consigners. Market agencies also stated that large

groups of livestock of uniform quality and size help attract large volume buyers to sales at posted stockyards. They posit that this increases the level of competition among all buyers benefiting both small and large consignors. Finally, market agencies operating at posted stockyards argue they are under increasing pressure to compete with market agencies selling videotaped herds of cattle by satellite telecast or over the Internet. Video and Internet cattle sales tend to attract and draw consignments of large groups of cattle away from posted stockyards. Market agencies at posted stockyards feel the non-tiered volume-base rate discounts will help them compete more effectively for large consignment business.

GIPSA has examined its policy on non-tiered volume-based commission rate discounting and the arguments presented by livestock industry groups and market agencies. GIPSA has determined that it will change its policy to allow the use of non-tiered volume-based commission rate discounting methods in tariffs submitted for approval. GIPSA policy will not attempt to differentiate between levels of discounting but will rely on competition among markets and marketing systems to set rate levels that are fair to market agencies and livestock producers. However, GIPSA still will consider non-tiered volume-based rate discounts to be discriminatory if a market agency does not provide the same discount to all qualifying consignors.

Rate Regulation Investigations and Compliance

GIPSA will continue to investigate the validity of complaints alleging discriminatory rates for stockyard services (9 CFR 203.17(c)). Under the P&S Act (7 U.S.C. 207(e)), GIPSA can suspend the use of new rates believed to be unlawful. With or without complaints received, GIPSA may conduct an investigation and provide an opportunity for a hearing on a rate tariff set for stockyard services and if a rate is deemed in violation of the P&S Act (7 U.S.C. 205, 206, 207), GIPSA can establish a different rate and order the market agency to cease using the rate (7 U.S.C. 211).

Effective Date

This notice becomes final upon publication in the **Federal Register**.

Authority: 7 U.S.C. 203, 205, 206, 207, 211, 228.

James E. Link,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E7–15814 Filed 8–13–07; 8:45 am]

BILLING CODE 3410–KD–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Georgia Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting with briefing of the Georgia Advisory Committee to the Commission will convene at 9 a.m. and adjourn at 12 p.m. on Wednesday, August 29, 2007, at the Sam Nunn Federal Center Building, 61 Forsyth Street, SW., Conference Room Center, Conference Room A, Atlanta, GA, 30303. The purpose of this meeting is to review the Committee's school desegregation report and receive a briefing on fair housing issues in the state.

Members of the public are entitled to submit written comments; the comments must be received in the regional office by September 14, 2007. The address is: Southern Regional Office, Sam Nunn Federal Center Building, 61 Forsyth Street, SW., Suite 18T40, Atlanta, GA., 30303. Persons wishing to e-mail their comments, or to present their comments verbally at the meeting, or who desire additional information should contact Peter Minarik, Ph.D., Regional Director, (404) 562–7000, or by e-mail: *pminarik@usccr.gov.*

Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least ten (10) working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Southern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *http://www.usccr.gov,* or to contact the Southern Regional Office at the above e-mail or street address.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA. It was not possible to publish this notice 15 days in advance of the meeting date because of internal processing delays.

Dated in Washington, DC, August 9, 2007.

Ivy Davis,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. E7–15915 Filed 8–13–07; 8:45 am]

BILLING CODE 6335–02–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Travel and Tourism Advisory Board: Meeting of the U.S. Travel and Tourism Advisory Board

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The U.S. Travel and Tourism Advisory Board (Board) will hold a meeting to discuss topics related to the travel and tourism industry. The Board was established on October 1, 2003, and reconstituted October 1, 2005, to advise the Secretary of Commerce on matters relating to the travel and tourism industry.

DATES: September 5, 2007.

Time: 10:30 a.m. to 12 p.m. (EDT).

ADDRESSES: Department of Commerce, 1401 Constitution Avenue, NW., Room 4830, Washington, DC, 20230. Because of building security, all non-government attendees must pre-register. This program will be physically accessible to people with disabilities. Seating is limited and will be on a first come, first served basis. Requests for sign language interpretation, other auxiliary aids, or pre-registration, should be submitted no later than August 29, 2007, to J. Marc Chittum, U.S. Travel and Tourism Advisory Board, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone 202–482–4501, *Marc.Chittum@mail.doc.gov.*

FOR FURTHER INFORMATION CONTACT: J. Marc Chittum, U.S. Travel and Tourism Advisory Board, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone: 202–482–4501, e-mail: *Marc.Chittum@mail.doc.gov.*

Dated: August 7, 2007.

J. Marc Chittum,

Executive Secretary, U.S. Travel and Tourism Advisory Board.

[FR Doc. 07–3947 Filed 8–13–07; 4:54 pm]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Notice of a Public Meeting of the National Conference on Weights and Measures, Steering Committee on Automatic Temperature Compensation

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of a Public Meeting of the National Conference on Weights and Measures Steering Committee on Temperature Compensation, August 2007.

SUMMARY: A meeting of the National Conference on Weights and Measures (NCWM) Steering Committee on Automatic Temperature Compensation (ATC) will be held August 27, 2007, beginning at 1 p.m. in Chicago, Illinois, and will end at noon on August 29, 2007.

The ATC meeting is open to the public; however, advance registration with the NCWM is required. The NCWM is an organization of state, county, and city weights and measures officials and includes representatives of business, federal agencies, and members of the private sector which come together to develop standards related to weights and measures technology, administration, and enforcement. Pursuant to 15 U.S.C. 272(b)(6), the Weights and Measures Division of the National Institute of Standards and Technology (NIST) supports the NCWM as one of the forums it uses to solicit comments and recommendations on revising or updating a variety of publications related to legal metrology. NIST promotes uniformity among the states in laws, regulations, methods of sale, and testing equipment that comprise the regulatory control of commercial weighing and measuring devices and other practices used in trade and commerce. Publication of this notice on the NCWM's behalf is undertaken as a public service; NIST does not endorse, approve, or recommend any of the proposals contained in this notice or in NCWM publications.

DATES: August 27, 2007, to August 29, 2007.

Meeting Location: This meeting will be convened at the Sofitel Chicago O'Hare, 5550 North River Road, Rosemont, Illinois 60018, telephone: 847–678–4488; e-mail: *0894@accor.com.* Please contact the NCWM at its URL at *http://www.ncwm.net* to obtain registration form and hotel accommodation information.

SUPPLEMENTARY INFORMATION: Topics related to Automatic Temperature Compensation for Refined Petroleum Products and Other Fuels will be discussed at this meeting and includes:

1. Establishing Standardized Product Densities,
2. Establish Specifications for Temperature Probes Used by Inspectors,
3. Response Time of Thermometer Wells,
4. Referencing 15 °C vs 60 °F,
5. Temperature Uncertainties Related to the 19-Liter (5-Gallon) Test Draft,
6. Implementation: ''Permissive'' or ''Mandatory,''
7. Labeling/Signage/Receipts,
8. Tax Data,
9. Temperature Data, and
10. NCWM National Type Evaluation Program Checklist.

FOR FURTHER INFORMATION CONTACT: Carol Hockert, Chief, NIST, Weights and Measures Division, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899–2600, at 301–975–5507, e-mail *Carol.Hockert@nist.gov,* or the NCWM contact Don Onwiler, Chairman, ATC Steering Committee, National Conference on Weights and Measures, 15245 Shady Grove Road, Suite 130, Rockville, Maryland 20850–3222, at 402–471–4292, e-mail *ncwm@mgmtsol.com.* Additional NCWM contact numbers are: 240–404–6473 (Direct) and 240–632–9454 (Main).

Dated: August 9, 2007.

William Jeffrey,

Director.

[FR Doc. E7–15903 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA60

Marine Mammals; File No. 1070–1783

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

ACTION: Notice; issuance of permit amendment.

SUMMARY: Notice is hereby given that Dr. Alejandro Acevedo-Gutiérrez has been issued an amendment to scientific research Permit No. 1070–1783–01.

ADDRESSES: The amendment and related documents are available for review upon written request or by appointment in the following office(s):

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 and

Northwest Region, NMFS, 7600 Sand Point Way NE, BIN C15700, Bldg. 1, Seattle, WA 98115–0700; phone (206)526–6150; fax (206)526–6426.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly or Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: On June 1, 2007, notice was published in the **Federal Register** (72 FR 30553) that an amendment of Permit No. 1070–1783–01, issued September 5, 2006 (71 FR 53423), had been requested by the above-named individual. The requested amendment has been granted under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The permit has been amended to increase the number of harbor seals (Phoca vitulina) that may be harassed annually during scat collection on haul-out sites in Washington. The objective of the research remains the same: to study temporal and spatial variation in numbers and diet composition of harbor seals to determine responses of harbor seals to changes in prey density and the impact of seal behavior on marine protected areas. The permit amendment is valid through March 2011.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: August 8, 2007.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–15927 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB93

Advisory Committee to the U.S. Section of the International Commission for the Conservation of Atlantic Tunas (ICCAT); Summer Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of meeting.

SUMMARY: In preparation for the 2007 International Commission for the Conservation of Atlantic Tunas (ICCAT) meeting, the Advisory Committee to the U.S. Section to ICCAT will have a summer meeting.

DATES: The meeting will be held August 29–30, 2007. There will be an open session the morning of Wednesday August 29, 2007, beginning at 9 a.m. thru 12 p.m. The remainder of the meeting will be closed to the public.

ADDRESSES: The meeting will be held at the Hilton Hotel, 8727 Colesville Road, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Kelly Denit, Office of International Affairs, 301–713–2276.

SUPPLEMENTARY INFORMATION: The Advisory Committee to the U.S. Section to ICCAT will meet in an open session to consider information on stock status of highly migratory species, in particular bigeye, northern albacore and southern albacore tuna. After the open session, the Advisory Committee to the U.S. Section to ICCAT will meet in a closed session to discuss sensitive information relating to upcoming international negotiations, specifically bigeye and albacore tuna management. The Advisory Committee will also address fleet capacity management and monitoring, control and surveillance issues.

Special Accommodations

The meeting locations are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kelly Denit at (301) 713–2276 by at least 5 days prior to the meeting date.

Dated: August 8, 2007.

Rebecca Lent,

Director, Office of International Affairs, National Marine Fisheries Service.

[FR Doc. E7–15920 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XC00

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Salmon Technical Team (STT) will hold a work session by telephone conference, which is open to the public, to develop recommendations for the September, 2007 Council meeting.

DATES: The telephone conference will be held Friday, August 31, from 9 a.m. to 1 p.m.

ADDRESSES: A listening station will be available at the Pacific Fishery Management Council, Small Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Fishery Management Council: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the work session is to review information in the Council briefing book related to salmon management, and to develop comments and recommendations for consideration at the September Council meeting.

Although non-emergency issues not contained in the meeting agenda may come before the STT for discussion, those issues may not be the subject of formal STT action during this meeting. STT action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the STT'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 Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: August 9, 2007.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E7–15885 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XB98

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public scoping meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will convene a series of public scoping meetings regarding Amendment 16 to the Snapper Grouper Fishery Management Plan. Amendment 16 will end overfishing for gag (grouper) and vermilion snapper. During its June 2007 meeting, the Council received a report from its Scientific and Statistical Committee stating its approval of the Southeastern Data, Assessment, and Review (SEDAR) stock assessments for gag and vermilion snapper. The Council is charged to end overfishing within a one year period. The scoping meetings and public comment period are being held to receive input regarding possible measures to end overfishing, including modifications to current regulations and potential new measures (closed seasons, recreational boat limits, commercial trip limits, etc.) to achieve the necessary reductions.

DATES: The public scoping meetings will be held in September 2007. Written comments must be received in the Council office by 5 p.m. on September 17, 2007. See **SUPPLEMENTARY INFORMATION** for the specific dates and times of the public scoping meetings.

ADDRESSES: Written comments should be sent to Bob Mahood, Executive Director, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405, or via email to *SGAm16Scoping@safmc.net*. Copies of the Amendment 16 Scoping Document are available from Gregg Waugh, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366 or toll free at (866) SAFMC–10.

FOR FURTHER INFORMATION CONTACT: Gregg Waugh, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366; fax: (843) 769–4520; email address: *gregg.waugh@safmc.net*.

SUPPLEMENTARY INFORMATION: Public scoping meeting dates and locations. All meetings are scheduled to begin at 6 p.m.

September 4, 2007 - Hilton Wilmington Riverside, 301 North Water Street, Wilmington, NC 28401; telephone: (910) 763–5900;

September 4, 2007 - Sombrero Cay Clubs, 19 Sombrero Boulevard, Marathon, FL 33050; telephone: (305) 743–2250;

September 5, 2007 - Sheraton Atlantic Beach, 2717 W. Fort Macon Road, Atlantic Beach, NC 28512; telephone: (252) 240–1155;

September 6, 2007 - Hampton Inn Daytona Speedway, 1715 W. International Speedway Boulevard, Daytona Beach, FL 32114; telephone: (386) 257–4030;

September 10, 2007 - Holiday Inn Charleston Airport & Convention Center, 5264 International Boulevard, North Charleston, SC 29418; telephone: (843) 576–0300;

September 17, 2007 - Avista Resort, 300 N. Ocean Blvd., N. Myrtle Beach, SC 29582; telephone: (843) 249–2521

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by August 30, 2007.

Dated: August 9, 2007.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E7–15884 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN: 0648–XB99

South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold a meeting of its Snapper Grouper Advisory Panel; Advisory Panel Selection Committee (Closed Session); Standard Operations, Policy, and Procedures (SOPPs) Committee; Finance Committee; Scientific and Statistical Selection Committee (Closed Session); Information and Education Committee; Snapper Grouper Committee; Shrimp Committee; Mackerel Committee; Limited Access Privilege (LAP) Program Committee; Ecosystem-based Management Committee; Southeast Data, Assessment, and Review (SEDAR) Committee; and a meeting of the full Council. The Council will also hold a meeting of the LAP Program Exploratory Workgroup and a public scoping meeting regarding Amendment 16 to the Snapper Grouper Fishery Management Plan to address overfishing for gag grouper and vermilion snapper. The scoping meeting is included in an earlier **Federal Register** Notice.

DATES: The meetings will be held September 17, 2007 through September 21, 2007. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meeting will be held at the Avista Resort, 300 North Ocean Boulevard, N. Myrtle Beach, SC 29582; telephone: (1–800) 968–8986 or (843) 249–2521. Copies of documents are available from Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer; telephone: (843) 571–4366 or toll free at (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

Meeting Dates

1. Snapper Grouper Advisory Panel Meeting: September 17, 2007, 1 p.m. until 6 p.m.; September 18, 2007 from 8 a.m. until 12 noon (Concurrent Sessions)

The Snapper Grouper Advisory Panel will deal with issues surrounding Amendment 16 (Gag & Vermilion Snapper management) and Amendment 15. They will develop recommendations for Snapper Grouper Committee and Council consideration.

2. Advisory Panel Selection Committee Meeting: September 17, 2007, 1 p.m. until 3 p.m. (Closed Session)

The Advisory Panel Selection Committee will review applications and develop recommendations for advisory panel appointments for Council consideration.

3. SOPPs Committee Meeting: September 17, 2007, 3 p.m. until 4:30 p.m.

The SOPPs Committee will receive an update on the status of Secretarial review of Council SOPPs, develop changes to SOPPs as necessary, and consider recommended changes to the Administrative Handbook.

4. Finance Committee Meeting: September 17, 2007, 4:30 p.m. until 5:30 p.m.

The Finance Committee will receive an update on the Activities Schedule and the status of the Calendar Year 2007 budget.

Note: A public scoping meeting for Amendment 16 to the Snapper Grouper Fishery Management Plan to address overfishing for gag grouper and vermilion snapper will take place at 6 p.m. on September 17, 2007. (This meeting was included in an earlier FRN).

5. LAP Program Exploratory Workgroup Meeting: September 18, 2007, 1 p.m. until 6 p.m. and September 19, 2007, 8 a.m. until 3 p.m. (Concurrent Sessions)

The LAP Program Exploratory Workgroup will meet to discuss the Draft Working document, bulleted items under ''Prerequisites for an Industry Supported LAP Program'', and enforcement issues. Also being discussed, Outreach Sub-Committee update, data updates, data collection presentations, and collection options.

6. Scientific and Statistical Selection Committee Meeting: September 18, 2007, 8 a.m. until 9 a.m. (Closed Session)

The SSC Selection Committee will meet to review applications and develop recommendations for SSC appointments. The Committee will also discuss guidelines for SSCs being developed by NOAA Fisheries.

7. Information and Education Committee Meeting: September 18, 2007, 9 a.m. until 11 a.m.

The Information and Education Committee will receive an update on outreach efforts for the Oculina Bank Habitat Area of Particular Concern (HAPC) and Experimental Closed Area, review advisory panel comments and develop recommendations for outreach regarding marine protected areas, Limited Access Privilege Programs, the Council's Fishery Ecosystem Plan, and Amendment 16 to the Snapper Grouper Fishery Management Plan. The Committee will also receive a presentation on NOAA Fisheries Services' FishWatch Consumer Seafood Web site.

8. SEDAR Committee Meeting: September 18, 2007, 11 a.m. until 12 noon

The SEDAR Committee will provide guidance to the Council representatives for the October SEDAR Steering Committee meeting.

9. Snapper Grouper Committee Meeting: September 18, 2007, 1:30 p.m. until 6 p.m. and September 19, 2007, 8 a.m. until 12 noon

The Snapper Grouper Committee will review the results of black sea bass pot research and develop direction to staff for Snapper Grouper Amendment 16 addressing overfishing for gag grouper and vermilion snapper. The Committee will also develop recommendations for completing the public hearing draft of Snapper Grouper Amendment 15 and approve the amendment for public hearing.

10. Mackerel Committee Meeting: September 19, 2007, 1:30 p.m. until 4 p.m.

The Mackerel Committee will review the framework document for changing the Atlantic Spanish Mackerel trip limit and approve the document for submission to the Secretary of Commerce for formal review. The Committee will also discuss geographical allocation of the commercial king mackerel quota.

11. Shrimp Committee Meeting: September 19, 2007, 4 p.m. until 6 p.m.

The Shrimp Committee will review the analysis of options to be considered in Shrimp Amendment 7 (addressing rock shrimp permit issues) and provide guidance to staff.

12. Ecosystem-based Management Committee Meeting: September 20, 2007, 8 a.m. until 12 noon

The Ecosystem-based Management Committee will receive a update on the status of the Fishery Ecosystem Plan, presentations on Coral HAPCs and deepwater corals, and recommend management options to include in the Ecosystem Comprehensive Amendment. The Committee will also receive reports on Ocean Observing Systems and a recent alternative energy workshop.

13. Limited Access Privilege (LAP) Program Committee Meeting: September 20, 2007, 1:30 p.m. until 3:30 p.m.

The LAP Program Committee will receive a presentation on the Gulf Red Snapper Individual Fishing Quota (IFQ) Program and updates concerning the LAP Program Workgroup.

14. Council Session: September 20, 2007, 3:30 p.m. until 6 p.m. and September 21, 2007, 8 a.m. until 12 noon

Council Session: September 20, 2007, 3:30 p.m. until 6 p.m.

From 3:30 p.m. - 4 p.m., the Council will call the meeting to order, adopt the agenda, approve the June 2007 meeting minutes, elect a Chair and Vice-Chair, and make presentations.

From 4 p.m. - 4:15 p.m., the Council will review Experimental Fishing Permit applications.

From 4:15 p.m. - 4:45 p.m., the Council will receive a presentation on Amendment 2 to the Consolidated Highly Migratory Species (HMS) Fishery Management Plan.

From 4:45 p.m. - 5:15 p.m., the Council will receive a report on Working Waterfronts.

From 5:15 p.m. - 6 p.m., the Council will receive a report from the Mackerel Committee and take action as appropriate.

5:15 p.m. - Public Comment Session: Public comment regarding the Mackerel Framework Document addressing the Atlantic Spanish mackerel fishing trip limit.

Council Session: September 21, 2007, 8 a.m. - 12 noon.

From 8 a.m. - 8:15 a.m., the Council will receive a NOAA General Counsel briefing on litigation issues (CLOSED SESSION).

From 8:15 a.m. - 8:30 a.m., the Council will receive a report from the Snapper Grouper Committee and approve Amendment 15 for public hearing, approve alternatives for Amendment 16, and consider other Committee recommendations and take action as appropriate.

From 8:30 a.m. - 8:45 a.m., the Council will receive a report from the Shrimp Committee and take action as appropriate.

From 8:45 a.m. - 9 a.m., the Council will receive a report from the LAP Program Committee and take action as appropriate.

From 9 a.m. - 9:15 a.m., the Council will receive a report from the Ecosystem-based Management Committee and take action as appropriate.

From 9:15 a.m. - 9:30 a.m., the Council will receive a report from the SEDAR Committee and take action as appropriate.

From 9:30 a.m. - 9:45 a.m., the Council will receive a report from the Finance Committee and take action as appropriate.

From 9:45 a.m. - 10 a.m., the Council will receive a report from the Advisory Panel Selection Committee and take action as appropriate.

From 10 a.m. - 10:15 a.m., the Council will hear a report from the SSC Selection Committee and take action as appropriate.

From 10:15 a.m. - 10:30 a.m., the Council will hear a report from the SOPPs Committee and take action as appropriate.

From 10:30 a.m. - 10:45 a.m., the Council will hear a report from the Information and Education Committee and take action as appropriate.

From 10:45 a.m. - 12 noon, the Council will receive status reports from NOAA Fisheries' Southeast Regional Office, NOAA Fisheries' Southeast Fisheries Science Center, agency and liaison reports, and discuss other business including upcoming meetings.

Documents regarding these issues are available from the Council office (see **ADDRESSES**).

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subjects of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305 (c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Except for advertised (scheduled) public hearings and public comment, the times and sequence specified on this agenda are subject to change.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by September 12, 2007.

Dated: August 9, 2007.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E7–15886 Filed 8–13–07; 8:45 am]

BILLING CODE 3510–22–S

COMMODITY FUTURES TRADING COMMISSION

Agency Information Collection Activities: Notice of Intent To Renew Collection 3038–0025, Practice by Former Members and Employees of the Commission

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice.

SUMMARY: The Commodity Futures Trading Commission (CFTC) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on requirements relating to practice before the Commission by former members and employees of the Commission.

DATES: Comments must be submitted on or before October 15, 2007.

ADDRESSES: Comments may be mailed to John P. Dolan, Office of the General Counsel, U.S. Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.

FOR FURTHER INFORMATION CONTACT: John P. Dolan at (202) 418–5120; FAX: (202) 418–5524; e-mail: *jdolan@cftc.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information''is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of the proposed collection of information listed below.

With respect to the following collection of information, the CFTC invites comments on:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- The accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

Practice by Former Members and Employees of the Commission, OBM Control Number 3038–0025—Extension

Commission Rule 140.735–6 governs the practice before the Commission of former members and employees of the Commission and is intended to ensure that the Commission is aware of any existing conflict of interest. The rule generally requires former members and employees who are employed or retained to represent any person before the Commission within two years of the termination of their CFTC employment to file a brief written statement with the Commission's Office of General Counsel. The proposed rule was promulgated pursuant to the Commission's rulemaking authority contained in Section 8a(5) of the Commodity Exchange Act, 7 U.S.C. 12a(5) (1994).

The Commission estimates the burden of this collection of information as follows:

ESTIMATED ANNUAL REPORTING BURDEN

17 CFR section	Annual number of respondents	Frequency of response	Total annual responses	Hours per response	Total hours
17 CFR 140.735–6	3	1.5	4.5	.10	0.45

There are no capital costs or operating and maintenance costs associated with this collection.

This estimate is based on the number of responses received over the last three years.

Dated: August 8, 2007.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 07–3951 Filed 8–13–07; 8:45 am]

BILLING CODE 6351–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Termination of Federal Advisory Committee

AGENCY: DoD.

ACTION: Notice.

SUMMARY: Under the provisions of Executive Order 13426, the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.55, the Department of Defense gives notice that it is terminating the President's Commission on Care for America's Returning Wounded Warriors on August 30, 2007.

The President's Commission on Care for America's Returning Wounded Warriors, pursuant to section 6, of Executive Order 13426, is terminated 30 days after it submits its report to the President through the Secretary of Defense and the Secretary of Veterans Affairs. The President's Commission on Care for America's Returning Wounded Warriors, which submitted its report to the President on July 30, 2007, was chartered to:

1. Examine the effectiveness of returning wounded service members' transition from deployment in support of the Global War on Terror to successful return to productive military service or civilian society, and recommend needed improvements;

2. Evaluate the coordination, management, and adequacy of the delivery of health care, disability, traumatic injury, education, employment, and other benefits and services to returning wounded Global War on Terror service members by Federal agencies as well as the private sector, and recommend ways to ensure that programs provide high-quality services;

3. (a) Analyze the effectiveness of existing outreach to service members regarding such benefits and services, and service members' level of awareness of an ability to access these benefits and services, (b) identify ways to reduce

barriers to and gaps in the benefits and services; and

4. Consult with foundations, veterans service organizations, non-profit groups, faith-based organizations, and others as appropriate, in performing the Commission's functions.

The President's Commission on Care for America's Returning Wounded Warriors' final report, title ''Serve, Support, Simplify'', contains the six recommendations and can be viewed at the Commission's Web site: *http://www.pccww.gov/index.html.*

Pursuant to 41 CFR 102–3.175(a), the Department of Defense, no later than July 30, 2008, shall submit a follow-up report on the recommendations made by the President's Commission on Care for America's Returning Wounded Warriors. This report will be submitted to the congressional oversight committees, the Committee Management Secretariat for the General Services Administration, and the Library of Congress.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, DoD Committee Management Office, 703–601–2554, extension 128.

Dated: August 8, 2007.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07–3952 Filed 8–13–07; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Task Force on Sexual Assault in the Military Services

AGENCY: Office of the Under Secretary of Defense (Personnel and Readiness); DoD.

ACTION: Committee Meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, announcement is made of the following committee meeting:

Name of Committee: Defense Task Force on Sexual Assault in the Military Services (hereafter referred to as the Task Force).

Date: September 19, 2007.

Time: 7:30 a.m. to 5:30 p.m.

Place of Meeting: Crystal Gateway One, 1235 South Clark Street, Washington Headquarters Services (WHS) Conference Room, Suite 940, Arlington, Virginia 22202.

Purpose of the Meeting: The purpose of the administrative work meeting is to: (a) Discuss administrative matters of the Task Force; (b) receive administrative information from the Department of Defense; and (c) complete the appointment of the Task Force Members by administering their oaths of office.

The administrative working meeting will be held at Crystal Gateway One, 1235 South Clark Street, Washington Headquarters Services (WHS) Conference Room, Suite 940, Arlington, Virginia 22202 from 7:30 a.m. to 5:30 p.m. on Wednesday, September 19, 2007. Pursuant to 41 CFR 102–3.160, this Administrative Work Meeting is closed to the public.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to the Task Force Membership about the Task Force's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of the planned meeting of the Task Force.

All written statements shall be submitted to the Designated Federal Officer (hereafter DFO) for the Task Force. The DFO will ensure that the written statements are provided to the Membership for their consideration. Contact information for the Task Force DFO can be obtained from the GSA's FACA Database—*http://www.fido.gov/facadatabase/public.asp*.

Pursuant to 41 CFR 102–3.150, the DFO will announce planned meetings of the Task Force. The DFO may also provide additional guidance on the submission of written statements or other materials in response to the stated agenda for the planned meeting in question.

FOR FURTHER INFORMATION CONTACT: Lieutenant Shaka Thorne, JAGC, U.S. Navy, Designated Federal Officer, Defense Task Force on Sexual Assault in the Military Services, 2850 Eisenhower Ave, Suite 100, Alexandria, Virginia 22314, Telephone: (703) 325–6640, Fax: (703) 325–6710/6711, DSN# 221, *shaka.thorne@wso.whs.mil*.

Dated: August 9, 2007.

C.R. Choate,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 07–3988 Filed 8–10–07; 12:32 pm]

BILLING CODE 5001–06–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, September 6, 2007, 9 a.m.–5 p.m.; Friday, September 7, 2007, 8:30 a.m.–4 p.m.

ADDRESSES: Seattle Public Library, 1000 Fourth Avenue, Seattle, Washington 98104, Phone: (206) 386–4636.

FOR FURTHER INFORMATION CONTACT: Erik Olds, Federal Coordinator, Department of Energy Richland Operations Office, 2440 Stevens Drive, P.O. Box 450, H6–60, Richland, WA 99352; Phone: (509) 372–9130; or e-mail: *Theodore_E_Erik_Olds@orp.doe.gov*.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Annual Agency Updates (Department of Energy Office of River Protection and Richland Operations Office; Washington State Department of Ecology; and the U.S. Environmental Protection Agency).
- Discussion on Board Priorities from Hanford Advisory Leadership Retreat and Adoption of Priorities.
- Introduction of the Hanford Advisory Board Process Manual.
- Tank Waste Committee Updates, includes Early Startup of the Low-Activity Waste Facility; Demonstration Bulk Vitrification System; and Tank Closure and Waste Management Environmental Impact Statement.
- River and Plateau Committee Updates, includes the River Corridor Risk Assessment for the 100 and 300 Areas; the July 24th workshop on groundwater data gap for cleanup decisions in the 100 and 300 Areas; and Institutional Controls.
- Budget and Contracts Committee Updates, includes Briefing on Request for Proposals; Fiscal Year 2009 Budget Submission Update; and Fiscal Year 2008 Budget Appropriations.
- Tri-Party Agreement Negotiations.
- Request for Proposals.

Public Participation: The meeting is open to the public. Written statements

may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Erik Olds' office at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comment will be provided a maximum of five minutes to present their comments.

Minutes: The minutes of this meeting will be available for public review and copying at the U.S. Department of Energy's Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday–Friday, except Federal holidays. Minutes will also be available by writing to Erik Olds' office at the address or telephone number listed above.

Issued at Washington, DC on August 9, 2007.

Rachel M. Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. E7–15870 Filed 8–13–07; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2007–0358; FRL–8454–7]

Agency Information Collection Activities: Proposed Collection; Comment Request; Reporting and Recordkeeping Requirements Under the Responsible Appliance Disposal Program; EPA ICR No. 2254.01; OMB Control No. 2060–NEW

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request for a new Information Collection Request (ICR) to the Office of Management and Budget (OMB). Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before October 15, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2007–0358, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epamail.epa.gov.*
- *Fax:* 202–566–1741.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2007–0358, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, NW., Mailcode: 2822T, Washington, DC 20460.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, NW., Room 3334, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2003–0358. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Note: The EPA Docket Center suffered damage due to flooding during the last week of June 2006. The Docket Center is continuing to operate. However, during the cleanup, there will be temporary changes to Docket Center telephone numbers, addresses, and hours of operation for people who wish to make hand deliveries or visit the Public Reading Room to view documents. Consult EPA's **Federal Register** notice at 71 FR 38147 (July 5, 2006) or the EPA Web site at *http://www.epa.gov/epahome/dockets.htm* for current information on docket operations, locations and telephone numbers. The Docket Center's mailing address for U.S. mail and the procedure for submitting comments to *http://www.regulations.gov* are not affected by the flooding and will remain the same.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2007–0358. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. (For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*)

FOR FURTHER INFORMATION CONTACT: Evelyn Swain, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation, 1200 Pennsylvania Ave., NW., (6205J), Washington, DC 20460; telephone number: (202) 343–9956; facsimile number: (202) 343–2362; e-mail address: *swain.evelyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

How Can I Access the Docket and/or Submit Comments?

The EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–OAR–2007–0358, which is available for online viewing at *http://www.regulations.gov*, or in person viewing at the Air Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is 202–566–1744, and the telephone number for the Docket is 202–566–1752.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

What Should I Consider When I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under **DATES**.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What Information Collection Activity or ICR Does This Apply to?

[Docket ID No. EPA–HQ–OAR–2007–0358]

Affected entities: Entities potentially affected by this action are electric utilities, appliance retailers, appliance manufacturers, local governments, and universities.

Title: Reporting and Record Keeping Requirements Under the Responsible Appliance Disposal Program.

ICR numbers: EPA ICR No. 2254.01, OMB Control No. 2060–NEW.

ICR status: This ICR is for a new information collection activity. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: The Paperwork Reduction Act requires the information found in this Information Collection Request (ICR) number 2254.01, to assess the burden (in hours and dollars) of the reporting and record keeping necessary to maintain the Responsible Appliance Disposal (RAD) Program. The RAD Program, developed in 2006, is a voluntary, non-regulatory program that promotes the proper handling of refrigerated household appliances at the time of their disposal. EPA is partnering with utilities, municipalities, retailers, manufacturers, and universities to promote the proper disposal of older household appliances, namely refrigerators, freezers, window air conditioning units, and dehumidifiers, in order to prevent emissions of refrigerants and foam-blowing agents that are ozone depleting substances and/or greenhouse gases. The Program is also expected to save landfill space, save energy used by older appliances, lead to the recovery of valuable materials for use in making new products (e.g., metals, plastics, glass), and prevent the release of hazardous substances—including PCBs, mercury, and used oil.

Utilities, municipalities, retailers, manufacturers, and universities can participate in the program for guidance on proper appliance disposal practices and recognition of their efforts. Participation in the program begins with completion of a Partnership Agreement that outlines responsibilities of the RAD Program. This Partnership Agreement reflects a voluntary agreement between a utility, municipality, retailer, manufacturer, or university and EPA. By joining the program, a Partner agrees to complete an annual reporting form identifying the appliances handled and the fates of their components. If the reporting form is completed electronically, it provides feedback for the user on the gross impact of their program on the environment, energy savings, and consumer savings. This agreement can be terminated by either Party 20 days after the receipt of written notice by the other Party with no penalties or continuing obligations.

The time period covered in this ICR is a three-year period from June 1, 2007 through May 30, 2010.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 6 hours per respondent. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 50.

Frequency of response: Annual.

Estimated total average number of responses for each respondent: 3.

Estimated total annual burden hours per respondent: 6 hours.

Estimated total average annual costs per respondent: $526. This includes an estimated burden cost of $526 and an estimated cost of $0 for capital investment or maintenance and operational costs.

What Is the Next Step in the Process for This ICR?

The EPA will consider the comments received under this notice and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: August 8, 2007.

Druscilla Hufford,

Acting Director, Office of Atmospheric Programs.

[FR Doc. E7–15917 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8454–5]

Environmental Laboratory Advisory Board (ELAB) Meeting Dates, and Agenda

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Teleconference Meetings.

SUMMARY: The Environmental Protection Agency's Environmental Laboratory Advisory Board (ELAB), as previously announced, will have teleconference meetings on August 15, 2007 at 1 p.m. ET; September 19, 2007 at 1 p.m. ET; October 17, 2007 at 1 p.m. ET; November 21, 2007 at 1 p.m. ET; and December 19, 2007 at 1 p.m. ET to discuss the ideas and views presented at the previous ELAB meetings, as well as new business. Items to be discussed by ELAB over these coming meetings include: (1) Expanding the number of laboratories seeking National Environmental Laboratory Accreditation Conference (NELAC) accreditation; (2) homeland security issues affecting the laboratory community; (3) ELAB support to the Agency's Forum on Environmental Measurements (FEM); (4) implementing the performance approach; and (5) follow-up on some of ELAB's past recommendations and issues. In addition to these teleconferences, ELAB will be hosting their next face-to-face meeting on August 22, 2007 at the Hyatt Regency Cambridge in Cambridge, MA at 10 a.m. (ET). An Open Forum for the public to bring issues forward to ELAB for their consideration to address as part of their work will be held on Tuesday, August 21, 2007 from 5:30 p.m.–6:30 p.m. at the Hyatt Regency Cambridge in Cambridge, MA.

Written comments on laboratory accreditation issues and/or environmental monitoring issues are encouraged and should be sent to Ms. Lara P. Autry, DFO, U.S. EPA (E243–05), 109 T. W. Alexander Drive, Research Triangle Park, NC 27709, faxed to (919) 541–4261, or e-mailed to *autry.lara@epa.gov.* Members of the public are invited to listen to the teleconference calls, and time permitting, will be allowed to comment on issues discussed during this and previous ELAB meetings. Those persons interested in attending should call Lara P. Autry at (919) 541–5544 to obtain teleconference information. The number of lines for the teleconferences, however, are limited and will be distributed on a first come, first serve basis. Preference will be given to a group wishing to attend over a request from an individual. For information on access or services for individuals with disabilities, please contact Lara P. Autry at the number above. To request accommodation of a disability, please contact Lara P. Autry, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

George M. Gray,

Assistant Administrator, Office of Research and Development.

[FR Doc. E7–15975 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL—8454–4]

Science Advisory Board Staff Office; Notification of Two Public Teleconferences and a Meeting of the Science Advisory Board Integrated Nitrogen Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board Staff Office announces two public teleconferences and a meeting of the EPA SAB Integrated Nitrogen Committee.

DATES: The teleconference meetings will be held on Friday, September 14, 2007, from 2:00 p.m. to 4 p.m. (Eastern Time) and on October 15, 2007 from 2 p.m. to 4 p.m. (Eastern Time). A face-to-face meeting will be held on October 29 from 9 a.m. to 5 p.m. (Eastern Time), continuing from 8:30 a.m. to 5 p.m. (Eastern Time) on October 30, and from 8:30 a.m. to 2 p.m. on October 31.

ADDRESSES: The teleconferences will be conducted by phone only. The October 29–31, 2007 face-to-face meeting will be held at the SAB Conference Center, located at 1025 F. Street, NW., Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wishes to obtain the call-in number and access code for the teleconferences; attend the face-to-face meeting; or receive further information concerning the teleconferences and meeting may contact Ms. Kathleen White, Designated Federal Officer (DFO). Ms. White may be contacted at the EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or via telephone/voice mail: (202) 343–9878; fax: (202) 233–0643; or e-mail at: *white.kathleen@epa.gov.* General information concerning the EPA SAB can be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

Background: The SAB Integrated Nitrogen Committee is studying the need for integrated research and strategies to reduce reactive nitrogen in the environment. At the global scale, reactive nitrogen resulting from human activities now exceeds that produced by natural terrestrial ecosystems. Reactive nitrogen both benefits and impacts the health and welfare of people and ecosystems. Scientific information suggests that reactive nitrogen is accumulating in the environment and that nitrogen cycling through biogeochemical pathways has a variety of consequences. Research suggests that the management of reactive nitrogen should be viewed from a systems perspective and integrated across environmental media. Accordingly, linkages between reactive nitrogen induced environmental and human health effects need to be understood in order to optimize reactive nitrogen research and risk management strategies.

At a public meeting January 30–31, 2007, the Committee developed a work plan for the study. At its June 20–22, 2007 meeting the Committee gathered information, created an outline for the study's report relating to reactive nitrogen in the environment, and made writing assignments. Further information on those meetings was provided in the **Federal Register** (72 FR 1989, January 17, 2007 and 72 FR 13492, March 22, 2007). On the September 14, 2007 teleconference, Committee members will summarize the progress they have made on their assignments, identify anything they need to complete the work, and engage in other Committee business as needed. On the October 15, 2007 call, the Committee will hear brief summaries of the member's work, identify any critical areas that need attention before the face-to-face meeting, make recommendations for refining the agenda, and conduct other Committee business. At the October 29–31, 2007 meeting, the Committee will discuss the body of its report, arrange for revisions as needed, and to plan the completion of the remaining chapters.

Availability of Meeting Materials: The draft agenda, and other materials for this teleconference will be posted on the SAB Web site at *http://www.epa.gov/sab* prior to the meeting.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for the Integrated Nitrogen Committee to consider during the course of their study. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to three minutes per speaker, with no more than a total of 30 minutes for all speakers. Interested parties should contact Ms. White, DFO, in writing (preferably via e-mail), by September 7, 2007, for the September 14 teleconference, by October 10 for the October 15 teleconference, and by October 22 for the October 29–31 meeting, at the contact information noted above, to be placed on the list of public speakers for this meeting. *Written Statements:* Written statements should be received in the SAB Staff Office by the same dates. Written statements should be supplied to the DFO in the following formats: one hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Ms. White at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: August 7, 2007.

Anthony F. Maciorowski,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. E7–15899 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–8454–3]

Proposed CERCLA Administrative Cost Recovery Settlement; FCI, USA, Inc., Wampus Milford Associates Superfund Site, Milford, CT

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(i) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended (''CERCLA''), 42 U.S.C. 9622(i), notice is hereby given of a proposed administrative settlement for recovery of past response costs and future oversight response costs concerning the Wampus Milford Associates Superfund Site in Milford, Connecticut with the following settling party: FCI, USA, Inc. The settling party has agreed to perform the response action and EPA has agreed not to seek recovery of $91,541 in past costs and agreed not to pursue future oversight costs from the settling party. The settlement includes a covenant not to sue the settling party pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a). For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

The Agency's response to any comments received will be available for public inspection at One Congress Street, Boston, MA 02114–2023.

DATES: Comments must be submitted on or before September 13, 2007.

ADDRESSES: Comments should be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region I, One Congress Street, Suite 1100 (RAA), Boston, Massachusetts 02114–2023 and should refer to: In re: Wampus Milford Associates Superfund Site, U.S. EPA Docket No. 01–2007–0110.

FOR FURTHER INFORMATION CONTACT: A copy of the proposed settlement may be obtained from Amelia Katzen, Senior Enforcement Counsel, U.S. Environmental Protection Agency, Region I, Office of Environmental Stewardship, One Congress Street, Suite 1100 (SES), Boston, MA 02114–2023, telephone (617) 918–1869.

Dated: August 1, 2007.

Richard Cavagnero,

Acting Director, Office of Site Remediation and Restoration.

[FR Doc. E7–15912 Filed 8–13–07; 8:45 am]

BILLING CODE 6560–50–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 application 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 September 7, 2007.

A. Federal Reserve Bank of Cleveland (Douglas A. Banks, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. PNC Financial Services Group, Inc., Pittsbugh, Pennsylvania; to acquire 100 percent of Sterling Financial Corporation, Lancaster, Pennsylvania, and thereby indirectly acquire BLC Bank, National Association, Strasburg, Pennsylvania, and Delaware Sterling Bank and Trust Company, Christiana, Delaware.

B. Federal Reserve Bank of Atlanta (David Tatum, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30309:

1. CSB and T Bancorp, Inc., Nashville, Tennessee; to become a bank holding company by acquiring 100 percent of the outstanding shares of Citizens Savings Bank and Trust Company, Nashville, Tennessee.

Board of Governors of the Federal Reserve System, August 9, 2007.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. E7–15868 Filed 8–13–07; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Meeting of the President's Council on Bioethics on September 6–7, 2007

AGENCY: The President's Council on Bioethics, HHS.

ACTION: Notice.

SUMMARY: The President's Council on Bioethics (Edmund D. Pellegrino, MD, Chairman) will hold its thirtieth meeting, at which it will (1) Discuss a projected ''white paper'' on the neurological standard for the determination of death; (2) continue the exploratory phase of a potential inquiry into the ''crisis'' of the healing professions with expert presentations and Council discussions; and (3) continue the exploratory phase of a potential inquiry into ethical issues associated with nanotechnology with expert presentations and Council discussions. Subjects discussed at past Council meetings (although not on the agenda for the September 2007 meeting) include: therapeutic and reproductive cloning, assisted reproduction, reproductive genetics, the ethics of health care, neuroscience, aging retardation, organ transplantation, newborn screening, human dignity, personalized medicine, and lifespan-extension. Publications issued by the Council to date include: *Human Cloning and Human Dignity: An Ethical Inquiry* (July 2002); *Beyond Therapy: Biotechnolody and the Pursuit of Happiness* (October 2003); *Being Human: Readings from the President's Council on Bioethics* (December 2003); *Monitoring Stem Cell Research* (January 2004), *Reproduction and Responsibility: The Regulation of New Biotechnologies* (March 2004), *Alternative Sources of Human Pluripotent Stem Cells: A White Paper* (May 2005), and *Taking Care: Ethical Caregiving in Our Aging Society* (September 2005). Reports on the bioethical significance of the concept of human dignity and on organ procurement, transplantation, and allocation are forthcoming.

DATES: The meeting will take place Thursday, September 6, 2007, from 9 am to 5:15 pm, ET; and Friday, September 7, 2007, from 8:30 am to 11:45 am, ET.

ADDRESSES: The Carolina Inn, 211 Pittsboro Street, Chapel Hill, NC 27516. Phone 919–933–2001 or 1–800–962–8519.

Agenda: The meeting agenda will be posted at *http://www.bioethics.gov.*

Public Comments: The Council encourages public input, either in person or in writing. At this meeting, interested members of the public may address the Council, beginning at 11:30 am, on Friday, September 7. Comments are limited to no more than five minutes per speaker or organization. As a courtesy, please inform Ms. Diane M. Gianelli, Director of Communications, in advance of your intention to make a public statement, and give your name and affiliation. To submit a written statement, mail or e-mail it to Ms. Gianelli at one of the addresses given below.

FOR FURTHER INFORMATION CONTACT: Ms. Diane M. Gianelli, Director of Communications, The President's Council on Bioethics, 1425 New York Avenue, NW., Suite C100 Washington, DC 20005. Telephone 202/296–4669. E-mail *info@bioethics.gov.* Web site: *http://www.bioethics.gov.*

Dated: August 6, 2007.

F. Daniel Davis,

Executive Director, The President's Council on Bioethics.

[FR Doc. 07–3948 Filed 8–13–07; 8:45 am]

BILLING CODE 4154–07–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Misconduct in Science

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI), the Assistant Secretary for Health, and another Federal agency have taken final action in the following case:

Juan Carlos Jorge-Rivera, Ph.D., Dartmouth College: Based on the findings of an inquiry conducted by Dartmouth College, an investigation conducted by another Federal agency, and additional analysis conducted by the Office of Research Integrity (ORI) during its oversight review, the U.S. Public Health Service (PHS) found that Juan Carlos Jorge-Rivera, Ph.D., former postdoctoral fellow, Department of Physiology, Dartmouth College, engaged in misconduct in science in research funded by National Institute of Neurological Disorders and Stroke (NINDS), National Institutes of Health (NIH), grant R01 NS28668.

Specifically, Dr. Jorge-Rivera knowingly and intentionally falsified amplifier gain in at least eleven (11) experiments of his postdoctoral research aimed at measuring the effects of anabolic steroids on GABAnergic current in brain cells and reported the falsified data in Figures 4 and 6 of the following paper: Jorge-Rivera, J.C., McIntyre, K.L., & Henderson, L.P. ''Anabolic steroids induce region- and subunit-specific modulations of GABA receptor mediated currents in the rat forebrain.'' *Journal of Neurophysiology* 83:3299–3309, 2000.

Dr. Jorge-Rivera has been debarred by the Federal agency with joint jurisdiction for a period of two (2) years, beginning on January 11, 2007, and ending on January 11, 2009.

ORI has implemented the following administrative actions:

(1) For a period of three (3) years, beginning on June 23, 2007, and ending on June 22, 2010, Dr. Jorge-Rivera is prohibited from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant; and

(2) for a period of three (3) years, beginning at the end of his debarment period (January 11, 2009), and ending on January 10, 2012, Dr. Jorge-Rivera must submit, in conjunction with each application for PHS funds, annual reports, manuscripts, or abstracts of PHS-funded research in which he is involved, a certification that the data he provides are based on actual experiments or are otherwise legitimately derived and that the data, procedures, and methodology are accurately reported in the application or report.

FOR FURTHER INFORMATION CONTACT: Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

Chris B. Pascal,

Director, Office of Research Integrity.

[FR Doc. E7–15881 Filed 8–13–07; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–07–0677]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the

proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Maryam Daneshvar, Acting CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Sexually Transmitted Diseases Laboratory Methods Survey (OMB No. 0920–0677)—Extension—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Approximately 18.9 million new cases of sexually transmitted diseases (STDs) are estimated to occur each year in the United States. Effective control and prevention of STDs require prompt diagnosis which relies on laboratory testing, proper screening of those at risk, and effective treatment. Thus, an understanding of the current laboratory testing practices for STDs in the U.S. is critical, not only to monitor capacity but to assess current practices of public health and private laboratories to appropriately test for these diseases. Additionally, these testing practices could affect the resources available to public health departments for STD screening and surveillance programs and could affect our ability to monitor trends in the prevalence of STDs.

The objectives of this proposed data collection are to: (1) Collect information about the volume of and type of testing for chlamydia, gonorrhea, herpes simplex virus (HSV), syphilis, human papillomavirus (HPV), bacterial vaginosis, trichomonas, and pap smears performed in laboratories in calendar year 2006 and (2) collect information about antimicrobial susceptibility testing for gonorrhea during the calendar year 2006.

This survey will build on data collected in 2004 by the Centers for Disease Control and Prevention on laboratory test methods and the volume of testing (Dicker *et al. Testing for Sexually Transmitted Diseases in the U.S. Public Health Laboratories in 2004.* Sexually Transmitted Diseases. (43):1, pg. 41–46, Jan. 2007).

CDC anticipates collecting this data using an on-line survey of 150 public health laboratories. The survey will take approximately 25 minutes to complete. The only cost to respondents is their time to complete the survey.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Types of data collection	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Public Health Laboratories	150	1	25/60	63
Total				63

Dated: August 8, 2007.

Maryam Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–15894 Filed 8–13–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–07–0707]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–4604 or send comments to Maryam Daneshvar, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

2005 Lead Disclosure Rule Public Awareness Survey—Extension—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The proposed 2005 Lead Disclosure Rule Public Awareness Survey assesses small and medium-sized rental property owners' self-reported awareness of and compliance with the Lead Disclosure Rule. The Lead Disclosure Rule requires property owners to disclose to prospective tenants and buyers the presence of lead paint and lead-based paint hazards in residential properties built before 1978, if known by the owners. The rule was published under the authority of Title X of the Housing and Community Development Act of 1992 by the Department of Housing and Urban Development (HUD) at 24 CFR part 35, subpart A, and by the Environmental Protection Agency (EPA) at 40 CFR 745, subpart F.

Childhood lead poisoning, while on the decline, remains a threat to the health and well-being of young children across the United States. In accordance with the Healthy People 2010 goal to ''eliminate elevated blood lead levels in children,'' there is a need for primary prevention of childhood lead poisoning. Primary prevention is the removal of lead hazards from a child's environment before the child is exposed. Ensuring compliance with the Lead Disclosure Rule is one component of a primary prevention strategy.

As part of this evaluation effort, CDC is interested in the perception of the Lead Disclosure Rule by sectors of the property owner population that have been targeted less often for enforcement of the rule. This survey of small and medium-sized rental property owners (owning fewer than 50 rental units) is the first effort of its kind to capture this particular population's self-reported awareness of and compliance with the Lead Disclosure Rule.

Approval was granted for the information collection request, set to expire 01/31/2008. However, due to unforeseeable and unavoidable delays in coordinating the interventions, an extension of the approved information request is required to complete data collection. An extension of 2 years is requested to allow for further unavoidable delays. There are no proposed changes to the survey design or questionnaire.

The survey was to be administered twice in four U.S. cities during 2005 and 2006. Two of the cities are involved in a compliance assistance and enforcement intervention by HUD. The other two cities are control cities (without such an intervention). For all four cities, CDC is conducting a cross-sectional, ''before and after'' study design. Each respondent is surveyed only once, and participation is voluntary. Respondents are asked to complete a brief written survey and return the survey anonymously via the addressed, stamped envelope CDC will provide. There is no cost to respondents except the time to complete the survey.

The population surveyed using this questionnaire are small and medium property owners who rent housing units to tenants. These owners may not consider themselves to be in business or may not have leasing offices. Regardless, they are technically small business owners. They have been identified by publicly-available tax assessor records. A sample of 3,000 such owners will be surveyed, with a likely response from approximately 1,000 small and medium property owners. We believe this is a good use of public burden because this particular population has never been surveyed as to their awareness of and compliance with the Lead Disclosure Rule. The anticipated burden per respondent has been kept to a minimum by asking only a small number of essential questions. Additionally, the questionnaire is anonymous so that no individual property owner or small business can be identified. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	No. of respondents	No. of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Targeted Property Owners	1000	1	15/60	250

Dated: August 8, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–15895 Filed 8–13–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–07–07BF]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Formative Research on Lung Cancer Screening—New—Division of Cancer Prevention and Control, National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Currently, there is scientific debate about the value of lung cancer screening. For people in whom lung cancer is found and treated at an early, localized stage, the five-year survival rate is roughly 49%. However, only 16% of people with lung cancer are diagnosed at this early, localized stage. Screening for lung cancer using chest x-rays (CXR) was widely practiced, but studies have shown that CXR with or without sputum cytology does not reduce mortality from lung cancer. Studies are currently underway to provide more information about the effectiveness of other types of screening tests, such as computed tomography (CT) scans and spiral CT scans.

The purpose of this project is to conduct formative research to gather information from adult consumers and primary care physicians about experiences and practices related to lung cancer screening and testing as well as their knowledge, attitudes, and behaviors related to preventive cancer

screenings overall. Of particular interest are adults aged 40–70 years of various races and ethnicities who are at high risk for lung cancer (i.e., long-term heavy smokers).

The proposed project will use focus groups to gather information about the target audiences' experiences and practices related to lung cancer screening and testing. If warranted from focus group data with adult consumers, follow-up personal interviews will be conducted with selected focus group participants, especially those reporting experience with screening tests, such as spiral computed tomography (CT).

A total of 16 focus groups will be conducted at professional focus group facilities with long term heavy smokers aged 40–70. The data will be collected from a convenience sample of adults who will be screened and recruited using lists maintained by the focus group facilities. Each focus group will include approximately nine participants and last two hours. If warranted, one-hour telephone follow-up interviews will be conducted with up to 16 participants within one month of the focus groups.

Four telephone focus groups will be conducted with primary care physicians. The American Medical Association Physician Masterfile list will be used to recruit a random sample of physicians for participation in the focus groups. Potential participants (physicians) will be mailed a screening packet to complete and return. Each of the four focus groups will include approximately eight participants and last 75 minutes.

There are no costs to respondents except their time to participate in the survey.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses/ respondent	Average burden/response (in hours)	Total burden (in hours)
Patient Participants Screener	288	1	2/60	10
Patient Focus Group Participants	144	1	2	288
Patient Follow-up Interview In Depth Participants	16	1	1	16
Physician Participants Screener	96	1	5/60	8
Physician Focus Group Participants	32	1	1.15	40
Total	362			362

Dated: August 8, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–15896 Filed 8–13–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Interagency Committee on Smoking and Health, National Center for Chronic Disease Prevention and Health Promotion

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting for the aforementioned committee:

Time and Date: 11:30 a.m.–4:30 p.m., September 18, 2007.

Place: Grand Hyatt Washington, 1000 H. Street, NW., Burnham Room, Washington, DC 20001, Telephone: (202) 582–1234.

Status: Open to the public, limited only by the space available. Those who wish to attend are encouraged to register with the contact person listed below. If you will require a sign language interpreter, or have other special needs, please notify the contact person by 4:30 p.m., E.S.T. on September 7, 2007.

Purpose: The Committee advises the Secretary, Department of Health and Human Services, and the Assistant Secretary for Health in the (a) coordination of all research and education programs and other activities within the Department and with other federal, state, local and private agencies and (b) establishment and maintenance of liaison with appropriate private entities, federal agencies, and state and local public health agencies with respect to smoking and health activities.

Matters To Be Discussed: The agenda will focus on ''Reducing Children's Exposure to Second Hand Smoke.''

Agenda items are subject to change as priorities dictate.

Substantive program information as well as summaries of the meeting and roster of committee members may be obtained from the Internet at *http://www.cdc.gov/tobacco.*

Contact Person for More Information: Ms. Monica L. Swann, Management and Program Analyst, Office on Smoking and Health, CDC, 4770 Buford Highway, M/S K50, Atlanta, GA 30341, Telephone: (770) 488–5278.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Diane C. Allen,

Acting Director, Management Analysis and Service Office, Centers for Disease Control and Prevention.

[FR Doc. E7–15873 Filed 8–13–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 72 FR 38600—38601, dated July 13, 2007) is amended to reflect the reorganization of the Coordinating Office for Global Health, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows: Delete in their entirety the titles and functional statements for the

Coordinating Office for Global Health (CW), and insert the following:

Coordinating Office for Global Health (CW). The mission of the Coordinating Office for Global Health (COGH) is to work with partners in CDC and around the glove through technical assistance and health system development to promote improved health and health diplomacy, and protect citizens of the U.S. and the world.

To carry out its mission, working with and through global programs, COGH: (1) Serves as the principal Centers for Disease Control and Prevention (CDC) organization to develop and foster collaborations, partnerships, program integration, and resource leveraging among public and private organizations and to increase the CDC's global health impact in order to achieve global health goals; (2) coordinates review of current global health status and evolving issues; (3) provides strategic direction for CDC's global health policies and programs; (4) identifies and develops activities to ensure CDC's technical expertise is used to maximize global health impact; (5) stimulates global health research and program development based on assessments of current global health needs and available resources; (6) conducts and stimulates activities to strengthen global health capacity and systems through public health workforce, systems, and process development and improvements; (7) coordinates cross-cutting CDC global health activities and global health emergency response efforts; and (8) manages CDC global field operations through a system of regional and country directors.

Office of the Director (CWA). (1) Manages, directs, and evaluates the activities of COGH; (2) provides leadership in the formulation and implementation of CDC's global health strategies, policies, and goals; (3) advises the Director, CDC, on global health issues; (4) ensures coordination of the CDC response to global health emergencies; (5) leads the development of, and fosters strategic and working partnerships, in support of the global health goals; (6) coordinates CDC's legislative agenda and activities related to global health; (7) provides leadership in determining requirements for CDC's funding and staffing needs for global health programs; (8) manages the distribution of, and provides oversight for, CDC categorical global health program funding; (9) coordinates, in cooperation with the Office of Strategy and Innovation, the development, measurement, and assessment of progress toward CDC's global health goals, efforts to improve global health equity, fostering of excellence and innovation, and executive decision support; (10) coordinates, in cooperation with Office of the Chief of Public Health Practice and the Office of the Chief Science Officer, CDC's global health practice and science activities; (11) coordinates, in cooperation with the Office of Enterprise Communications, internal and external global health communications, media relations, issues management across CDC global programs, and develops and maintains the COGH intra-, extra-, and internet and web sites; (12) coordinates, in cooperation with the Office of Workforce and Career Development, efforts to ensure a competent and sustainable CDC and global health workforce through workforce and career development for CDC internationally assigned staff, both direct hires and locally employed staff, and assisting partner countries in their workforce and career development efforts; (13) convenes and supports the Global Health Leadership Board; (14) provides business services support for COGH and program services for global health programs; (15) develops and implements supplemental administrative policies and procedures that govern business administration, procurement practices, facilities management, time and attendance reporting, travel, records management, personnel and a wide scope of other business services; (16) plans, coordinates, tracks, and provides management advice and direction of fiscal management for the organization's annual budgets and spend plans; (17) provides consultation on human capital needs and facilitates hiring and training practices as described in the Office of Personnel Management and agency guidelines; (18) coordinates and manages all business services related to management, administration, and training for COGH; (19) working with and through global programs, coordinates issues related to telecommunications, office space and design, physical security, procurement of equipment, furniture, IT services, and facilities management; (20) provides assistance in formulating, developing, negotiating, managing, and administering various COGH contracts; and (21) maintains liaison with the other offices within COGH and other business services offices within CDC.

Global Program Services Office (CWA2). The mission of the Global Program Services Office (GPSO) is to support CDC-wide programs and staff through the efficient, professional and timely delivery of critical global health mission-support services. To carry out its mission, GPSO performs the following functions: (1) Provides agency-wide support for global travel services; (2) provides agency-wide leadership and support in ensuring consistency for global assignments, systems, and operations; (3) provides a point of contact for overseas staff for deployment support, services, and entitlements; (4) administers the CDC Exchange Visitors Program and is responsible for agency-wide immigration-related activities; (5) provides leadership, expertise and technical assistance to CDC programs regarding extramural and procurement transactional functions; (6) provides a liaison with the Department of State for embassy related issues; (7) provides a liaison with the information technology office, global program offices, and overseas offices to advocate and coordinate global technology and systems; and (8) consults regularly with CDC Programs on strategic and operational issues regarding mission-support services provided by COGH–GPSO through a Governance Council and Customer Feedback Forum.

Global Operations Management Office (CWA23). (1) Advises the COGH Director and Chief Management Official on important issues related to assignments, systems, and operations for international activities impacting programmatic implementation; (2) services as the focal point for CDC services for international assignees; (3) coordinates the operational support services for CDC global programs; (4) coordinates development of policies for overseas services management, locally employed staff, and overseas travel; (5) coordinates and documents international services management policy agency-wide with the Department of Health and Human Services (DHHS) and with the Department of State (DOS), ascertaining the need for, and proposing administrative improvements and legislative requirements to improve operations and avoid management problems; (6) participates as a member of the government-wide working group for the interagency system for management of shared administrative support services (ICASS), overseas building operations and rightsizing liaison, capital security cost-sharing reconciliation, and property management (inventory, government-owned vehicles, furniture, furnishings, appliances, equipment); (7) in carrying out the above responsibilities, coordinates activities with coordinating center/offices/implementing programs,

DHHS, Office of Global Health Affairs, other governmental and non-governmental organizations, and other partners, as appropriate; (8) administers CDC Exchange Visitors Program and is responsible for agency-wide immigration-related activities; (9) coordinates processes for all overseas staff assignments including family support; (10) provided agency-wide passport, visa, and clearance services; (11) services as the CDC office responsible for obtaining DHHS and DOS clearances/approvals for all international TDY travel by CDC employees; (12) provides travel services to CDC employees traveling overseas including order issuance, country and DHHS clearances, as well as voucher preparation in support of the CDC global mission; (13) provides services to CDC employees stationed overseas who commence entitlement travel; (14) provides support and services to overseas assignees who are removed from their post for medical or security reasons; (15) provides reports to CDC programs regarding work volume, process timeliness, travel costs and customer satisfaction results; and (16) provides policy expertise to all employees performing international, entitlement or emergency travel.

Extramural and Procurement Services Office (CWA24). (1) Working with and through global programs, provides support in the development and implementation of Funding Opportunity Announcements and Request for Financial Assistance; (2) as an extension of program, provides leadership in establishing and implementing the Objective Review Panel Process leading to funding determinations; (3) monitors and evaluate the business services components of recipient organizations achievement of goals and objectives; (4) manages the credit card processes for CDC programs with an overseas presence; (5) coordinates and approves individual international credit card transactions for CDC programs with an overseas presence; (6) manages the procurement processes from request to implementation; (7) participates in strategic planning development and implementation of CDC program support goals; and (8) provides routine and continuous feedback to recipients of Extramural and Program Support services and their managers regarding services provided.

Division of Global Preparedness and Program Coordination (CWE). The Division of Global Preparedness and Program Coordination supports CDC global programs for global health preparedness and global health protection and promotion through leadership and coordination for global health programs. This includes agency-level oversight for CDC's system of international offices, and cross-cutting situational awareness for health status, program status, and partnership issues in all geographic regions of the world. To carry out its mission, the division performs the following functions: (1) Fosters collaborations, partnerships, integration, and resource leveraging to increase CDC's impact and achieve global health goals; (2) manages and supports all CDC global health field operations using CDC Country Director or Country Representative structures where there are multiple CDC programs in a country; (3) provides, in cooperation and coordination with GPSO, support for all CDC global health field operations; (4) coordinates management and oversight of critical global health preparedness and emergency response activities across CDC, including situational awareness and partnership management at the global and regional level; (5) coordinates with and responds to requests from a wide array of internal CDC and external partners and stakeholders; and (6) provides stewardship and leadership support to global health preparedness programs housed in the division.

Office of the Director (CWE1). (1) Provides leadership, oversight and overall direction for the activities of the division; (2) provides leadership and guidance on policy, program planning and evaluation, program management, and operations; (3) plans, allocates, and monitors resources; (4) provides leadership and management oversight in carrying out CDC global field programs; (5) provides liaison with other CDC organizations, other Federal agencies, national ministries of health, international organizations, non-governmental organizations, private sector, and others with whom CDC cooperates in global health programs and activities; (6) in collaboration with the COGH Science Officer, and the Associate Directors of Science from the CDC global programs, promotes high standards in science and ethics among CDC's international activities; and (7) in collaboration with the COGH Strategy and Innovation Officer, translates strategy and innovation concepts and initiatives out to the network of CDC international offices.

Global Disease Detection and Emergency Response Branch (CWEB). The Global Disease Detection and Emergency Response Branch provides leadership and works with partners around the globe to increase preparedness to prevent and control naturally-occuring and man-made threats to health. Specifically, it: (1) Administers CDC's Global Disease Detection program through coordination with relevant implementing programs; (2) coordinates global aspects of CDC's terrorism preparedness and emergency response activities in collaboration with CDC's Coordinating Office for Terrorism Preparedness and Emergency Response; (3) plans, supports, and coordinates international influenza pandemic preparedness in collaboration with relevant partners in CDC and DHHS; (4) provides leadership and support for the CDC global emergency preparedness and response program designed to prevent, if possible, and to prepare for, detect and respond to biological, chemical, radiological incidents, naturally occurring or man-made, of international interest; (5) works cooperatively with all CDC and U.S. government organizations involved in global emergency preparedness and response as well as with World Health Organization and other international organizations and partner countries; (6) assists in developing country-level epidemiologic, laboratory, and other capacity to ensure country emergency preparedness and response to outbreaks and incidents of local importance and of international interest; and (7) maintains staff in the Director's Emergency Operations Center to serve as a central focus for CDC's global outbreak/incident response activities.

Geographic and Program Coordination Branch (CWEC). (1) Directs and manages human and financial resources in consolidated CDC country offices; (2) provides leadership, support and coordination for the agency-wide responsibilities of CDC country offices; (3) provides core support and coordination to CDC country offices through regional liaison teams, in cooperation with the GPSO; (4) facilitates new opportunities for international activities of the national centers' programs, and provides technical and management support for existing activities; (5) promotes partnerships and coordination in strategic areas with key country, regional, international and U.S. Government institutions; (6) provides leadership on cross-cutting global health issues; and (7) coordinates country-based assessments, planning and performance monitoring and evaluation.

Division of Global Public Health Capacity Development (CWF). The Division of Global Public Health Capacity Development contributes to improving the health of the people of the United States and other nations by partnering with ministries of health, educational institutions, Federal

agencies, and international organizations to strengthen capacity of countries around the world to improve public health. To carry out its mission, the division performs the following functions: (1) Works with partners to build strong, transparent, and sustained public health systems through training, consultation, capacity building, and technical assistance in applied epidemiology, public health surveillance, evaluation, and laboratory systems; and promotes organizational excellence in public health through strengthening leadership and management capacity; (2) assists in developing and implementing COGH policy on public health system strengthening and sustainability; and (3) collaborates with other ODC organizations, Federal agencies, international agencies, partner countries, and non-governmental organizations assisting ministries of health to build public health capacity in other areas of public health.

Office of the Director (CWF1). (1) Provides leadership, overall direction, and evaluation for the division; (2) formulates and implements CDC's strategy for developing global public health capacity in applied epidemiology, public health systems, laboratory operations and management, and leadership; (3) provides leadership and guidance on policy, program planning, program management, and operations; (4) plans, allocates, and monitors resources; (5) provides leadership in assisting national ministries of health, international agencies, and non-governmental organizations in the delivery of epidemiologic services and the development of international epidemiologic networks; (6) provides liaison with other CDC organizations, other Federal agencies, national ministries of health, and international organizations; and (7) provides consultations with partners and stakeholders including nongovernmental organizations and the private sector on program development and overall public health systems and sub-systems.

Sustainable Management Development Program (CWF12). (1) Partners with ministries of health, educational institutions, and non-governmental organizations in developing countries, to promote organizational excellence in public health through strengthening leadership and management capacity; (2) works with partners to build capacity for public health leadership and management development through a multi-phased approach including situational analysis, capacity development, technical assistance, and sustainability; (3) develops strategic institutional partnerships for public health leadership and management capacity-building efforts; (4) develops faculty to enhance in-country leadership and management training capacity through the Management for International Public Health course and in-country training-of-trainers; (5) provides support to training faculty in partner institutions to conduct performance needs assessments; develops locally appropriate curricula; and designs in-country leadership and management workshops that provide participants with practical skills needed to manage public health teams, programs, and organizations; and (6) works with partner institutions to ensure the long-term sustainability of global public health leadership and management development programs.

Capacity Development Branch (CWFB). (1) With partners, designs and conducts evidence-based instruction in public health disciplines needed to strengthen their public health systems, including instructional design, epidemiology, surveillance, laboratory operations and management, communications, and economic evaluation; (2) working with the technical program components, provides consultation to ministries of health in development of surveillance systems (e.g. Integrated Disease Surveillance, injury, chronic diseases, infectious diseases, etc.); (3) creates and maintains computer-based and distance-based learning methods, and develops the capacity of partners to create, evaluate, and share their own; (4) develops and evaluates competency-based training materials; (5) maintains a divisional training material library and Web site; and (6) collaborates within CDC and with national or international organizations in development of competency-based training materials, evaluation of training, and design of surveillance systems needed to accomplish the mission.

Program Development Branch (CWFC). (1) Assists partners in assessing their needs for health systems strengthening; (2) plans, directs, supports, and coordinates field epidemiology and laboratory training programs, Data for Decision Making Projects, and other partnerships with ministries of health; (3) provides leadership and management oversight in assisting ministries of health in capacity building by training epidemiologists and other health professionals through the development of competency-based, residency-style, applied training programs; (4) provides leadership and expertise in assisting national ministries of health to utilize trained public health workers for developing health policy, and implementing and evaluating health programs; (5) assigns and manages expert consultants as long-term, in-country advisors to ministry of health programs; and (6) collaborates within CDC, with other Federal agencies, and with national and international organizations in support of partner programs.

Dated: August 3, 2007.

William H. Gimson,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 07–3953 Filed 8–13–07; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 1998D–0077 (formerly 98D–0077)]

Clinical Development Programs for Human Drugs, Biological Products, and Medical Devices for the Treatment and Prevention of Osteoarthritis; Request for Assistance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) seeks additional information on issues related to clinical development programs for human drugs, biological products, and medical devices for the treatment and prevention of osteoarthritis (OA). We will take such information into account as we work to finalize our draft guidance issued in July 1999. Once finalized, the guidance will aid sponsors and other interested parties in developing new products to treat OA.

Before the agency can issue such guidance, a critical appraisal of certain fundamentals of the science related to OA is needed. FDA is inviting any interested party, or parties, to conduct and manage the coordination of this critical appraisal. FDA believes that the party, or parties', first step in conducting the critical appraisal would be to hold a public meeting to discuss issues related to OA assessment and trial design. FDA intends to submit to the docket all the information received in response to this notice so that interested parties may be fully informed and to facilitate participation in and coordination of these activities.

DATES: Submit written or electronic comments on this notice by October 15, 2007.

ADDRESSES: Submit written comments on this notice 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.fda.gov/dockets/ecomments*.

FOR FURTHER INFORMATION CONTACT: Terrie L. Crescenzi, Office of the Commissioner (HF–18), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7864.

SUPPLEMENTARY INFORMATION: Because of the positive response to the agency's guidance on rheumatoid arthritis, the agency has recognized the need for more information on the development of human drugs, biological products, and medical devices for the treatment and prevention of OA. FDA is requesting assistance from the public in conducting scientific analyses for the purpose of finalizing the agency's current draft OA guidance.

Specifically, the agency is inviting any interested group or consortium of interested groups from academia, industry, practitioners, and patients and their representatives to conduct and manage the coordination of a critical appraisal of certain fundamentals of the science related to OA. Initially, the party or parties would organize and hold a public meeting to discuss relevant questions related to OA assessment and trial design (a number of which are suggested in this notice). FDA believes a public meeting will lead to conceptual advances not now present, and the expression of such advances in a series of concept papers. These concept papers would then be discussed at subsequent workshops, soliciting feedback from all parties including regulators from the United States and elsewhere. Such discussion would emphasize the rationale for various approaches to key issues.

FDA welcomes other suggestions of activities that could be undertaken as part of this guidance development effort. To provide a starting point for discussion, FDA has developed a list of some key concepts that the interested parties may want to consider for discussion at the meeting.

1. Should the *scope* of the guidance apply to OA alone? Are there particular clinical subgroups of OA that need to be explicitly considered and addressed?

2. For a *claim of symptomatic relief* in OA, what are the optimal outcome measures and trial designs? Currently, withdrawal and flare designs are commonly used. These designs, while believed to be predictive, may lack generalizability. It is also difficult to understand the actual size of the treatment effect based on a flare design. If withdrawal and flare designs are not optimal, what alternative designs could be used to support a symptomatic relief claim? What should the size and duration of exposure of the safety database be for symptomatic relief?

3. Is a *claim of decreased rate of progression* useful and, if so, what would be the appropriate outcome measure(s) to establish the claim? What is the desirable duration of a trial for this claim? What comparator arms might be used?

4. For a *claim of prevention or risk reduction* for the development of OA, what are potential outcome measures? If biomarkers are used, what is their state of qualification? What is the desirable duration of a trial for such a claim? What is an appropriate safety database for a prevention of OA claim?

5. Are there *additional claims* that should be considered? If so, what outcome measures and trial designs should be used?

6. In any *long term studies*, what are the best statistical comparisons for inference testing (is, for instance, a comparison of mean changes from baseline suitable or should responses be graded according to points on established scales)? Because longer trials inevitably have substantial dropouts, what imputation methods for dropouts are most appropriate or should the trial results be based on a survival analysis or a time to event (for treatment failure) analysis?

Interested persons should submit comments and expressions of interest in conducting and managing a critical appraisal to the Division of Dockets Management (see **ADDRESSES**). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments are available for public examination in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: August 8, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–15844 Filed 8–13–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2006P–0281]

Determination That ORUDIS KT (Ketoprofen) Tablets, 12.5 Milligrams, Were Not Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that ORUDIS KT (ketoprofen) tablets, 12.5 milligrams (mg), were not withdrawn from sale for reasons of safety or effectiveness. This determination will allow FDA to approve abbreviated new drug applications (ANDAs) for ketoprofen tablets, 12.5 mg.

FOR FURTHER INFORMATION CONTACT: Mary Catchings, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA sponsors must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the ''listed drug,'' which is a version of the drug that was previously approved. Sponsors of ANDAs do not have to repeat the extensive clinical testing otherwise necessary to gain approval of a new drug application (NDA). The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the ''Approved Drug Products With Therapeutic Equivalence Evaluations,'' which is generally known as the ''Orange Book.'' Under FDA regulations, drugs are withdrawn from the list if the agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness or if FDA

determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (21 CFR 314.162).

Under 21 CFR 314.161(a)(1), the agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness before an ANDA that refers to that listed drug may be approved. FDA may not approve an ANDA that does not refer to a listed drug.

In a citizen petition dated July 11, 2006 (Docket No. 2006P–0281/CP1), submitted under 21 CFR 10.30, Camargo Pharmaceutical Services, LLC, requested that the agency determine whether ORUDIS KT (ketoprofen) tablets, 12.5 mg, were withdrawn from sale for reasons of safety or effectiveness. ORUDIS KT (ketoprofen) tablets, 12.5 mg, are the subject of approved NDA 20–429 held by Wyeth Consumer Healthcare (Wyeth). ORUDIS KT, an over-the-counter nonsteroidal anti-inflammatory (NSAID) drug indicated for the temporary relief of minor aches and pains associated with the common cold, headache, toothache, muscular aches, backache, minor pain of arthritis and menstrual cramps. ORUDIS KT (ketoprofen) is also indicated to temporarily reduce fever. In a letter dated August 24, 2005, Wyeth informed FDA of the firm's decision to discontinue manufacture of ORUDIS KT (ketoprofen) tablets, 12.5 mg, and the product was moved to the ''Discontinued Drug Product List'' section of the Orange Book.

The agency has determined that ORUDIS KT (ketoprofen) tablets, 12.5 mg, were not withdrawn from sale for reasons of safety or effectiveness. The petitioner referenced, among other information, certain labeling changes intended to assist consumers in the safe use of the drug, and some adverse event reports. FDA has independently evaluated relevant literature and data for possible postmarketing adverse events and has determined that this product was not withdrawn from sale for reasons of safety or effectiveness.

After considering the citizen petition and reviewing agency records, FDA determines that, for the reasons outlined in this notice, ORUDIS KT (ketoprofen) tablets, 12.5 mg, were not withdrawn from sale for reasons of safety or effectiveness. Accordingly, the agency will continue to list ORUDIS KT (ketoprofen) tablets, 12.5 mg, in the ''Discontinued Drug Product List'' section of the Orange Book. The ''Discontinued Drug Product List'' delineates, among other items, drug products that have been discontinued from marketing for reasons other than safety or effectiveness. ANDAs that refer to ORUDIS KT (ketoprofen) tablets, 12.5 mg, may be approved by the agency as long as they meet all relevant legal and regulatory requirements for approval of ANDAs. If FDA determines that labeling for this drug product should be revised to meet current standards, the agency will advise ANDA applicants to submit such labeling.

Dated: August 7, 2007.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. E7–15843 Filed 8–13–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Cardiovascular and Renal 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: Cardiovascular and Renal 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 October 16 and 17, 2007, from 8 a.m. to 5 p.m.

Location: The National Labor College, Lane Kirkland Center, Solidarity Hall, 10000 New Hampshire Ave., Silver Spring, MD. The telephone number is 301–431–6400.

Contact Person: Cathy A. Miller, 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: *Cathy.Miller1@fda.hhs.gov*, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512533. 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 October 16, 2007, the committee will discuss regulatory considerations for extending the use of phosphate binders from the dialysis population (where they are approved) to the pre-dialysis population (where no products are approved). The committee will hear presentations on this topic from Shire Development, Genzyme Corp, and Fresenius Medical Care.

On October 17, 2007, the committee will discuss data requirements and study designs appropriate to characterize the durability of treatment effect of REVATIO (sildenafil citrate) Pfizer, Inc., in pulmonary arterial hypertension in children.

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 2007 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 October 1, 2007. Oral presentations from the public will be scheduled between approximately 8:30 a.m. and 9:30 a.m. on both days for the corresponding agenda. 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 September 21, 2007. 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 September 24, 2007.

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 Cathy Miller 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: August 7, 2007.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E7–15834 Filed 8–13–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 1998D–0307] (Formerly Docket No. 98D–0307)

Guidance for Industry on Exports Under the Food and Drug Administration Export Reform and Enhancement Act of 1996; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry entitled ''FDA Guidance for Industry: Exports Under the FDA Export Reform and Enhancement Act of 1996.'' The guidance document addresses issues pertaining to the exportation of human drugs, animal drugs, biologics, devices, food, food additives, color additives and dietary supplements under the FDA Export Reform and Enhancement Act.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Office of International Programs (HFG–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857. Include a self-addressed adhesive label to assist that office in processing your request. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*.

FOR FURTHER INFORMATION CONTACT: Barbara Ward-Groves, Office of International Programs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4480 or 404–253–1221.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 12, 1998 (63 FR 32219), FDA published a draft guidance document entitled ''FDA Guidance for Industry on: Exports and Imports Under the FDA Export Reform and Enhancement Act of 1996.'' FDA wrote the draft guidance to help interested parties understand and comply with the FDA Export Reform and Enhancement Act. Enacted and later amended in 1996, the FDA Export Reform and Enhancement Act (Public Law 104–134, as amended by Public Law 104–180) significantly changed the export requirements for human drugs, animal drugs, biologics, devices, and, to a limited extent, food additives. For example, before the law was enacted, most exports of unapproved new drug products could only be made to 21 countries identified in section 802 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 382), and these exports were subject to various restrictions. The FDA Export Reform and Enhancement Act amended section 802 of the act to allow, among other things, the export of unapproved new drugs to any country in the world if the drug complies with the laws of the importing country and has valid marketing authorization from any of the following countries: Australia, Canada, Israel, Japan, New Zealand, Switzerland, South Africa, and the countries in the European Union (EU) and the European Economic Area (EEA). (Currently, the EU countries are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Currently, the EEA countries are the EU countries, Iceland, Liechtenstein, and Norway. The list of countries will expand automatically if any country accedes to the EU or becomes a member of the EEA.)

The guidance document provides information on the statutory and regulatory requirements for exporting FDA-regulated products, including general requirements for products exported under section 801 of the act, labeling requirements for drugs and biologics exported under section 801(e) of the act, export requirements for unapproved drugs, biologics, and devices under section 802(b) of the act, exports of unapproved drugs and devices for investigational use, exports of unapproved drugs and devices in anticipation of foreign approval, exports of drugs and devices for diagnosing, preventing, or treating a tropical disease or disease ''not of significant prevalence in the United States,'' and export notifications to FDA. The guidance document announced in this notice finalizes the draft guidance issued June 12, 1998.

The guidance document is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115) and represents FDA's current thinking on exports under sections 801(e) and 802 of the act. 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 comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The guidance 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 guidance is available on the Internet at *http://www.fda.gov* or *http://www.fda.gov/ohrms/dockets/default.htm*.

Dated: August 7, 2007.

Randall W. Lutter,

Deputy Commissioner for Policy.

[FR Doc. E7–15840 Filed 8–13–07; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the meeting of the President's Cancer Panel.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(9)(B), Title 5 U.S.C., as amended, because the premature disclosure of information and the discussions would likely to significantly frustrate implementation of recommendations.

Name of Committee: President's Cancer Panel.

Date: September 10, 2007.

Open: September 10, 2007, 8 a.m.–4 p.m.

Agenda: Strategies for Maximizing the Nation's Investment in Cancer.

Place: Marriott Evergreen Conference Center, 4021 Lakeview Drive, Stone Mountain, GA 30083.

Closed: September 10, 2007, 4:30 p.m.–6:30 p.m.

Agenda: The Panel will discuss potential recommendations from current series ''Strategies for Maximizing the Nation's Investment in Cancer'' and discuss potential topics for the 2008/2009 series.

Place: Marriott Evergreen Conference Center, 4021 Lakeview Drive, Stone Mountain, GA 30083.

Contact Person: Abby Sandler, PhD, Executive Secretary, National Cancer Institute, National Institutes of Health, Building 6116, Room 212, 6116 Executive Boulevard, Bethesda, MD 20892, 301/451–9399.

Any interested person may file written comments with the committee by forwarding the comments to the Contact Person listed on this notice. The comments should include the name, address, telephone number and, when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *deainfo.nci.nih.gov/advisory/pcp/pcp.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: August 8, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3956 Filed 8–13–07; 8:45 am]

BILLING CODE 4140–01–M

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. Appendix 2), notice is hereby given of the following meetings.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Vaccine Design and Acute HIV Infection.

Date: September 7, 2007.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge 6700, 6700B Rockledge Drive, Bethesda, MD 20817 (Telephone Conference Call).

Contact Person: Clayton C. Huntley, PhD, Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–451–2570, *chuntley@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Disease Research, National Institutes of Health, HHS)

Dated: August 8, 2007.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 07–3957 Filed 8–13–07; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1699–DR]

Kansas; Amendment No. 13 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 Kansas (FEMA–1699–DR), dated May 6, 2007, and related determinations.

DATES: *Effective Date:* July 31, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Kansas is hereby amended to include the following area among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of May 6, 2007.

Sumner 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15857 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–3276–EM]

Federated States of Micronesia; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the Federated States of Micronesia (FEMA–3276–EM), dated July 31, 2007, and related determinations.

DATES: *Effective Date:* July 31, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated July 31, 2007, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the Federated States of Micronesia resulting from a drought beginning on March 5, 2007, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act). Therefore, I declare that such an emergency exists in the Federated States of Micronesia.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act, to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide Individual Assistance, limited to the Emergency Food Assistance Program, and emergency protective measures (Category B) under the Public Assistance program, including direct Federal assistance. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs.

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 emergency assistance and administrative expenses. 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 pursuant to the authority vested in the Administrator, Department of Homeland Security, under Executive Order 12148, as amended, Woodrow Goins, Jr., of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the Federated States of Micronesia to have been affected adversely by this declared emergency:

The islands of Kuttu, Lukunoch, Onanu, Oneop, Onou, and Tamatam within Chuuk State for Individual Assistance, limited to the Emergency Food Assistance Program through the U.S. Department of Agriculture, and emergency protective measures (Category B) under the Public Assistance program, including direct Federal 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15859 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1713–DR]

North Dakota; 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 North Dakota (FEMA–1713-DR), dated July 17, 2007, and related determinations.

DATES: *Effective Date:* August 3, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Dakota is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 17, 2007.

Cass and Cavalier Counties 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15874 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1712–DR]

Oklahoma; 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 Oklahoma (FEMA–1712–DR), dated July 7, 2007, and related determinations.

DATES: *Effective Date:* August 3, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Oklahoma is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of July 7, 2007.

Logan, Payne, Pontotoc, and Seminole Counties for Individual Assistance.

Blaine, Bryan, Canadian, Cleveland, Cotton, Grady, Kiowa, McClain, Oklahoma, Rogers, and Stephens Counties for Individual Assistance and emergency protective measures [Category B], limited to direct Federal assistance under the Public Assistance 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15875 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1709–DR]

Texas; Amendment No. 9 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–1709–DR), dated June 29, 2007, and related determinations.

DATES: *Effective Date:* August 7, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 29, 2007.

Guadalupe, Henderson, Nueces, Van Zandt, Walker, and Zavala Counties for Individual Assistance.

Anderson, Hill, Navarro, Throckmorton, Van Zandt, Walker, and Wilbarger Counties for Public Assistance, including direct Federal assistance.

Cherokee County for Public Assistance, including direct Federal 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15855 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1709–DR]

Texas; Amendment No. 8 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 for the State of Texas (FEMA–1709–DR), dated June 29, 2007, and related determinations.

DATES: *Effective Date:* August 3, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective August 3, 2007.

(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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15856 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1709–DR]

Texas; Amendment No. 7 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–1709–DR), dated June 29, 2007, and related determinations.

DATES: *Effective Date:* July 31, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Texas is hereby amended to include the following areas among those areas determined to have been adversely affected by the catastrophe declared a major disaster by the President in his declaration of June 29, 2007.

Bee and Medina Counties for Individual Assistance and Public Assistance, including direct Federal assistance.

Denton and Tarrant Counties for Public Assistance, including direct Federal assistance (already designated for Individual Assistance and Public Assistance Category B [emergency protective measures], limited to direct Federal assistance).

Parker, Runnels, Smith, and Starr Counties for Public Assistance, including direct Federal 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15858 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1715–DR]

Vermont; 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 Vermont (FEMA–1715–DR), dated August 3, 2007, and related determinations.

DATES: *Effective Date:* August 6, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Albert L. Lewis, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of Michael L. Parker 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program—Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15871 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[FEMA–1715–DR]

Vermont; 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 Vermont (FEMA–1715–DR), dated August 3, 2007, and related determinations.

DATES: *Effective Date:* August 3, 2007.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Disaster Assistance Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated August 3, 2007, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the damage in certain areas of the State of Vermont resulting from severe storms and flooding during the period of July 9–11, 2007, 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. 5121–5206 (the Stafford Act). Therefore, I declare that such a major disaster exists in the State of Vermont.

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, 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 be supplemental, any Federal funds provided under the Stafford Act for Hazard Mitigation will be limited to 75 percent of the total eligible costs. Federal funds provided under the Stafford Act for Public Assistance also will be limited to 75 percent of the total eligible costs, except for any particular projects that are eligible for a higher Federal cost-sharing percentage under the FEMA Public Assistance Pilot Program instituted pursuant to 6 U.S.C. 777. If Other Needs Assistance under Section 408 of the Stafford Act is later requested and warranted, Federal funding under that program also 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 Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Michael L. Parker, of FEMA is appointed to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Vermont to have been affected adversely by this declared major disaster:

Orange, Washington, and Windsor Counties for Public Assistance.

All counties within the State of Vermont 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 Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050 Individuals and Households Program-Other Needs, 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

R. David Paulison,

Administrator, Federal Emergency Management Agency.

[FR Doc. E7–15872 Filed 8–13–07; 8:45 am]

BILLING CODE 9110–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Form I–131, Revision of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review: Form I–131, Application for Travel Document. OMB Control Number: 1615–0013.

The Department of Homeland Security, U.S. Citizenship and Immigration Services has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until October 15, 2007.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated

response time should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352, or via e-mail at *rfs.regs@dhs.gov*. When submitting comments by e-mail please add the OMB Control Number 1615–0013 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection*: Application for Travel Document.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–131. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as brief abstract: Primary:* Individuals or households. Certain aliens, namely permanent or conditional residents, refugees or asylees and aliens abroad use this information collection to apply for a travel document to lawfully enter or reenter the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 164,103 responses at 55 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 147,692 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at: *http://www.regulations.gov/fdmspublic/component/main*. We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: August 8, 2007.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E7–15853 Filed 8–13–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 30-Day Notice of Information Collection Under Review: Notice of Immigration Pilot Program, OMB Control No. 1615–0061.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on June 8, 2007, at 72 FR 31844 allowing for a 60-day public comment period. USCIS did not receive any comments.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until September 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Management Division, Clearance Office, 111 Massachusetts Avenue, 3rd floor, Washington, DC 20529. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov,* and to the OMB USCIS Desk Officer via facsimile at 202–395–6974 or via e-mail at *kastrich@omb.eop.gov.*

When submitting comments by e-mail please make sure to add OMB Control Number 1615–0061 in the subject box. Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Immigration Pilot Program.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No form number. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and households. The information collected will be used by USCIS to determine which regional centers should participate in the immigration pilot program.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 50 responses at 40 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 2,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the information collection instrument, please visit the USCIS Web site at:

http://www.regulations.gov/fdmspublic/component/main. We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd floor, Suite 3008, Washington, DC 20529, telephone number 202–272–8377.

Dated: August 8, 2007.

Stephen Tarragon,

Deputy Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. E7–15854 Filed 8–13–07; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5130–N–08]

Privacy Act; Proposed New Systems of Records, Real Estate Management System/Integrated Real Estate Management System (REMS/iREMS)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Establish a new Privacy Act System of Records.

SUMMARY: HUD proposes to establish a new record system to add to its inventory of systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed new system of records is the Real Estate Management System (REMS/iREMS). The new record system is sponsored by HUD's Office of Multifamily Housing and will be used to provide regulatory control over HUD's multifamily housing portfolio, and to ensure compliance with HUD program requirements. REMS/iREMS will also serve as the Department's repository for HUD's property portfolios of insured, subsidized, HUD-held, HUD-owned, co-insured, elderly and disabled properties, and provides portfolio management for Section 8 contracts, physical property inspection follow-up, and financial assessment reviews.

DATES: *Effective Date:* This action shall be effective without further notice on September 13, 2007 unless comments are received during or before this period that would result in a contrary determination.

Comments Due Date: September 13, 2007.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: The Departmental Privacy Act Officer, 451 Seventh Street, SW., Room 4178, Washington, DC 20410, telephone Number (202) 708–2374 or the System Owner, 451 Seventh Street, SW., Room 6232, Washington, DC 20410, telephone number (202) 402–3297. (These are not toll-free numbers.) Telecommunication device for hearing and speech-impaired individuals (TTY) is available at (800) 877–8339 (Federal Information Relay Service).

SUPPLEMENTARY INFORMATION: Title 5 U.S.C. 552a(e)(4) and (11) provide that the public be afforded a 30-day period in which to comment on the new system of records, and require published notice of the existence and character of the system of records.

The new system report was submitted to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Oversight and Government Reform pursuant to paragraph 4c of Appendix 1 to OMB Circular No. A–130, ''Federal Responsibilities for Maintaining Records About Individuals,'' July 25, 1994 (59 FR 37914).

Authority: 5 U.S.C. 552a, 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated August 7, 2007.

Bajinder Paul,

Acting, Chief Information Officer.

HUD/MFH–10

SYSTEM NAME:

Real Estate Management System (REMS), effective Fiscal Year 2008 the new system name will be Integrated Real Estate Management System (iREMS).

SYSTEM LOCATION:

Charleston West Virginia, Philadelphia Pennsylvania (back-up facility).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

External business partners approved to do Multifamily business with HUD (e.g., property owners, management agents, contract administrators, and owner/agent contacts. (Address, phone, fax, and e-mail)

CATEGORIES OF RECORDS IN THE SYSTEM:

Loan Servicing information, Section 8 subsidy contract renewals, property management reviews, physical condition of multifamily properties and ownership data, workload tracking of HUD staff, Departmental Enforcement Center tracking for corrective actions/referrals, and participant/partner information. Within the participant data (owners, lessees, management agents, and sponsor/developers), the name, address, telephone number, fax number, e-mail address, and Tax ID Number or Social Security Number are stored.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 3543, Section 165 of the Housing and Community Development Act, 24 CFR part 5(b).

PURPOSES:

REMS/iREMS is HUD's multifamily property management tool for the Office of Multifamily Housing (MFH), the Departmental Enforcement Center (DEC), and the Real Estate Assessment Center (REAC). REMS provides regulatory control over HUD's Multifamily housing portfolio, and ensures compliance with HUD program requirements. REMS/iREMS data is the repository of HUD's data that define the property portfolio of insured, subsidized, HUD-held, HUD-owned, co-insured, elderly and disabled properties, and provides portfolio management for Section 8 contracts, physical property inspection follow-up, and financial assessment reviews.

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, other routine uses of the data are to ensure compliance with HUD regulations and business agreements:

(1) Office of Multifamily Housing—to define the portfolio of insured, subsidized, HUD-held, HUD-owned, co-insured, elderly and disabled properties; Provides portfolio management for Section 8 contracts, physical inspection follow-up and financial assessment reviews; Track property status, loan status and characteristics, Section 8 contract renewals, and financial status of property owners.

(2) Real Estate Assessment Center—to validate financial statement submissions and mortgagee inspections.

(3) Departmental Enforcement Center and Office of Affordable Housing Preservation—to track property/owner corrective action referrals.

(4) HUD Headquarters staff and Field Offices use data to uniquely identify program participants,

(5) Government National Mortgage Association (GNMA) receives monthly

extracts of participant data to confirm the status of active loans.

(6) HUD Business Partners (Public Housing Authorities and Community Development Corporations serving as Performance-Based Contract Administrators (PBCAs)) will use the information to manage their assigned Section 8 contracts.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The REMS/iREMS database is termed the Housing Enterprise Real Estate Management System (HEREMS) database. There are three HEREMS database servers: The main production DB server in Charleston WVA, a hot-backup copy which is updated several seconds behind the Charleston server, and a nightly created copy of the HEREMS DB from which standardized reports (created with Actuate) and Ad hoc reports (via MS Access) are retrieved. These files are stored on disk and backups are stored on tape. Manual files are stored in local field office per the records disposition schedule 18 in Handbook 2225.6 Rev-1.

RETRIEVABILITY:

Information is retrieved by Property identification or Contract ID. Within these, it is possible to use screen queries to drill down into other layers of subordinate data. In some cases, participant/partner information and security system access is via name, Taxpayer Identification Number (TIN) and/or Social Security Number (SSN). However, the Property Identification or Contract ID are the primary sources used to retrieve information from the REMS/iREMS.

SAFEGUARDS:

Data can only be accessed via entry of a valid HUD User ID and Password. HUD Security access to REMS is controlled by the Web Access Subsystem (WASS), a common security module for multiple web-based applications.

Manual records from forms and printed reports are secured and stored in an enclosed office space that is accessible only to HUD personnel with a need to use/know the records content. (i.e., Records are stored in cabinets in rooms to which access is restricted to those HUD/PBCA persons performing property asset management functions. Background screening, limited authorization to specific property and technical web-based restraints are employed with regard to accessing records.

RETENTION AND DISPOSAL:

Property data, both current and historical is not archived or destroyed. Owner history data is maintained indefinitely to support enforcement actions and portfolio analysis. REMS/iREMS receives data primarily from other computer applications at HUD. Paper records are stored here or at the HUD Field Office. These systems follow the records disposition schedule defined in Appendix 18 of Handbook 2225.6 Rev-1.

SYSTEM MANAGER(S) AND ADDRESS:

Stephen A. Martin, Director, Office of Program Systems Management, Office of Multifamily Housing. Address: 451 Seventh Street, SW., Washington, DC 20410

NOTIFICATION PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer at the Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410, in accordance with the procedures in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

Include the following standard language: Procedures for the amendment or correction of records, and for applicants want to appeal initial agency determination appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178, Washington, DC 20410; and,

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street, SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

The sources of data are contractual agreements between HUD and property owners (e.g., Regulatory Agreement, Section 8 Housing Assistance Payments (HAP) contract) and memorandums to HUD from the business partners.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. E7–15841 Filed 8–13–07; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability for the Comprehensive Conservation Plan and Finding of No Significant Impact for the Flattery Rocks, Quillayute Needles, and Copalis National Wildlife Refuges, Clallam, Jefferson, and Grays Harbor Counties, WA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The Fish and Wildlife Service (Service) has completed a Comprehensive Conservation Plan (CCP) and Finding of No Significant Impact (FONSI) for the Flattery Rocks, Quillayute Needles, and Copalis National Wildlife Refuges (Washington Islands Refuges, or Refuges). The CCP was developed to provide a foundation for the management and use of the Washington Islands Refuges. The Service is furnishing this notice to advise other agencies and the public of the availability of the CCP and FONSI, and the decision to implement Alternative B as described in the CCP. The Service's Regional Director for the Pacific Region selected Alternative B for managing the Refuges for the next 15 years. The Washington Islands Refuges are located off the Pacific Coast of Washington.

DATES: The CCP and FONSI are now available. Implementation of the CCP may begin immediately.

ADDRESSES: Printed copies of the CCP and FONSI are available for viewing at Washington Maritime National Wildlife Refuge Complex Headquarters, 33 S. Barr Road, Port Angeles, WA 98362, and may be obtained by visiting or writing to the Refuge Complex. These documents are also available for viewing and downloading on the Internet at *http://pacific.fws.gov/planning*.

FOR FURTHER INFORMATION CONTACT: Kevin Ryan, Project Leader, Washington Maritime National Wildlife Refuge Complex, phone (360) 457–8451.

SUPPLEMENTARY INFORMATION: The Washington Islands Refuges are part of the National Wildlife Refuge System administered by the Service. The National Wildlife Refuge System Administration Act of 1966 (Refuge Administration Act), as amended, requires all units of the National Wildlife Refuge System to be managed in accordance with an approved CCP. A CCP provides management direction, and identifies refuge goals, objectives,

and strategies for achieving refuge purposes. We prepared the CCP and FONSI for the Washington Islands Refuges pursuant to the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321–4370d), as amended, and its implementing regulations, the Refuge Administration Act, and Service policies.

The Washington Islands Refuges are located in Clallam, Jefferson, and Grays Harbor Counties, Washington. Planning for the Refuges was conducted together because many of the same physical characteristics, management issues, and conservation opportunities occur on, or are relevant to the management of each of the Refuges.

During the CCP planning process for the Refuges many elements were considered, including wildlife management and habitat protection, off-refuge wildlife-dependent recreational and educational opportunities, and coordination with tribal, State, and Federal agencies and other interested groups. The Draft CCP and associated Environmental Assessment identified and evaluated two alternatives for managing the Refuges. The Draft CCP was available for a 30-day public review and comment period, which occurred May 31 through June 30, 2005 (May 31, 2005, 70 FR 30967). The Service received 24 comment letters on the Draft CCP, which were incorporated into, or otherwise responded to in the final CCP. No substantive changes where required to address public comments.

By implementing the CCP, the Service will minimize disturbance to wildlife, reduce contaminants, enhance oil spill response preparedness, initiate and participate in cooperative monitoring and research, and enhance the Refuges' public education program.

Wildlife disturbances will be minimized by enforcing access restrictions to Refuge islands, educating boaters and pilots about wildlife disturbances, promoting a voluntary 200-yard boat-free zone, pursuing tideland leases with the State, and enforcing wildlife disturbance regulations. Working with partners to reduce impacts from oil spills and remove derelict fishing gear and other wildlife hazards is a high priority for the Refuges. Long-term wildlife monitoring efforts will continue, and Refuge staff will assist with developing a monitoring manual for seabirds. The Service will develop partnerships to pursue joint research projects and develop and staff an off-refuge interpretive center. The proposal in the CCP for eradication of European rabbits on Destruction Island will be addressed in a separate planning effort with full public involvement.

Dated: June 14, 2007.

Renne R. Lohoefener,

Regional Director, Region 1, Portland, Oregon.

[FR Doc. E7–15883 Filed 8–13–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Washington Maritime National Wildlife Refuge Complex, Sequim, WA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of intent to prepare a comprehensive conservation plan and environmental assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) intend to prepare a Comprehensive Conservation Plan and Environmental Assessment (CCP/EA) for the Protection Island and San Juan Islands National Wildlife Refuges (Refuges). The Refuges are located in Island, Jefferson, San Juan, Skagit, and Whatcom Counties, Washington. The San Juan Islands Refuge includes the San Juan Islands Wilderness Area. We are furnishing this notice to advise other agencies and the public of our intentions, and to obtain public comments, suggestions, and information on the scope of issues to be considered during the CCP and National Environmental Policy Act planning process.

DATES: Written comments on the scope of the CCP received by October 15, 2007, will be considered during development of the Draft CCP/EA.

ADDRESSES: Address comments, questions, and requests for information to: Kevin Ryan, Project Leader, Washington Maritime National Wildlife Refuge Complex, 33 South Barr Road, Port Angeles, WA 98362. Comments may be faxed to the Refuge at (360) 452–5086, or e-mailed to *FW1PlanningComments@fws.gov.* Include Protection Island and San Juan Islands Refuges CCP in the subject line of your message. Additional information about the CCP planning process is available on the Internet at: *http://www.fws.gov/pacific/planning.*

FOR FURTHER INFORMATION CONTACT: Kevin Ryan, Project Leader, Washington Maritime National Wildlife Refuge Complex, phone (360) 457–8451.

SUPPLEMENTARY INFORMATION: The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd-668ee), requires all lands within the National Wildlife Refuge System to be managed in accordance with an approved CCP. A CCP guides refuge management decisions, and identifies long-range goals, objectives, and strategies for achieving the purposes for which the refuge was established. During the CCP planning process many elements will be considered, including wildlife and habitat protection and management, public use opportunities, and cultural resource protection. Public input during the planning process is essential. The CCP for the Protection Island and San Juan Islands Refuges will describe desired conditions for the Refuges and the long-term goals, objectives, and strategies for achieving those conditions. As part of the planning process, the Service will prepare an environmental assessment in accordance with the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4371 et seq.)

Background

The Protection Island National Wildlife Refuge Act was enacted in 1982 (Pub L. 97–333), authorizing creation of the 316-acre Refuge located near the mouth of Discovery Bay on the southeast side of the Strait of Juan de Fuca. The purposes of the Protection Island Refuge are to provide habitat for a broad diversity of bird species, with particular emphasis on protecting the nesting habitat of the bald eagle, tufted puffin, rhinoceros auklet, pigeon guillemot, and pelagic cormorant; protecting harbor seals' hauling-out areas; and providing for scientific research and wildlife-oriented public education and interpretation. Refuge habitats include grass and shrublands, a small woodland area, shoreline, spits, and sandy bluffs. Most of the breeding seabird population of Puget Sound and the Strait of Juan de Fuca nests on Protection Island. The island is a major resting and breeding site for harbor seals, and also supports a small number of breeding elephant seals. Additional information concerning Protection Island NWR is available at: *http://www.fws.gov/pacific/refuges/field/wa_protectionis.htm.*

Located in the northwest corner of Washington State between southern Canada and the United States mainland, the San Juan Islands Refuge has a long establishment history. Executive Order 1959 established the Smith Island Reservation in 1914, as a preserve, breeding ground, and winter sanctuary for native birds. Subsequent executive orders and public land orders through 1983 culminated in the current configuration of the Refuge, which totals

approximately 454 acres of islands, rocks, and reefs. Habitats include remnant prairies, cliff faces, shorelines, and old growth forest. San Juan Islands Refuge provides important breeding, resting, and foraging habitat for sensitive marine bird and mammal species. The islands of this refuge are part of the San Juan Islands Wilderness, except for Smith, Minor, and Turn Island, and a 5-acre parcel on Matia Island. The provisions of the Wilderness Act apply to all refuge lands that are designated wilderness. Additional information concerning San Juan Islands Refuge is available at: *http://www.fws.gov/pacific/refuges/field/wa_sanjuanis.htm.*

Preliminary Issues, Concerns, and Opportunities

The following broad categories of preliminary issues have been identified by the Service for consideration in the planning process: Threats to Refuge resources; Refuge buffers; habitat restoration; wilderness management on San Juan Islands Refuge; research opportunities; visitor services; and refuge administration. Additional issues may be identified during public scoping. The CCP will focus on ways of minimizing threats to the Refuges' resources and visitor services programs will be evaluated based on current Service policies. A revised wilderness stewardship plan for the San Juan Islands Wilderness will be included in the CCP as well.

Public Availability of Comments

All comments received from individuals become part of the official public record. Requests for such comments will be handled in accordance with the Freedom of Information Act, NEPA, and Service and Department of the Interior policies and procedures.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

Dated: July 17, 2007.

David J. Wesley,

Acting Regional Director, Region 1, Portland, Oregon.

[FR Doc. E7–15882 Filed 8–13–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Safe Harbor Agreement for the Valley Elderberry Longhorn Beetle and the Giant Garter Snake for Landowners Restoring, Enhancing or Managing Native Riparian and Wetland Habitats in Yolo County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; receipt of application.

SUMMARY: This notice advises the public that the National Audubon Society, Inc., doing business in California as Audubon California (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an enhancement of survival permit pursuant to Section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (Act). The permit application includes a proposed Safe Harbor Agreement (Agreement) between the Applicant and the Service for the threatened valley elderberry longhorn beetle (VELB) (*Desmocerus californicus dimorphus*) and/or the giant garter snake (GGS) (*Thamnopsis gigas*). The Agreement and permit application are available for public comment.

DATES: Written comments should be received on or before September 13, 2007.

ADDRESSES: Comments should be addressed to Shannon Holbrook, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, W–2605, Sacramento, California 95825. Written comments may be sent by facsimile to (916) 414–6712.

FOR FURTHER INFORMATION CONTACT: Ms. Shannon Holbrook, Sacramento Fish and Wildlife Office (see **ADDRESSES**); telephone: (916) 414–6600.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of the documents for review by contacting the individual named above. You may also make an appointment to view the documents at the above address during normal business hours.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Background

Under a Safe Harbor Agreement, participating landowners voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the Act. Safe Harbor Agreements, and the subsequent enhancement of survival permits that are issued pursuant to Section 10(a)(1)(A) of the Act (16 U.S.C. 1531 et seq.), encourage private and other non-Federal property owners to implement conservation efforts for listed species by assuring property owners that they will not be subjected to increased land use restrictions as a result of efforts to attract or increase the numbers or distribution of a listed species on their property. Application requirements and issuance criteria for enhancement of survival permits through Safe Harbor Agreements are found in 50 CFR 17.22(c).

We have worked with the Applicant to develop this proposed Programmatic Agreement for the conservation of the VELB and the GGS in Yolo County, California. The properties subject to this Agreement consist of approximately 200,000 acres of non-Federal properties within the boundaries of Yolo County, on which habitat for the VELG and/or GGS will be restored, enhanced, and managed pursuant to a written agreement between Audubon California and a property owner.

This Agreement provides for the creation of a Program in which private landowners (Program Participants) enter into written cooperative agreements with the Applicant pursuant to the terms of the Agreement, to restore, enhance, and maintain riparian and wetland habitat in ways beneficial to the VELB and/or GGS. Such cooperative agreements will be for a term of at least 10 years. The proposed duration of the Agreement is 30 years, and the proposed term of the enhancement of survival permit is 30 years. The Agreement fully describes the proposed management activities to be undertaken by Program Participants and the conservation benefits expected to be gained for the VELB and GGS.

Upon approval of this Agreement, and consistent with the Service's Safe Harbor Policy published in the **Federal Register** on June 17, 1999 (64 FR 32717), the Service would issue a permit to Audubon California authorizing take of VELG and GGS by Program Participants incidental to the implementation of the

management activities specified in the cooperative agreements, incidental to other lawful uses of the properties, including normal routine land management activities, and/or to return to pre-Agreement conditions.

To benefit the VELB and GGS, Program Participants will agree to undertake site-specific management activities, which will be specified in their written cooperative agreements. Management activities that could be included in the Cooperative Agreements will provide for the restoration, enhancement and management of native riparian and/or wetland habitats in Yolo County. The object of such activities is to enhance populations of VELB and/or GGS by creating healthy native riparian plant and/or wetland communities. Take of VELB and GGS incidental to the aforementioned activities is unlikely; however, it is possible that in the course of such activities or other lawful activities on the enrolled property, a Program Participant could incidentally take a VELB or GGS thereby necessitating take authority under the permit.

Pre-Agreement conditions (baseline), consisting of a description and survey to delineate the locations of all elderberry bushes having 1 or more stems that are 1 inch or greater in diameter at the base and to determine the quantity, quality, and location of suitable GGS habitat, shall be determined for each enrolled property as provided in the Agreement. In order to receive the above assurances regarding incidental take of VELB and/or GGS, a Program Participant must maintain baseline on the enrolled property. The Agreement and requested enhancement of survival permit will allow each Program Participant to return to baseline conditions after the end of the term of the 10-year cooperative agreement and prior to the expiration of the 30-year permit, if so desired by the Applicants.

Consistent with the Service's Safe Harbor Policy (64 FR 32717), the proposed Agreement and requested permit also extend certain assurances to those lands that are immediately adjacent to lands on which restoration activities occur. To receive such assurances, a neighboring landowner must enter into a written agreement with the Service that specifies the baseline conditions on the property. This written agreement remains in effect until the expiration of the 30-year Agreement between the Applicant and the Service and requires the neighboring landowner to maintain the baseline conditions established at the start of the agreement.

Public Review and Comments

The Service has made a preliminary determination that the proposed Agreement and permit application are eligible for categorical exclusion under the National Environmental Policy Act of 1969 (NEPA). We explain the basis for this determination in an Environmental Action Statement, which is also available for public review.

Individuals wishing copies of the permit application, copies of our preliminary Environmental Action Statement, and/or copies of the full text of the Agreement, including a map of the proposed permit area, references, and legal descriptions of the proposed permit area, should contact the office and personnel listed in the **ADDRESSES** section above.

If you wish to comment on the permit application or the Agreement, you may submit your comments to the address listed in the **ADDRESSES** section of this document. Comments and materials received, including names and addresses of respondents, will be available for public review, by appointment, during normal business hours at the address in the **ADDRESSES** section above and will become part of the public record, pursuant to section 10(c) of the Act. Individual respondents may request that we withhold their home address from the record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. Anonymous comments will not be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, are available for public inspection in their entirety.

We will evaluate this permit application, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a) of the Act and NEPA regulations at 40 CFR 1506.6. If we determine that the requirements are met, we will sign the proposed Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the Act to the Applicants for take of the VELB and/or GGS incidental to otherwise lawful activities in accordance with the terms of the Agreement. We will not make our final decision until after the end of the 30-day comment period and will fully consider all comments received during the comment period.

The Service provides this notice pursuant to section 10(c) of the Act and pursuant to implementing regulations for NEPA (40 CFR 1506.6).

Dated: August 8, 2007.

Susan K. Moore,

Field Supervisor, Sacramento Fish and Wildlife Office, Sacramento, California.

[FR Doc. E7–15893 Filed 8–13–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–050–1020–MJ; HAG07–0169]

Notice of Public Meetings—John Day/Snake Resource Advisory Council (RAC)

AGENCY: Bureau of Land Management (BLM), Prineville District.

ACTION: Notice of Public Meetings—John Day/Snake Resource Advisory Council (RAC).

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act of 1972, the Department of the Interior, BLM John Day Snake RAC will meet as indicated below:

The John Day/Snake RAC is scheduled to meet on September 12, 2007, at the Geiser Grand Hotel at 1996 Main Street, Baker City, Oregon. The meeting time will be from approximately 8 a.m. to 3:30 p.m. A public comment period will begin at 1 p.m. and end at 1:15 p.m. (Pacific Daylight Time). The meeting will include such topics as the John Day Basin Resource Management Plan, Eastern Oregon off-highway vehicle and travel management, salmon recovery efforts for the Mid-Columbia and Northeast Oregon/Snake Rivers, the Blue Mountain Forest Plan Revision and other matters as may reasonably come before the council.

Meeting Procedures: The meeting is open to the public. The public may present written comments to the RAC. Depending on the number of persons wishing to provide oral comments and agenda topics to be covered, the time to do so may be limited. Individuals who plan to attend and need special assistance such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM representative indicated below. For a copy of the information to be distributed to the RAC members, please submit a written

request to the BLM Prineville District Office 10 days prior to the meeting.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the John Day/Snake RAC may be obtained from Virginia Gibbons, BLM Public Affairs Specialist, Prineville District Office, 3050 NE., Third Street, Prineville, Oregon 97754, (541) 416–6647 or e-mail *Virginia Gibbons@or.blm.gov.*

Dated: August 8, 2007.

Stephen R. Robertson,

Acting District Manager.

[FR Doc. E7–15898 Filed 8–13–07; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OMB Number 1121–NEW]

Bureau of Justice Statistics; Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of new information collection: 2007 Survey of Law Enforcement Gang Units.

The Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. The proposed information collection was previously published in the **Federal Register** Volume 72, Number 102, pages 29550–29551 on May 29, 2007, allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until September 13, 2007. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–5806.

Written comments and suggestions from the pubic and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Enhance the quality, utility, and clarity of the information to be collected; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information

(1) Type of Information Collection: New Collection, Survey of Law Enforcement Gang Units, 2007.

(2) The Title of the Form/Collection: 2007 Survey of Law Enforcement Gang Units.

(3) The Agency Form Number, if any, and the Applicable Component of the Department Sponsoring the Collection: The form number is LEGU–07, Bureau of Justice Statistics, Office of Justice Programs, United States Department of Justice.

(4) Affected Public Who Will be Asked or Required to Respond, as well as a Brief Abstract: All law enforcement gang units in police agencies with 100 or more officers. This nationwide information collection will identify all large law enforcement agencies (those with 100 or more officers) in which there is a specialized unit staffed with full-time personnel that focuses primarily on gang activity. Information will be gathered about the operations, workload, policies, and procedures of these gang units. The information collected will provide a comprehensive look at the way in which large law enforcement agencies are organized to respond to gang problems and the types of gang prevention tactics that are employed. Summary measures of gang activity in the agencies' jurisdictions will supply some standardized metrics with which to compare jurisdictions.

(5) An Estimate of the Total Number of Respondents and the Amount of Time Estimated for an Average Respondent to Respond: An estimated 450 law enforcement gang units will complete a 1-hour questionnaire (LEGU–07).

(6) An Estimate of the Total Public Burden (in hours) Associated with the collection: The estimated public burden associated with this collection is 450 hours. (450 data collection forms completed by a commanding officer from each unit * one hour per form = 450 burden hours)

If additional information is required contact: Ms. Lynn Bryant, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: August 8, 2007.

Lynn Bryant,

Department Clearance Officer, PRA, United States Department of Justice.

[FR Doc. E7–15929 Filed 8–13–07; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

Parole Commission

Public Announcement; Pursuant to the Government in the Sunshine Act (Public Law 94–409) [5 U.S.C. Section 552b]

AGENCY HOLDING MEETING: Department of Justice, United States Parole Commission.

TIME AND DATE: 10 a.m., Thursday, July 26, 2007.

PLACE: 5550 Friendship Blvd., Fourth Floor, Chevy Chase, MD 20815.

STATUS: Open.

MATTERS CONSIDERED: At the July 26, 2007 meeting the Commission considered the following item that was placed on the agenda the day before the meeting, in addition to the items previously noticed:

Consideration of the Commission's funding request for FY 2009. The Commission voted to approve the Chairman's proposed funding request by a vote of 3–1.

AGENCY CONTACT: Thomas W. Hutchison, Chief of Staff, United States Parole Commission, (301) 492–5990.

Dated: August 9, 2007.

Rockne Chickinell,

General Counsel, U.S. Parole Commission.

[FR Doc. 07–3978 Filed 8–10–07; 10:16 am]

BILLING CODE 4410–31–M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 24, 2007.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than August 24, 2007. The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 7th day of August 2007.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

APPENDIX

[TAA petitions instituted between 7/30/07 and 8/3/07]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
61893	G and K Services, Inc. (Comp)	Laurel, MS	07/30/07	07/25/07
61894	Fry's Metals, Inc. (Comp)	Altoona, PA	07/30/07	07/26/07
61895	GF Office Furniture (TN AFL)	Gallatin, TN	07/30/07	07/27/07
61896	Brookwood Furniture Co., Inc. (Wrks)	Pontotoc, MS	07/30/07	07/20/07
61897	Managed Business Solutions, LLC (Wrks)	Fort Collins, CO	07/30/07	07/24/07
61898	Welco Lumber Company (Wrks)	Shelton, WA	07/30/07	07/27/07
61899	Ortronics, Inc. (Wrks)	Dallas, NC	07/30/07	07/27/07
61900	BorgWarner (Comp)	Sallisaw, OK	07/30/07	07/24/07
61901	Woodgrain Millworks (Wkrs)	White City, OR	07/31/07	07/30/07
61902	Gates Corporation (Wkrs)	Moncks Corner, SC	07/31/07	07/30/07
61903	TTM Technologies (Comp)	Chippewa Falls, WI	07/31/07	07/24/07
61904	Recon Automotive Remanufactors (Wkrs)	Philadelphia, PA	07/31/07	07/23/07
61905	The Boeing Company (AFLCIO)	Oak Ridge, TN	07/31/07	07/06/07
61906	Intec Group (Wkrs)	Morocco, IN	07/31/07	07/27/07
61907	Progressive Furniture, Inc. (Comp)	Claremont, NC	07/31/07	07/30/07
61908	Paulstra Company (Wkrs)	Grand Rapids, MI	07/31/07	07/27/07
61909	Rotation Dynamics (Wkrs)	Chicago, IL	07/31/07	07/11/07
61910	Trice Technologies Corporation (Wkrs)	Brownsville, TX	07/31/07	07/30/07
61911	Tembec (State)	St Francisville, LA	08/01/07	07/31/07
61912	Zach Hosiery, Inc. (Comp)	Thomasville, NC	08/01/07	07/31/07
61913	Sumersault Manufacturing Corp. (Comp)	Closter, NJ	08/01/07	07/31/07
61914	Amandi Services Inc. (Comp)	Mt. Pleasant, PA	08/01/07	07/31/07
61915	Vanson Leathers, Inc. (State)	Fall River, MA	08/02/07	08/01/07
61916	Honeywell International (Comp)	Fostoria, OH	08/02/07	07/30/07
61917	Millennium Speciality Chemicals (Comp)	Baltimore, MD	08/02/07	08/01/07
61918	Apparel Group (The)/Foxcroft Sportswear (State)	Fall River, MD	08/02/07	08/01/07
61919	Wakefield Engineering (State)	Fall River, MA	08/02/07	08/01/07
61920	Unit Parts Company (Comp)	Edmond, OK	08/02/07	07/30/07
61921	Whaling Manufacturing Co., Inc. (Comp)	Fall River, MA	08/02/07	07/31/07
61922	Urban Industries of Ohio, Inc. (Comp)	Galion, OH	08/02/07	08/01/07
61923	CHF Industries (State)	Fall River, MA	08/02/07	08/01/07
61924	Domtar (State)	Baileyville, ME	08/02/07	07/31/07
61925	Ansell (Comp)	Tarboro, NC	08/02/07	08/01/07
61926	Wellstone Mills (Comp)	Eufaula, AL	08/02/07	08/01/07
61927	C-Tech Industries (Wkrs)	Calumet, MI	08/02/07	08/01/07
61928	Seatply Inc. (Comp)	Jeffersonville, IN	08/02/07	08/01/07
61929	Ametek, Inc. (Comp)	Grand Junction, CO	08/03/07	08/02/07
61930	Astro American Chemical Co., Inc. (Comp)	Fountain Inn, SC	08/03/07	08/01/07
61931	Tyco Electronics (Comp)	East Berlin, PA	08/03/07	08/02/07

[FR Doc. E7–15847 Filed 8–13–07; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–60,578]

Loud Technologies, Inc. Including On-Site Temporary Workers of Microtech/KPB Staffing, Whitinsville, MA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on February 22, 2007, applicable to workers of Loud Technologies, Inc., Whitinsville, Massachusetts. The notice was published in the **Federal Register** on March 8, 2007 (72 FR 10561).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of wood speaker cabinets and speakers.

New information provided by the State agency representative shows that some of the former employees of the subject firm were converted to a temporary staffing agency, MicroTech/KPB Staffing, and continued employment on-site at the Whitinsville, Massachusetts location of Loud Technologies, Inc.

Based on this new information, the Department is amending the certification to include temporary workers of MicroTech/KPB Staffing working on-site at the Whitinsville, Massachusetts location of the subject firm.

The intent of the Department's certification is to include all workers at Loud Technologies, Inc., Whitinsville, Massachusetts, who were adversely affected by a likely increase in imports following a shift in production to China.

The amended notice applicable to TA-W–60,578 is hereby issued as follows:

All workers of Loud Technologies, Inc., including on-site temporary workers of MicroTech/KPB Staffing, Whitinsville, Massachusetts, who became totally or partially separated from employment on or after December 11, 2005, through February 22, 2009, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 6th day of August 2007.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–15850 Filed 8–13–07; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–59,685]

Laidlaw Corporation Now Known as Oldlaw Corporation Metropolis Division, Metropolis, IL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273), and section 246 of the Trade Act of 1974 (26 U.S.C. 2813), as amended, the Department of Labor issued a Certification Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance on July 25, 2006, applicable to workers of Laidlaw Corporation, Metropolis Division, Metropolis, Illinois. The notice was published in the **Federal Register** on August 14, 2006 (71 FR 46518).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of wire clothes hangers and drycleaning chemicals.

New information shows that as of May 1, 2006, Laidlaw Corporation is now known as Oldlaw Corporation following a partial purchase of the subject firm's assets by a group of investors. Workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account for Oldlaw Corporation, Metropolis Division.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Laidlaw Corporation, now known as Oldlaw Corporation, Metropolis Division, who were adversely affected by increased customer imports.

The amended notice applicable to TA–W–59,685 is hereby issued as follows:

All workers of Laidlaw Corporation, now known as Oldlaw Corporation, Metropolis Division, Metropolis, Illinois, who became totally or partially separated from employment on or after July 7, 2005, through July 25, 2008, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974, and are also eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

Signed at Washington, DC this 7th day of August 2007.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–15849 Filed 8–13–07; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,793]

Phillips Brothers, Inc., Springfield, IL; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on July 5, 2007 in response to a petition filed by a company official on behalf of workers at Phillips Brothers, Inc., Springfield, Illinois.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 27th day of July 2007.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–15852 Filed 8–13–07; 8:45 am]
BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,904]

Recon Automotive Remanufactors, Philadelphia, PA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on July 31, 2007, in response to a worker petition filed on behalf of workers at Volt Services Group, Houston, Texas.

The petitioning group of workers is covered by an earlier petition (TA–W–61,874) filed on July 24, 2007 that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case

would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed in Washington, DC, this 6th day of August, 2007.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–15846 Filed 8–13–07; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–61,541]

South Indiana Lumber Company, Inc., Liberty, KY; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated July 26, 2007, the petitioner requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers and former workers of the subject firm. The determination was signed on June 25, 2007 and published in the **Federal Register** on July 19, 2007 (72 FR 39644).

The initial investigation resulted in a negative determination based on the finding that imports of furniture blanks, stair balusters, and handle blanks did not contribute importantly to worker separations at the subject firm and no shift of production to a foreign source occurred.

In the request for reconsideration, the petitioner provided additional information regarding the subject firm's customers.

The Department has reviewed the workers' request for reconsideration and the existing record, and has determined that an administrative review is appropriate. Therefore, the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed in Washington, DC, this 3rd day of August, 2007.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–15851 Filed 8–13–07; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the period of *July 30 through August 3, 2007.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. The sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. Increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a)(2)(B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. There has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. The country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. There has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made for secondarily affected workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for the Division of Trade Adjustment Assistance to issue a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of Section 246(a)(3)(A)(ii) of the Trade Act must be met.

1. Whether a significant number of workers in the workers' firm are 50 years of age or older.

2. Whether the workers in the workers' firm possess skills that are not easily transferable.

3. The competitive conditions within the workers' industry (i.e., conditions within the industry are adverse).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–61,728; R and S Vinyl Products Group L.L.C., Clarion, PA: June 21, 2006.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) of the Trade Act have been met.

TA–W–61,866; STMicroelectronics, Inc., Carrollton, TX: July 23, 2006.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

None.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) of the Trade Act have been met.

None.

Affirmative Determinations For Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,683; Stanford Furniture Corp., Claremont, NC: June 11, 2006.

TA–W–61,843; Kraft Foods Global, Inc, Rochelle, IL: July 19, 2006.

TA–W–61,853; GHN Neon, Inc., A Subsidiary of Everbrite LLC, Neon Division, Garden Grove, CA: July 12, 2006.

TA–W–61,873; Sasol North America, Manufacturing Division, Baltimore, MD: July 18, 2006.

TA–W–61,466; Twiss Associates, Inc., Opelika, AL: May 2, 2006.

TA–W–61,636; Bethleon Togs, Inc., Bethlehem, PA: June 1, 2006.

TA–W–61,673; Voltarc Technologies, Inc., Waterbury, CT: June 12, 2006.

TA–W–61,720; Blue Heron Paper Co. of California, LLC, Pomona, CA: May 31, 2006.

TA–W–61,727; New River Industries, Inc., Radford, VA: June 20, 2006.

TA–W–61,758; Credence Speakers, Inc., Kevil, KY: June 21, 2006.

TA–W–61,786; SPM Corporation, Woburn, MA: July 2, 2006.

TA–W–61,800; O'Sullivan Industries, Inc., Roswell, GA: July 6, 2006.

TA–W–61,809; Vitco, LLC, Nappanee, IN: June 29, 2006.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,585; M and B Window Fashions, A Div. of Hunter Douglas, On-Site Leased Workers from Accountabilities & Inte, Los Angeles, CA: April 23, 2006.

TA–W–61,722; Seagate Technology, LLC, Recording Media Operations, On-Site Leased Workers From Spherion, Milpitas, CA: June 7, 2006.

TA–W–61,825; ASC Lansing Trim, Formerly Known as American Specialty Cars, Lansing, MI: July 12, 2006.

TA–W–61,829; Crane Plumbing LLC, Dallas Steel Division, Dallas, TX: July 12, 2006.

TA–W–61,865; Overland Custom Coach US, Inc., Brown City, MI: July 16, 2006.

TA–W–61,772; Emerson Network Power, Embedded Computing Facility, Madison, WI: June 29, 2006.

TA–W–61,838; Tyler Pipe Company, Tyler, TX: July 19, 2007.

The following certifications have been issued. The requirements of Section 222(b) (supplier to a firm whose workers are certified eligible to apply for TAA) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,645; Federal Mogul Corporation, Powertrain Division, Schofield, WI: June 7, 2006.

TA–W–61,846; Tingstol Company, Elk Grove Village, IL: July 3, 2006.

The following certifications have been issued. The requirements of Section 222(b) (downstream producer for a firm whose workers are certified eligible to apply for TAA based on increased imports from or a shift in production to Mexico or Canada) and Section 246(a)(3)(A)(ii) of the Trade Act have been met.

TA–W–61,562; Quebecor World, Chicago Division, Elk Grove, IL: May 15, 2006.

TA–W–61,875; Willowbrook Hosiery Co., Burlington, NC: August 20, 2007.

TA–W–61,417; Edenton Dyeing and Finishing, LLC, Edenton, NC: June 10, 2006.

Negative Determinations for Alternative Trade Adjustment Assistance

In the following cases, it has been determined that the requirements of 246(a)(3)(A)(ii) have not been met for the reasons specified.

The Department has determined that criterion (1) Of Section 246 has not been met. The firm does not have a significant number of workers 50 years of age or older.

None.

The Department has determined that criterion (2) of Section 246 has not been met. Workers at the firm possess skills that are easily transferable.

TA–W–61,728; R and S Vinyl Products Group L.L.C., Clarion, PA.

The Department has determined that criterion (3) of Section 246 has not been met. Competition conditions within the workers' industry are not adverse.

TA–W–61,866; STMicroelectronics, Inc., Carrollton, TX.

Negative Determinations for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

Because the workers of the firm are not eligible to apply for TAA, the workers cannot be certified eligible for ATAA.

The investigation revealed that criteria (a)(2)(A)(I.A.) and (a)(2)(B)(II.A.) (employment decline) have not been met.

TA–W–61,659; Mentor Graphics Corp., Systems Design Division, Wilsonville, OR.

TA–W–61,700; Thomson Satellite Premises Systems, Indianapolis, IN.

TA–W–61,735; Dolby Laboratories Licensing Corp., San Francisco, CA.

TA–W–61,773; Gilmour Manufacturing Co., A Subsidiary of Robert Bosch Tool Corp., Somerset, PA.

TA–W–61,833; Chapin Watermatics, Inc., A Subsidiary of Jain Americas, Inc., Watertown, NY.

TA–W–61,852; Schnadig Corporation, Montoursville, PA.

The investigation revealed that criteria (a)(2)(A)(I.B.) (Sales or production, or both, did not decline)

and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–61,687; The GSI Group, Inc., Vandalia, IL.

The investigation revealed that criteria (a)(2)(A)(I.C.) (increased imports) and (a)(2)(B)(II.B.) (shift in production to a foreign country) have not been met.

TA–W–61,742; Sypris Technologies, Inc., A Subsidiary of Sypris Solutions, Kenton, OH.

TA–W–61,845; NYC American, Inc., Brooklyn, NY.

The workers' firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–61,662; Metso Paper USA, Inc., Roll Service Shop, Appleton, WI.

TA–W–61,778; Integrated Brands, Inc., Divisional Coolbrands International, Ronkonkoma, NY.

TA–W–61,790; State Farm Insurance, Regional Claims Office, Wheelersburg, OH.

The investigation revealed that criteria of Section 222(b)(2) has not been met. The workers' firm (or subdivision) is not a supplier to or a downstream producer for a firm whose workers were certified eligible to apply for TAA.

None.

I hereby certify that the aforementioned determinations were issued during the period of July 30 through August 3, 2007. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: August 8, 2007.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. E7–15848 Filed 8–13–07; 8:45 am]

BILLING CODE 4510–FN–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards; Meeting Notice

In accordance with the purposes of sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232b), the Advisory Committee on Reactor Safeguards (ACRS) will hold a meeting on September 6–8, 2007, 11545 Rockville Pike, Rockville, Maryland. The date of this meeting was previously published in the **Federal Register** on Wednesday, November 15, 2006 (71 FR 66561).

Thursday, September 6, 2007, Conference Room T–2b3, Two White Flint North, Rockville, Maryland

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10:30 a.m.: Final Review of the License Renewal application for the Pilgrim Nuclear Power Station (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff and Entergy Nuclear Operations, Inc. regarding the license renewal application for the Pilgrim Nuclear Power Station and the associated NRC staff's final Safety Evaluation Report.

10:45 a.m.–12:15 p.m.: Revisions to Standard Review Plan (SRP) Sections 19.0 and 19.2 (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding revisions to SRP Sections 19.0, ''Probabilistic Risk Assessment and Severe Accident Evaluation for New Reactors,'' and 19.2, ''Review of Risk Information Used to Support Permanent Plant Specific Changes to the Licensing Basis: General Guidance.''

1:30 p.m.–3 p.m.: Proposed Recommendations for Resolving Generic Safety Issue (GSI) 156.6.1, ''Pipe Break Effects on Systems and Components Inside Containment'' (Open)—The Committee will hear presentations by and hold discussions with representatives of the NRC staff regarding the recommendations proposed by the staff for resolving GSI–156.6.1, and related matters.

3:15 p.m.–4:45 p.m.: Status of NRR Activities in the Fire Protection Area (Open)—The Committee will hear presentations by and hold discussions with representatives of the Office of Nuclear Reactor Regulation (NRR) regarding the status of ongoing and proposed NRR activities associated with fire protection.

5 p.m.–7 p.m.: Preparation of ACRS Reports (Open)—The Committee will discuss proposed ACRS reports on matters considered during this meeting, as well as a proposed ACRS report on Technology-Neutral Framework for Future Plant Licensing.

Friday, September 7, 2007, Conference Room T–2B3, Two White Flint North, Rockville, Maryland

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–9:30 a.m.: Future ACRS Activities/Report of the Planning and Procedures Subcommittee (Open)—The Committee will discuss the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the full Committee during future meetings. Also, it will hear a report of the Planning and Procedures Subcommittee on matters related to the conduct of ACRS business, including anticipated workload and member assignments.

9:30 a.m.–9:45 a.m.: Reconciliation of ACRS Comments and Recommendations (Open)—The Committee will discuss the responses from the NRC Executive Director for Operations to comments and recommendations included in recent ACRS reports and letters.

9:45 a.m.–10 a.m.: Subcommittee Report (Open)—The Committee will hear a report by and hold discussions with the Chairman of the ACRS Subcommittee on Plant License Renewal regarding interim review of the license renewal application for the Fitzpatrick Nuclear Plant.

10:15 a.m.–11:45 a.m.: Draft Report on Quality Assessment of Selected NRC Research Projects (Open)—The Committee will discuss a draft ACRS report on the results of the quality assessment of the NRC research projects on: Fatigue Crack Flaw Tolerance in Nuclear Power Plant Piping; Cable Response to Live Fire (CAROLFIRE) Testing; and Technical Review of On-Line Monitoring Techniques for Performance Assessment.

12:45 p.m.–2:45 p.m.: Draft ACRS Report on the NRC Safety Research Program (Open)—The Committee will discuss a draft ACRS report on the NRC Safety Research Program.

3 p.m.–7 p.m.: Preparation of ACRS Reports (Open)—The Committee will discuss proposed ACRS reports.

Saturday, September 8, 2007, Conference Room T–2B3, Two White Flint North, Rockville, Maryland

8:30 a.m.–12:30 p.m.: Preparation of ACRS Reports (Open)—The Committee will continue its discussion of proposed ACRS reports.

12:30 p.m.–1 p.m.: Miscellaneous (Open)—The Committee will discuss matters related to the conduct of Committee activities and matters and specific issues that were not completed during previous meetings, as time and availability of information permit.

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 2, 2006 (71 FR 58015). In accordance with those procedures, oral

or written views may be presented by members of the public, including representatives of the nuclear industry. Electronic recordings will be permitted only during the open portions of the meeting. Persons desiring to make oral statements should notify the Cognizant ACRS staff named below five days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Information regarding the time to be set aside for this purpose may be obtained by contacting the Cognizant ACRS staff prior to the meeting. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the Cognizant ACRS staff if such rescheduling would result in major inconvenience.

Further information regarding topics to be discussed, whether the meeting has been canceled or rescheduled, as well as the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted therefor can be obtained by contacting Mr. Sam Duraiswamy, Cognizant ACRS staff (301–415–7364), between 7:30 a.m. and 4 p.m., (ET). ACRS meeting agenda, meeting transcripts, and letter reports are available through the NRC Public Document Room at *pdr@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/* (ACRS & ACNW Mtg schedules/agendas).

Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service for observing ACRS meetings should contact Mr. Theron Brown, ACRS Audio Visual Technician (301–415–8066), between 7:30 a.m. and 3:45 p.m., (ET), at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

Dated: August 8, 2007.

J. Samuel Walker,

Acting Secretary of the Commission.

[FR Doc. E7–15887 Filed 8–13–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards; Subcommittee Meeting on Planning and Procedures; Notice of Meeting

The ACRS Subcommittee on Planning and Procedures will hold a meeting on September 5, 2007, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that may be closed pursuant to 5 U.S.C. 552b(c)(2) and (6) to discuss organizational and personnel matters that relate solely to the internal personnel rules and practices of the ACRS, and information the release of which would constitute a clearly unwarranted invasion of personal privacy.

The agenda for the subject meeting shall be as follows:

Wednesday, September 5, 2007, 8:30 a.m.–10 a.m.

The Subcommittee will discuss proposed ACRS activities and related matters. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Sam Duraiswamy (telephone: 301–415–7364) between 7:30 a.m. and 4 p.m. (ET) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 7:30 a.m. and 4 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes in the agenda.

Dated: August 7, 2007.

Cayetano Santos,

Branch Chief, ACRS.

[FR Doc. E7–15889 Filed 8–13–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the Subcommittee on Plant License Renewal; Notice of Meeting

The ACRS Subcommittee on Plant License Renewal will hold a meeting on September 5, 2007, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, September 5, 2007—10:30 a.m. until 5 p.m.

The Subcommittee will discuss Fitzpatrick license renewal application and the associated Safety Evaluation Report (SER) prepared by the NRR staff. The Subcommittee will hear presentations by and hold discussions with representatives of the NRC staff, Entergy Nuclear Northeast, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Charles G. Hammer (telephone 301/415–7363) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official between 6:45 a.m. and 3:30 p.m. (ET). Persons planning to attend this meeting are urged to contact the above named individual at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: August 7, 2007.

Cayetano Santos,

Branch Chief, ACRS.

[FR Doc. E7–15890 Filed 8–13–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of August 13, 20, 27, September 3, 10, 17, 2007.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of August 13, 2007

Tuesday, August 14, 2007.

9:30 a.m. Discussion of Intragovernmental Affairs (Closed-Ex. 1 & 9).

Week of August 20, 2007—Tentative

Tuesday, August 21, 2007.

1:25 p.m.
Affirmation Session (Public Meeting) (Tentative).
a. Final E-Filing Rule (Tentative).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

1:30 p.m.
Meeting with OAS and CRCPD (Public Meeting). (Contact: Shawn Smith, 301 415–2620).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

Wednesday, August 22, 2007.

9:30 a.m.
Periodic Briefing on New Reactor Issues (Morning Session)(Public Meeting) (Contact: Donna Williams, 301 415–1322).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

1:30 p.m.
Periodic Briefing on New Reactor Issues (Afternoon Session)(Public Meeting) (Contact: Donna Williams, 301 415–1322).

This meeting will be webcast live at the Web address— *http://www.nrc.gov.*

Week of August 27, 2007—Tentative

There are no meetings scheduled for the Week of August 27, 2007.

Week of September 3, 2007—Tentative

There are no meetings scheduled for the Week of September 3, 2007.

Week of September 10, 2007—Tentative

There are no meetings scheduled for the Week of September 10, 2007.

Week of September 17, 2007—Tentative

There are no meetings scheduled for the Week of September 17, 2007.

*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: Michelle Schroll, (301) 415–1662.

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 *REB3@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

This notice is distributed by mail to several hundred 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). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: August 9, 2007.

R. Michelle Schroll,

Office of the Secretary.

[FR Doc. 07–3987 Filed 8–10–07; 11:37 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from July 19, 2007, to August 1, 2007. The last biweekly notice was published on July 31, 2007 (72 FR 41780).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking, Directives and Editing Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

Within 60 days after the date of publication of this notice, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested persons should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide 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/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed within 60 days, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner/requestor shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner/requestor intends to rely in proving the contention at the hearing. The petitioner/requestor must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner/requestor intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner/requestor to relief. A petitioner/requestor who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed 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; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff; (3) E-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, *HearingDocket@nrc.gov;* or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemakings and Adjudications Staff at (301) 415–1101, verification number is (301) 415–1966. A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and it is requested that copies be transmitted either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to the attorney for the licensee.

Nontimely requests and/or petitions and contentions will not be entertained absent a determination by the Commission or the presiding officer of the Atomic Safety and Licensing Board that the petition, request and/or the contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's PDR, located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

Calvert Cliffs Nuclear Power Plant, Inc., Docket Nos. 50–317 and 50–318, Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2, Calvert County, Maryland

Date of amendments request: June 29, 2007.

Description of amendments request: The amendment would modify Technical Specification (TS) requirements related to control room envelope (CRE) habitability in TS 3.7.8, ''Control Room Emergency Ventilation System (CREVS),'' and TS 5.5, ''Programs and Manuals.'' The changes are consistent with the Nuclear Regulatory Commission approved Technical Specification Task Force (TSTF)–448, Revision 3, ''Control Room Habitability.'' The availability of the TS improvement was published in the **Federal Register** on January 17, 2007 (72 FR 2022) as part of the consolidated item improvement process (CLIIP). In addition, the amendment would remove a footnote currently contained in the Completion Time of TS 3.7.8, Required Action D. The footnote was added in Amendment Nos. 250/227 and was only applicable during the Unit 1 2002 refueling outage.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change revises the TS for the CRE emergency ventilation system, which is a mitigation system designed to minimize unfiltered air leakage into the CRE and to filter the CRE atmosphere to protect the CRE occupants in the event of accidents previously analyzed. An important part of the CRE emergency ventilation system is the CRE boundary. The CRE emergency ventilation system is not an initiator or precursor to any accident previously evaluated. Therefore, the probability of any accident previously evaluated is not increased. Performing tests to verify the operability of the CRE boundary and implementing a program to assess and maintain CRE habitability ensure that the CRE emergency ventilation system is capable of adequately mitigating radiological consequences to CRE occupants during accident conditions, and that the CRE emergency ventilation system will perform as assumed in the consequence analyses of design basis accidents. Thus, the consequences of any accident previously evaluated are not increased.

The removal of a footnote [to TS 3.7.8] that is no longer applicable is an editorial change that does not affect accident initiators or precursors, nor alter the design assumptions, conditions or configuration of the facility. The proposed change also does not affect the ability of SSCs to perform their intended function to mitigate the consequences of an accident. Therefore, the proposed editorial change does not increase the probability or consequences of an accident previously evaluated.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not impact the accident analysis. The proposed change does not alter the required mitigation capability of the CRE emergency ventilation system, or its functioning during accident conditions as assumed in the licensing basis analyses of design basis accident radiological consequences to CRE occupants. No new or different accidents result from performing the new surveillance or following the new program. The proposed change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. The proposed change does not alter any safety analysis assumptions and is consistent with current plant operating practice.

The proposed change is the editorial removal of a footnote [to TS 3.7.8] that no longer applies. The removal of a footnote that no longer applies does not impact the accident analyses. Additionally, it does not add or modify any existing plant equipment and does not introduce any new operational methods. Therefore, the proposed editorial change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The proposed change does not affect safety analysis acceptance criteria. The proposed change will not result in plant operation in a configuration outside the design basis for an unacceptable period of time without compensatory measures. The proposed change does not adversely affect systems that respond to safely shut down the plant and to maintain the plant in a safe shutdown condition.

The proposed editorial change [removal of a footnote to TS 3.7.8] does not affect safety analyses acceptance criteria or safety system operation. Removal of a footnote that is no longer applicable does not result in plant operation outside the design basis. Therefore, the proposed editorial change does not involve a reduction in the margin of safety.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Carey Fleming, Sr. Counsel—Nuclear Generation, Constellation Generation Group, LLC, 750 East Pratt Street, 17th floor, Baltimore, MD 21202.

NRC Branch Chief: Mark G. Kowal.

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of amendment request: February 20, 2007.

Description of amendment request: The proposed change would revise Limerick Generating Station (LGS), Units 1 and 2, Technical Specifications (TSs), Section 6.8.4.g, ''Primary Containment Leakage Rate Testing Program,'' to allow a one-time extension of no more than 5 years for the Type A, Integrated Leakage Rate Test (ILRT) interval. This revision is a one-time exception to the 10-year frequency of the performance-based leakage rate testing program for Type A tests as defined in Nuclear Energy Institute (NEI) document NEI 94–01, Revision 0, ''Industry Guideline For Implementing Performance-Based Option of 10 CFR Part 50, Appendix J,'' pursuant to Title 10 of the Code of Federal Regulations (10 CFR) Part 50, Appendix J, Option B. The requested exception is to allow the ILRT to be performed within 15 years from the last ILRT as opposed to the current 10-year frequency. The most recent containment Type A ILRTs for LGS Units 1 and 2 were performed on May 15, 1998, and May 21, 1999, respectively.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or

consequences of an accident previously evaluated?

Response: No.

The proposed change will revise TS 6.8.4.g (''Primary Containment Leakage Rate Testing Program'') of the LGS, Units 1 and 2 TS to reflect a one-time extension to the Type A Integrated Leak Rate Test (ILRT) as currently specified in the Technical Specifications. This change will extend the requirement to perform the Type A ILRT from the current requirement of 10 to 15 years, which is ''no later than May 15, 2013'' for LGS, Unit 1 and is ''no later than May 21, 2014'' for Unit 2.

The function of the containment is to isolate and contain fission products released from the reactor coolant system following a design basis Loss of Coolant Accident (LOCA) and to confine the postulated release of radioactive material to within limits. The test interval associated with Type A ILRTs is not a precursor of any accident previously evaluated. Type A ILRTs provide assurance that the LGS, Units 1 and 2 containments will not exceed allowable leakage rate values specified in the TS and will continue to perform their design function following an accident. The risk assessment of the proposed change has concluded that there is an insignificant increase in Large Early Release Frequency, Person-Rem, and Conditional Containment Failure Frequency. Additionally, containment inspections have also been performed which demonstrate the continued structural integrity of the primary containment and will be performed in the future as required by the ASME Code.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change for a one-time extension of the Type A ILRTs for LGS, Units 1 and 2 will not affect the control parameters governing unit operation or the response of plant equipment to transient and accident conditions. The proposed change does not introduce any new equipment, modes of system operation or failure mechanisms.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The integrity of the containment penetrations and isolation valves is verified through Type B and Type C local leak rate tests (LLRTs) and the overall leak tight integrity of the containment is verified by a Type A ILRT, as required by 10 CFR 50, Appendix J, ''Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors.'' These tests are performed to verify the essentially leak tight characteristics of the containment at the design basis accident pressure. The proposed change for a one-time extension of the Type A ILRT does not affect the method for Type A, B or C testing or the test acceptance criteria.

EGC has conducted a risk assessment to determine the impact of a change to the LGS, Units 1 and 2 Type A ILRT from 10 to 15 years. This risk assessment measured the impact to the Large Early Release Frequency, Person-Rem, and Conditional Containment Failure Frequency. This assessment indicated that the proposed LGS, Units 1 and 2 Type A ILRT interval extension has a very small change in risk to the public and is an acceptable plant change from a risk perspective.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Bradley Fewell, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Branch Chief: Harold K. Chernoff.

Florida Power and Light Company, Docket Nos. 50–335 and 50–389, St. Lucie Plant, Units 1 and 2, St. Lucie County, Florida

Date of amendment request: June 4, 2007.

Description of amendment request: The proposed amendment would remove the Technical Specification (TS) requirements that reference hydrogen recombiners and hydrogen monitors. The proposed amendment suggests changes support implementation of the revisions to 10 CFR 50.44, ''Standards for Combustible Gas Control System in Light Water Cooled Power Reactors,'' that became effective on September 16, 2003. The changes would be consistent with Revision 1 of the NRC-approved Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler, TSTF–447, ''Elimination of Hydrogen Recombiners and Change to Hydrogen and Oxygen Monitors.'' The particular TS improvement in question was announced in the **Federal Register** Notice on September 25, 2003, as part of the consolidated line item improvement process.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The revised 10 CFR 50.44 no longer defines a design-basis loss-of-coolant accident (LOCA) hydrogen release, and eliminates requirements for hydrogen control systems to mitigate such a release. The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage. In addition, these systems were ineffective at mitigating hydrogen releases from risk-significant accident sequences that could threaten containment integrity.

With the elimination of the design-basis LOCA hydrogen release, hydrogen [and oxygen] monitors are no longer required to mitigate design-basis accidents and, therefore, the hydrogen monitors do not meet the definition of a safety-related component as defined in 10 CFR 50.2. RG [Regulatory Guide] 1.97 Category 1, is intended for key variables that most directly indicate the accomplishment of a safety function for design-basis accident events. The hydrogen [and oxygen] monitors no longer meet the definition of Category 1 in RG 1.97. As part of the rulemaking to revise 10 CFR 50.44 the Commission found that Category 3, as defined in RG 1.97, is an appropriate categorization for the hydrogen monitors because the monitors are required to diagnose the course of beyond design-basis accidents. [Also, as part of the rulemaking to revise 10 CFR 50.44, the Commission found that Category 2, as defined in RG 1.97, is an appropriate categorization for the oxygen monitors, because the monitors are required to verify the status of the inert containment.]

The regulatory requirements for the hydrogen [and oxygen] monitors can be relaxed without degrading the plant emergency response. The emergency response, in this sense, refers to the methodologies used in ascertaining the condition of the reactor core, mitigating the consequences of an accident, assessing and projecting offsite releases of radioactivity, and establishing protective action recommendations to be communicated to offsite authorities. Classification of the hydrogen monitors as Category 3, [classification of the oxygen monitors as Category 2] and removal of the hydrogen [and oxygen] monitors from TS will not prevent an accident management strategy through the use of the SAMGs [severe accident management guidelines], the emergency plan (EP), the emergency operating procedures (EOP), and site survey monitoring that support modification of emergency plan protective action recommendations (PARs).

Therefore, the elimination of the hydrogen recombiner requirements and relaxation of the hydrogen [and oxygen] monitor requirements, including removal of these

requirements from TS, does not involve a significant increase in the probability or the consequences of any accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen [and oxygen] monitor requirements, including removal of these requirements from TS, will not result in any failure mode not previously analyzed. The hydrogen recombiner and hydrogen [and oxygen] monitor equipment was intended to mitigate a design-basis hydrogen release. The hydrogen recombiner and hydrogen [and oxygen] monitor equipment are not considered accident precursors, nor does their existence or elimination have any adverse impact on the pre-accident state of the reactor core or post accident confinement of radionuclides within the containment building.

Therefore, this change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The elimination of the hydrogen recombiner requirements and relaxation of the hydrogen [and oxygen] monitor requirements, including removal of these requirements from TS, in light of existing plant equipment, instrumentation, procedures, and programs that provide effective mitigation of and recovery from reactor accidents, results in a neutral impact to the margin of safety.

The installation of hydrogen recombiners and/or vent and purge systems required by 10 CFR 50.44(b)(3) was intended to address the limited quantity and rate of hydrogen generation that was postulated from a design-basis LOCA. The Commission has found that this hydrogen release is not risk-significant because the design-basis LOCA hydrogen release does not contribute to the conditional probability of a large release up to approximately 24 hours after the onset of core damage.

Category 3 hydrogen monitors are adequate to provide rapid assessment of current reactor core conditions and the direction of degradation while effectively responding to the event in order to mitigate the consequences of the accident. The intent of the requirements established as a result of the TMI [Three-Mile Island], Unit 2 accident can be adequately met without reliance on safety-related hydrogen monitors.

[Category 2 oxygen monitors are adequate to verify the status of an inerted containment.]

Therefore, this change does not involve a significant reduction in the margin of safety. The intent of the requirements established as a result of the TMI, Unit 2 accident can be adequately met without reliance on safety-related oxygen monitors.] Removal of hydrogen [and oxygen] monitoring from TS will not result in a significant reduction in their functionality, reliability, and availability.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

NRC Branch Chief: Thomas H. Boyce.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of amendment request: June 13, 2007.

Description of amendment request: The proposed amendment would revise Technical Specifications (TS) 5.5.9, ''Ventilation Filter Testing Program (VFTP),'' to impose lower (i.e., more restrictive) limits on the maximum pressure drop across the combined high efficiency particulate air filters and charcoal adsorbers in three safety-related ventilation systems. These ventilation systems are the Control Room Emergency Ventilation System, the Engineered Safety Features Ventilation System, and the Fuel-Handling Area Exhaust Ventilation System.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

Response: No.

The proposed change consists of establishing more restrictive criteria in the Technical Specification (TS) for the maximum pressure drop across high efficiency particulate air filters (HEPA) and charcoal adsorbers in safety-related ventilation systems. These TS criteria are used to determine the acceptability of periodic test results. These criteria are not accident initiators. Therefore, there will be no effect on the probability of an accident. The safety-related ventilation systems involved in the proposed change function to mitigate the consequences of accidents. The proposed change will provide increased assurance that the HEPA filters and charcoal adsorbers in these systems will be capable of performing their safety function of reducing the release of radioactive material resulting from evaluated accidents. Therefore, there will be no increase in the consequences of those accidents.

Therefore, the proposed change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change consists of establishing more restrictive acceptance criteria for existing TS[-]required tests. The proposed change does not affect the manner in which the tests are performed. The proposed change will not result in any new or different methods or modes of operation of existing structures, systems, or components. The proposed change will not introduce any new structures, system, or components.

Therefore, the proposed change will not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety associated with the proposed change is the capability of the applicable safety-related ventilation systems to prevent radiation exposures from exceeding acceptable limits due to the release of radioactive material caused by an evaluated accident. The proposed change will provide increased assurance that the HEPA filters and charcoal adsorbers in these systems will be capable of performing this function.

Therefore, the proposed change will not involve a significant reduction in the margin of safety.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Kimberly Harshaw, Esquire, One Cook Place, Bridgman, MI 49106.

NRC Acting Branch Chief: Travis Tate.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of amendment request: June 27, 2007.

Description of amendment request: The proposed amendment would revise Technical Specifications (TS) Surveillance Requirements 3.8.1.2, 8, 12, 13, 16, and 19, changing the steady state frequency of all diesel generators (DGs) from the current allowed frequency range of 59.4–61.2 Hz, to 59.4–60.5 Hz (i.e., a decrease of the upper limit, resulting in narrowing of

the current range). The licensee stated that the current frequency range is nonconservative and could result in undesirable effects such as centrifugal charging pump motor brake horsepower exceeding its nameplate maximum horsepower, and overloading the DGs.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee provided its analysis of the issue of no significant hazards consideration. The NRC staff has performed its own analysis, which is presented below:

(1) Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

Response: No.

The more restrictive steady state frequency range ensures that the diesel generators and equipment being powered by the diesel generators will function as designed to mitigate an accident as described in the Update Final Safety Analysis Report (UFSAR). The DGs and the equipment they power are part of the systems required to mitigate accidents; no accident analyzed in the UFSAR is initiated by mitigation equipment. Therefore, the proposed change to the allowed frequency range of the DGs will not have any impact on the probability of an accident previously evaluated. Furthermore, other than narrowing the allowed frequency range of the DGs, there is no other design or operational change. Therefore, the proposed change does not increase the probability of malfunction of the DGs or the equipment they power.

Narrowing of the DG maximum steady state frequency limit will ensure that the DGs and equipment powered by the DGs will perform as originally designed and analyzed to mitigate the consequences of any accident described in the UFSAR. Therefore, the proposed change does not involve a significant increase in the consequences of an accident previously evaluated in the UFSAR.

(2) Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

There is no design change associated with the proposed amendment. Making an existing DG requirement more restrictive alone will not alter plant configuration because no new or different type of equipment will be installed, and because no methods governing plant operation will be changed. The proposed change to allowed frequency range will not have any effect on the assumptions of accident scenarios previously made in the UFSAR. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

(3) Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Despite the proposed change to the DG maximum steady state frequency limit, the DGs and equipment powered by the DGs will continue to perform as originally designed, and originally analyzed in the UFSAR. There is no associated change to the methods and assumptions used to analyze DG performance. The proposed change will maintain the required function of the DGs and the equipment powered by the DGs to ensure that operation of structures, systems, or components is as currently set forth in the UFSAR. Therefore, the proposed change does not involve a significant reduction in the margin of safety.

The Nuclear Regulatory Commission (NRC) staff has reviewed the licensee's analysis and, based on its own analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: Kimberly Harshaw, Esquire, One Cook Place, Bridgman, MI 49106.

NRC Acting Branch Chief: Travis L. Tate.

Nuclear Management Company, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of amendment request: July 9, 2007.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TS), an NRC-controlled document, by moving the Table of Contents (TOC) out of the TS and making the TOC into a licensee-controlled document.

Basis for proposed no significant hazards consideration determination: As required by Title 10 of the Code of Federal Regulations (10 CFR) Part 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC) which is reproduced below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

No.

The proposed change is administrative and affects control of a document, the TOC, listing the specifications in the plant TS. Transferring control from the NRC to NMC (the licensee) does not affect the operation, physical configuration, or function of plant equipment or systems. It does not impact the initiators or assumptions of analyzed events, nor does it impact the mitigation of accidents or transient events. The change has no impact on, and hence cannot increase, the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

No.

The proposed change is administrative and does not alter the plant configuration, require installation of new equipment, alter assumptions about previously analyzed accidents, or impact the operation or function of plant equipment or systems. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

No.

The proposed change is administrative. The TOC is not required by regulation to be in the TS. [Its] removal does not impact any safety assumptions or have the potential to reduce a margin of safety as described in the TS Bases. The change involves a transfer of control of the TOC from the NRC to NMC. No change in the technical content of the TS [ ] is involved. Consequently, transfer from the NRC to NMC has no impact on the margin of safety, and hence cannot involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the proposed amendment involves no significant hazards consideration.

Attorney for licensee: Jonathan Rogoff, Esquire, Vice President, Counsel & Secretary, Nuclear Management Company, LLC, 700 First Street, Hudson, WI 54016.

NRC Acting Branch Chief: Travis L. Tate.

PPL Susquehanna, LLC, Docket No. 50–388, Susquehanna Steam Electric Station, Unit 2

(SSES 2), Luzerne County, Pennsylvania.

Date of amendment request: March 2, 2007.

Description of amendment request: The proposed amendment would add an ACTIONS Note 3 to the SSES 2 Technical Specification 3.8.1, ''AC Sources—Operating,'' to allow a Unit 1 4160 volt subsystem to be de-energized and removed from service to perform bus maintenance.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

This change does not involve any physical change to structures, systems, or components (SSCs) and does not alter the method of operation of any SSCs. The current assumptions in the safety analysis regarding accident initiators and mitigation of accidents are unaffected by these changes. No

SSC failure modes or mechanisms are being introduced, and the likelihood of previously analyzed failures remains unchanged.

Operation in accordance with the proposed new ACTIONS Note 3 in Unit 2 Technical Specification 3.8.1 ensures that the AC [alternating current] distribution system and supported equipment remain capable of performing their functions as described in the Final Safety Analysis Report (FSAR). There are no changes to any accident initiators or to the mitigating capability of safety-related equipment supported by the Class 1E Electrical AC system. The protection provided by these safety-related systems will continue to be provided as assumed by the safety analysis.

Therefore, this proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of any plant equipment. No new equipment is being introduced, and installed equipment is not being operated in a new or different manner. There are no setpoints, at which protective or mitigative actions are initiated, affected by this change. This change does not alter the manner in which equipment operation is initiated, nor will the function demands on credited equipment be changed. No alterations in the procedures that ensure the plant remains within analyzed limits are being proposed, and no changes are being made to the procedures relied upon to respond to an off-normal event as described in the FSAR [final safety analysis report]. As such, no new failure modes are being introduced. The change does not alter assumptions made in the safety analysis and licensing basis.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is established through equipment design, operating parameters, and the setpoints at which automatic actions are initiated. The proposed change is acceptable because the new ACTIONS Note 3 has been established to be consistent with the existing completion times for declaring required equipment inoperable that has no offsite power or DG [diesel generator] power available. Therefore, the plant response to analyzed events is not affected by this change and will continue to provide the margin of safety assumed by the safety analysis.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc. General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101–1179.

NRC Branch Chief: Mark G. Kowal.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: July 26, 2007

Description of amendment request: The proposed amendment would remove values for turbine first stage pressure equivalent to P_{bypass} from the Technical Specifications. P_{bypass} is the reactor power level below which the turbine stop valve closure and the turbine control valve fast closure reactor protection system trip functions and the end-of-cycle recirculation pump trip are bypassed automatically.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed removal of values for turbine first stage pressure associated with P_{bypass} from the Technical Specifications does not alter the requirements for component operability or surveillance currently in the Technical Specifications. The proposed change will have no impact on any safety related structures, systems or components.

The probability of occurrence of a previously evaluated accident is not increased because this change does not introduce any new potential accident initiating conditions. The consequences of accidents previously evaluated in the UFSAR [Updated Final Safety Analysis Report] are not affected because the ability of the components to perform their required function is not affected.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change is administrative in nature, and does not result in physical alterations or changes in the method by which any safety related system performs its intended function. The proposed change does not affect any safety analysis assumptions. The proposed change does not create any new accident initiators or involve an activity that could be an initiator of an accident of a different type.

All components will continue to be tested to the same requirements as defined in the Technical Specification Surveillance Requirements. The proposed revision does not make changes in any method of testing or how any safety related system performs its safety functions.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The proposed change to remove values for turbine first stage pressure associated with P_{bypass} from the Technical Specifications does not alter the Technical Specification requirements for reactor protection system operability. The turbine first stage pressure setpoint will be controlled in accordance with plant procedures and will be verified during post-installation testing.

The proposed change will not affect the current Technical Specification requirements or the components to which they apply.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. Jeffrie J. Keenan, Esquire, PSEG Nuclear—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Branch Chief: Harold K. Chernoff.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: June 26, 2007.

Description of amendment request: The proposed amendment would modify the Technical Specifications (TSs) to establish more effective and appropriate action, surveillance, and administrative requirements related to ensuring the habitability of the control room envelope (CRE) in accordance with Nuclear Regulatory Commission (NRC)-approved TS Task Force (TSTF) Standard Technical Specification change traveler TSTF–448, Revision 3, ''Control Room Habitability.'' Specifically, the proposed amendment would modify TS 3.7.7, Control Room Makeup and Cleanup Filtration System (CRMCFS) and TS Section 6.8, ''Administrative Controls-Procedures, Programs, and Manuals.'' The NRC staff issued a ''Notice of Availability of Technical Specification Improvement to

Modify Requirements Regarding Control Room Envelope Habitability Using the Consolidated Line Item Improvement Process'' associated with TSTF–448, Revision 3, in the **Federal Register** on January 17, 2007 (72 FR 2022). The notice included a model safety evaluation, a model no significant hazards consideration (NSHC) determination, and a model license amendment request. In its application dated June 26, 2007, the licensee affirmed the applicability of the model NSHC determination which is presented below.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of NSHC adopted by the licensee is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) to perform their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change revises the TS for the CRE emergency ventilation system, which is a mitigation system designed to minimize unfiltered air leakage into the CRE and to filter the CRE atmosphere to protect the CRE occupants in the event of accidents previously analyzed. An important part of the CRE emergency ventilation system is the CRE boundary. The CRE emergency ventilation system is not an initiator or precursor to any accident previously evaluated. Therefore, the probability of any accident previously evaluated is not increased. Performing tests to verify the operability of the CRE boundary and implementing a program to assess and maintain CRE habitability ensure that the CRE emergency ventilation system is capable of adequately mitigating radiological consequences to CRE occupants during accident conditions, and that the CRE emergency ventilation system will perform as assumed in the consequence analyses of design basis accidents. Thus, the consequences of any accident previously evaluated are not increased. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident from any Accident Previously Evaluated

The proposed change does not impact the accident analysis. The proposed change does not alter the required mitigation capability of the CRE emergency ventilation system, or its functioning during accident conditions as assumed in the licensing basis analyses of design basis accident radiological consequences to CRE occupants. No new or different accidents result from performing the new surveillance or following the new program. The proposed change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or a significant change in the methods governing normal plant operation. The proposed change does not alter any safety analysis assumptions and is consistent with current plant operating practice. Therefore, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The proposed change does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The proposed change does not affect safety analysis acceptance criteria. The proposed change will not result in plant operation in a configuration outside the design basis for an unacceptable period of time without compensatory measures. The proposed change does not adversely affect systems that respond to safely shut down the plant and to maintain the plant in a safe shutdown condition. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the analysis adopted by the licensee and, based on this review, it appears that the standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves NSHC.

Attorney for licensee: A. H. Gutterman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW., Washington, DC 20004.

NRC Branch Chief: Thomas G. Hiltz.

TXU Generation Company LP, Docket Nos. 50–445 and 50–446, Comanche Peak Steam Electric Station, Units 1 and 2, Somervell County, Texas.

Date of amendment request: April 10, 2007.

Brief description of amendments: The proposed amendments would revise Technical Specifications (TS) 3.1, ''Reactivity Control Systems,'' TS 3.2, ''Power Distribution Limits,'' TS 3.3, ''Instrumentation,'' and TS 5.6.5b, ''Core Operating Limits Report (COLR).'' The requested change proposes to incorporate standard Westinghouse-developed and NRC-approved analytical methods into the lists of methodologies used to establish the core operating limits.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

No physical plant changes or changes in manner in which the plant will be operated as a result of the methodology changes. The proposed changes do not impact the condition or performance of any plant structure, system or component. The core operating limits are established to support Technical Specifications 3.1, 3.2, 3.3, and 3.4. The core operating limits ensure that fuel design limits are not exceeded during any conditions of normal operation or in the event of any Anticipated Operational Occurrence (AOO). The methods used to establish the core operating limits for each operating cycle are based on methods previously found acceptable by the NRC and listed in Technical Specifications section 5.6.5.b. Application of these NRC-approved methods will continue to ensure that acceptable operating limits are established to protect the fuel cladding integrity during normal operation and AOOs. The requested Technical Specification changes, including those changes proposed to conform with the NRC-approved analysis methodologies, do not involve any plant modifications or operational changes that could affect system reliability, performance, or possibility of operator error. The requested changes do not affect any postulated accident precursors, does not affect any accident mitigation systems, and does not introduce any new accident initiation mechanisms.

As a result, the proposed changes to the CPSES [Comanche Peak Steam Electric Station] Technical Specifications do not involve any increase in the probability or the consequences of any accident or malfunction of equipment important to safety previously evaluated since neither accident probabilities nor consequences are being affected by this proposed change.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

There are no physical changes being made to the plant. No new modes of plant operation are being introduced. The parameters assumed in the analyses are within the design limits of the existing plant equipment. All plant systems will perform as designed during the response to a potential accident.

Therefore, the proposed change to the CPSES Technical Specifications does not create the possibility of a new or different kind of accident or malfunction of equipment important to safety from any accident previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The NRC-approved accident analysis methodologies include restrictions on the

choice of inputs, the degree of conservatism inherent in the calculations, and specified event acceptance criteria. Analyses performed in accordance with these methodologies will not result in adverse effects on the regulated margin of safety. Similarly, the use of axial power distribution controls based on the relaxed axial offset control strategy is a time-proven and NRC-approved method. The method is consistent with the accident analyses assumptions as described in the list of NRC-approved methodologies proposed to be used to establish the core operating limits. Finally, the proposed changes to allow operation with the BEACON [Best Estimate Analyzer for Core Operation Nuclear] power distribution monitoring tool provide additional information to the reactor operators on the state of the reactor core. Again, the use of the BEACON tool and the methodology used to develop the inputs to the tool are consistent with and controlled by the NRC-approved methodologies used to establish the core operating limits. As such, the margin of safety assumed in the plant safety analysis is not adversely affected by the proposed changes.

Based on the above evaluations, TXU Power concludes that the proposed amendment(s) present no significant hazards consideration under the standards set forth in 10 CFR 50.92(c) and, accordingly, a finding of no significant hazards consideration is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036.

NRC Branch Chief: Thomas G. Hiltz.

TXU Generation Company LP, Docket Nos. 50–445 and 50–446, Comanche Peak Steam Electric Station, Units 1 and 2, Somervell County, Texas

Date of amendment request: May 22, 2007.

Brief description of amendments: The proposed amendment would revise the Technical Requirements Surveillance (TRS) 13.3.33.2, Cycling Frequency for the Turbine Stop and Control Valves. The proposed change would increase the frequency interval for the turbine stop and control valves testing from 12 to 26 weeks.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change will increase the frequency interval for testing the high pressure (HP) and low pressure (LP) turbine stop and control valves to 26 weeks. This test requires the movement of the HP and LP turbine valves through one complete cycle once every 26 weeks. The test verifies freedom of movement of the valve components and is beneficial in early detection of problems with valve operation. [The test ensures that all turbine steam inlet valves are capable of closing to protect the turbine from excessive overspeed, which could generate potentially damaging missiles.]

Siemens, the turbine manufacturer for Comanche Peak Steam Electric Station (CPSES), has evaluated the change in the probability of generating external/high-trajectory turbine missiles resulting from a hypothetical LP turbine disk failure which could adversely affect safety-related SSCs [structures, systems, and components] due to the change in the surveillance interval weeks using a previously approved missile probability analysis methodology. The results of the analysis show the new valve test interval of 26 weeks with a turbine inspection interval of 100,000 hours is safe and acceptable as the probability of occurrence of a turbine missile per turbine year is less than the Nuclear Regulatory Commission (NRC) limit of 1E–4 per 8760 hours (turbine year) or 11.42E–4 at 100,000 hours (Reference 7.4 [of the licensee's May 22, 2007, application]). Therefore, the risk of the loss of an essential system from a single event is acceptable. Since the probability of generating external, high-trajectory turbine missiles resulting from a hypothetical LP turbine disc failure which could adversely affect safety related SSCs due to the increased valve test interval from 12 to 26 weeks is less than the NRC limit, it is acceptable to increase the turbine test interval in TRS 13.3.33.2. The test interval change would increase overall plant capacity factor and result in a net improvement in plant safety by reducing the likelihood of plant trips and stress and wear on plant components. In addition, the increased test intervals would reduce the likely cause of a plant transient and unnecessary burden on personnel resources which is consistent with Generic Letter 93–005 (Reference 7.7 [of the licensee's May 22, 2007, application]) and NUREG–1366 (Reference 7.2 [of the licensee's May 22, 2007, application]). Based upon Siemens' analysis and the updated stop and control valves failure probability, it is concluded that the implementation of this change in testing frequency will not increase the probability or consequences of an accident previously evaluated in the UFSAR.

The proposed change does not adversely affect accident initiators or precursors nor alter the design assumptions, conditions, or configuration of the facility or the manner in which the plant is operated and maintained. The proposed change does not alter or prevent the ability of structures, systems, and components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits. The proposed change does not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. The proposed change is consistent with safety analysis assumptions and resultant consequences.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will reduce the frequency for testing the high pressure (HP) and low pressure (LP) turbine stop and control valves. Turbine overspeed is limited by rapid closure of the turbine stop and control valves. Turbine overspeed can result in the occurrence of turbine missiles from a burst type failure of the low pressure blades or disks. The damage from turbine missiles has been previously evaluated in the UFSAR [updated final safety analysis report] (Reference 7.3 [of the licensee's May 22, 2007, application]). The proposed activity does not introduce the possibility of a new accident because no new failure modes are introduced.

Turbine overspeed with the resulting turbine missiles is the only accident potentially affected by failure of the turbine stop and control valves. The turbine missile analysis is not altered by reducing the frequency of high and low pressure stop and control valve testing. Reducing the frequency of turbine valve testing from every 12 weeks to every 26 weeks does not result in a significant change in the failure rate, nor does it affect the failure modes for the turbine valves.

There are no hardware changes nor are there any changes in the method by which any safety-related plant system performs its safety function. This amendment will not affect the normal method of plant operation or change any operating parameters. No performance requirements or response time limits will be affected. No new accident scenarios, transient precursors, failure mechanisms, or limiting single failures are introduced as a result of this amendment. There will be no adverse effect or challenges imposed on any safety-related system as a result of this amendment.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed change does not involve a significant reduction in a margin of safety since the conclusions of the safety analyses in the CPSES FSAR [final safety analysis report] (Reference 7.3 [of the licensee's May 22, 2007, application]) are essentially unchanged and NRC safety limits are not exceeded.

Therefore the proposed change does not involve a reduction in a margin of safety.

Based on the above evaluations, TXU Power concludes that the proposed amendment(s) present no significant hazards under the standards set forth in 10 CFR 50.92(c) and, accordingly, a finding of ''no significant hazards consideration'' is justified.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: George L. Edgar, Esq., Morgan, Lewis and Bockius, 1800 M Street, NW., Washington, DC 20036.

NRC Branch Chief: Thomas G. Hiltz.

Virginia Electric and Power Company, Docket Nos. 50–280 and 50–281, Surry Power Station, Unit Nos. 1 and 2, Surry County, Virginia

Date of amendment request: July 13, 2007.

Description of amendment request: The proposed amendment revises the Technical Specifications (TSs) requirements related to main control room and emergency switchgear room envelope habitability. These changes are consistent with the Nuclear Regulatory Commission (NRC)-approved Revision 3 of Technical Specification Task Force (TSTF) Standard Technical Specifications (STS) Change Traveler TSTF–448, ''Control Room Habitability.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes consist of TS wording, format and conforming changes to facilitate incorporation of TSTF–448 [72 FR 2022] into the Surry custom TS and for consistency with NUREG–1431, Revision 3, to the extent practical. The proposed changes are administrative in nature and, as such, do not impact the condition or performance of any plant structure, system or component. The proposed changes do not affect the initiators of any previously analyzed event or the assumed mitigation of accident or transient events. As a result, the proposed administrative changes to the Surry TS do not involve any increase in the probability or the consequences of any accident or malfunction of equipment important to safety previously evaluated since neither accident probabilities or consequences are being affected by the proposed changes.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes are administrative in nature, and therefore do not involve any changes in station operation or physical modifications to the plant. In addition, no changes are being made in the methods used to respond to plant transients that have been previously analyzed. No changes are being made to plant parameters within which the plant is normally operated or in the setpoints, which initiate protective or mitigative actions, and no new failure modes are being introduced. Therefore, the proposed changes to the Surry Technical Specifications do not create the possibility of a new or different kind of accident or malfunction of equipment important to safety from any previously evaluated.

3. Involve a significant reduction in a margin of safety.

The proposed changes consist of TS wording, format and conforming changes to facilitate incorporation of TSTF–448 into the Surry custom TS and for consistency with NUREG–1431, Revision 3. The proposed changes are administrative in nature, and do not impact station operation or any plant structure, system or component that is relied upon for accident mitigation. Furthermore, the margin of safety assumed in the plant safety analysis is not affected in any way by the proposed changes. Therefore, the proposed administrative changes to the Surry Technical Specifications do not involve a reduction in a margin of safety.

The NRC staff has reviewed the analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Esq., Senior Counsel, Dominion Resources Services, Inc., Millstone Power Station, Building 475, 5th Floor, Rope Ferry Road, Rt. 156, Waterford, Connecticut 06385.

NRC Branch Chief: Evangelos C. Marinos.

Previously Published Notices of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the Commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, see the individual notice in the **Federal Register** on the day and page cited. This notice does not extend the notice period of the original notice.

Exelon Generation Company, LLC, and PSEG Nuclear LLC,

Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station, Units 2 and 3, York and Lancaster Counties, Pennsylvania

Date of amendment request: March 6, 2007.

Brief description of amendment request: The proposed amendment would modify the main steam isolation valve (MSIV) leakage Technical Specification (TS) Surveillance Requirement (SR) 3.6.1.3.14 to establish a total leakage rate limit for the sum of the four main steam lines.

Date of publication of individual notice in ***Federal Register***: July 24, 2007.

Expiration date of individual notice: September 22, 2007.

Tennessee Valley Authority, Docket No. 50–259, Browns Ferry Nuclear Plant, Unit 1, Limestone County, Alabama

Date of application for amendments: June 25, as supplemented July 3, 2007.

Description of amendments request: The proposed amendment would allow deletion of License Condition 2.(G)2 regarding the performance of power uprate large transient testing.

Date of publication of individual notice in the ***Federal Register***: July 13, 2007 (72 FR 38627).

Expiration date of individual notice: August 14, 2007 (Public comments) and September 11, 2007 (Hearing requests).

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these

amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, Public File Area 01F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC web site, *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR Reference staff at 1 (800) 397–4209, (301) 415–4737 or by e-mail to *pdr@nrc.gov.*

AmerGen Energy Company, LLC, Docket No. 50–219, Oyster Creek Nuclear Generating Station, Ocean County, New Jersey

Date of application for amendment: September 28, 2006.

Brief description of amendment: The amendment revises the Oyster Creek Technical Specification (TS) definition of Channel Calibration, Channel Check, and Channel Test consistent with NUREG–1433, Revision 3.0, ''Standard Technical Specifications General Electric Plants, BWR/4 Specifications,'' dated June 2004. These definitions apply to all instrument functions in the TSs, including Reactor Protection System instruments.

Date of Issuance: July 27, 2007.

Effective date: As of the date of Issuance to be implemented within 60 days.

Amendment No.: 263.

Facility Operating License No. DPR–16: The amendment revised the TSs.

Date of initial notice in ***Federal Register***: November 21, 2006 (71 FR 67392). The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated July 27, 2007.

No significant hazards consideration comments received: No.

Arizona Public Service Company, et al., Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Units Nos. 1, 2, and 3, Maricopa County, Arizona

Date of application for amendments: July 20, 2006, as supplemented by letter dated May 3, 2007.

Brief description of amendments: The amendments revised Technical Specifications (TS) 3.1.6, ''Shutdown Control Element Assembly (CEA) Insertion Limits,'' to modify the TS Limiting Condition for Operation (LCO) 3.1.6 and Surveillance Requirements (SRs) 3.1.6.1 to require shutdown CEAs to be withdrawn to ≥147.75 inches, instead of the current limit of ≥144.75 inches.

Date of issuance: July 25, 2007.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment Nos.: Unit 1–168, Unit 2–168, Unit 3–168.

Facility Operating License Nos. NPF–41, NPF–51, and NPF–74: The amendments revised the Operating License and Technical Specifications.

Date of initial notice in ***Federal Register***: September 26, 2006 (71 FR 56191). The supplement dated May 3, 2007, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 25, 2007.

No significant hazards consideration comments received: No.

Carolina Power & Light Company, Docket No. 50–261, H. B. Robinson Steam Electric Plant, Unit No. 2, Darlington County, South Carolina

Date of application for amendment: February 2, 2007.

Brief description of amendment: This amendment deletes the technical specification (TS) requirements related to containment hydrogen monitors and supports implementation of the revisions of 10 CFR 50.44, Combustible Gas Control for Nuclear Power Reactors, that became effective on October 16, 2003. This is a Consolidated Line Item Improvement Program modification, which adopts TS Task Force (TSTF) Standard TS Change Traveler, TSTF–447, Elimination of Hydrogen Recombiners and Change to Hydrogen and Oxygen Monitors.

Date of issuance: July 16, 2007.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 216.

Renewed Facility Operating License No. DPR–23: Amendment revises the technical specifications.

Date of initial notice in ***Federal Register***: April 24, 2007 (72 FR 20378). The Commission's related evaluation of the amendment is contained in a safety evaluation dated March 21, 2007.

No significant hazards consideration comments received: No.

Carolina Power & Light Company, et al., Docket No. 50–400, Shearon Harris Nuclear Power Plant, Unit 1, Wake and Chatham Counties, North Carolina

Date of application for amendment: December 20, 2006.

Brief description of amendment: This amendment revises Technical Specification (TS) 6.12, ''High Radiation Area.'' The amendment aligns the requirements contained in the TS with the revised Regulatory Guide 8.38, Revision 1, ''Control of Access to High and Very High Radiation Areas in Nuclear Power Plants.'' Specifically, the changes include differentiating dose rates associated with high and very high radiation areas, adding requirements for groups entering high radiation areas, and clarifying the communication requirements for workers in high radiation areas.

Date of issuance: July 23, 2007.

Effective date: This amendment is effective as of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 125.

Facility Operating License No. NPF–63: Amendment revises the TSs.

Date of initial notice in ***Federal Register***: February 27, 2007 (72 FR 8802). The Commission's related evaluation of the amendment is contained in a safety evaluation dated July 23, 2007.

No significant hazards consideration comments received: No.

Duke Power Company LLC, Docket Nos. 50–369 and 50–370, McGuire Nuclear Station, Units 1 and 2, Mecklenburg County, North Carolina

Date of application for amendments: July 31, 2006 as supplemented May 24, 2007.

Brief description of amendments: The amendments revised TS 3.6.3, ''Containment Isolation Valves,'' by removing the allowance to open the upper containment purge isolation

valves in the applicable modes of operation when containment integrity is required by the TSs. In addition, the amendments deleted TS 3.3.6, ''Containment Purge and Exhaust Isolation Instrumentation''. The change made the TSs requirements consistent for both the upper and lower containment purge isolation valves.

Date of issuance: July 26, 2007.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment Nos.: 243, 224.

Renewed Facility Operating License Nos. NPF–9 and NPF–17: Amendments revised the licenses and the technical specifications.

Date of initial notice in ***Federal Register***: December 5, 2006 (71 FR 70558) The supplement dated May 24, 2007, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 26, 2007.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–440, Perry Nuclear Power Plant, Unit No. 1, Lake County, Ohio

Date of application for amendment: February 10, 2006, as supplemented by letter dated March 8, 2007.

Brief description of amendment: The changes would clarify technical specifications (TSs) for the Perry Nuclear Power Plant (PNPP) by revising the TS action requirements that must be followed when one or more annulus gas treatment system initiation channels are inoperable. The clarifying changes will make the PNPP TSs consistent with Nuclear Regulatory Commission (NRC) staff precedents for containment filtering safety systems that operate continuously in the protection mode of operation.

Date of issuance: July 30, 2007.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment No.: 147.

Facility Operating License No. NPF–58: This amendment revised the Technical Specifications and License.

Date of initial notice in ***Federal Register***: May 23, 2006 (71 FR 29678). The March 8, 2007, supplement contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated July 30, 2007.

No significant hazards consideration comments received: No.

Florida Power and Light Company, Docket Nos. 50–250 and 50–251, Turkey Point Plant, Units 3 and 4, Miami-Dade County, Florida

Date of application for amendments: January 27, 2006, as supplemented November 28, 2006, April 30, 2007, and July 17, 2007.

Brief description of amendments: These amendments revise Technical Specifications (TS) Section 3/4 9.1, ''Boron Concentration,'' Section 3/4 9.14, ''Spent Fuel Storage,'' and Section 3/4 5.5.1, ''Fuel Storage Criticality'' to allow use of Metamic rack inserts, and administrative controls that require mixing higher reactivity fuel with lower-reactivity fuel.

Date of issuance: July 17, 2007.

Effective date: As of the date of issuance and shall be implemented prior to the end of Unit 4 Cycle 24.

Amendment Nos: 234 and 229.

Renewed Facility Operating License Nos. DPR–31 and DPR–41: Amendments revised the TS.

Date of initial notice in ***Federal Register***: May 9, 2006 (71 FR 26999). The supplements dated November 28, 2006, April 30, 2007, and July 17, 2007, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register** on May 9, 2006.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 17, 2007.

No significant hazards consideration comments received: No.

Nuclear Management Company, Docket No. 50–263, Monticello Nuclear Generating Plant (MNGP), Wright County, Minnesota

Date of application for amendment: January 29, 2007, as supplemented on June 5, 2007.

Brief description of amendment: The amendment revised Table 3.3.5.1–1 of the Technical Specifications for three low-pressure coolant injection loop select logic functions. The surveillance of these three functions was previously required to be performed every 92 days. The amended requirement requires a channel calibration and logic system functional test, respectively, every 24 months. In addition, the allowable values associated with these three functions are changed to match the extended surveillance interval.

Date of issuance: July 20, 2007.

Effective date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No: 151.

Renewed Facility Operating License No. DPR–22: Amendment revised the Renewed Facility Operating License and Technical Specifications.

Date of initial notice in ***Federal Register***: March 13, 2007 (72 FR 11391).

The supplemental letter dated June 5, 2007, contained clarifying information and did not change the initial no significant hazards consideration determination, and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 20, 2007.

No significant hazards consideration comments received: No.

STP Nuclear Operating Company, Docket Nos. 50–498 and 50–499, South Texas Project, Units 1 and 2, Matagorda County, Texas

Date of amendment request: February 28, 2006, as supplemented by letters dated April 6 and May 31, 2007, and electronic mail dated July 18, 2007.

Brief description of amendments: The amendments revised TSs 3/4.8.2.1, ''DC [Direct Current] Sources—Operating,'' and 3/4.8.2.2, ''DC Sources—Shutdown,'' and add a new TS 3/4.8.2.3, ''Battery Parameters.'' The amendments revised allowed outage times for battery chargers as well as battery charger testing criteria, and relocate a number of battery surveillance requirements to a licensee-controlled Battery Monitoring and Maintenance Program. The changes are consistent with Standard TS Change Traveler TSTF–360, Revision 1, ''DC Electrical Rewrite.''

Date of issuance: July 20, 2007.

Effective date: As of the date of issuance and shall be implemented within 120 days of issuance.

Amendment Nos.: Unit 1–180; Unit 2–167.

Facility Operating License Nos. NPF–76 and NPF–80: The amendments revised the Facility Operating Licenses and Technical Specifications.

Date of initial notice in ***Federal Register***: September 12, 2006 (71 FR 53721). The supplemental letters dated April 6 and May 31, 2007, and electronic mail dated July 18, 2007, provided additional information that

clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated July 20, 2007.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 2nd day of August 2007.

For the Nuclear Regulatory Commission.

Catherine Haney,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. E7–15459 Filed 8–13–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Notice of Availability of the Final License Renewal Interim Staff Guidance LR–ISG–2006–03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives Analyses

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of Availability.

SUMMARY: NRC is issuing its Final License Renewal Interim Staff Guidance LR–ISG–2006–03 for preparing severe accident mitigation alternatives (SAMA) analyses. This LR–ISG recommends that applicants for license renewal use the Guidance Document Nuclear Energy Institute 05–01, Revision A, (ADAMS Accession No. ML060530203) when preparing their SAMA analyses. The NRC staff issues LR–ISGs to facilitate timely implementation of the license renewal rule and to review activities associated with a license renewal application. The NRC staff will also incorporate the approved LR–ISG into the next revision of Supplement 1 to Regulatory Guide 4.2, ''Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses.''

ADDRESSES: The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by e-mail at *pdr@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Emch, Jr., Senior Project Manager, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone 301–415–1590 or by e-mail at *rle@nrc.gov.*

SUPPLEMENTARY INFORMATION: Attachment 1 to this **Federal Register** notice, entitled *Staff Position and Rationale for the Final License Renewal Interim Staff Guidance LR–ISG–2006–03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives (SAMA)* Analyses contains the NRC staff's rationale for publishing the Final LR–ISG–2006–03. Attachment 2 to this **Federal Register** notice, entitled *Proposed License Renewal Interim Staff Guidance LR–ISG–2006–03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives (SAMA) Analyses,* contains the guidance for preparing SAMA analyses related to license renewal applications. The NRC staff approves this LR–ISG for NRC and industry use. The NRC staff will also incorporate the approved LR–ISG into the next revision of Supplement 1 to Regulatory Guide 4.2, ''Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses.''

Dated at Rockville, Maryland, this 2nd day of August 2007.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

Attachment 1—Staff Position and Rationale for the Final License Renewal Interim Staff Guidance LR–ISG–2006–03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives Analyses

Staff Position: The NRC staff recommends that applicants for license renewal follow the guidance provided in Nuclear Energy Institute (NEI) 05–01, ''Severe Accident Mitigation Alternatives (SAMA) Analysis—Guidance Document,'' Revision A, when preparing their SAMA analyses.

Rationale: The NEI developed a generic Guidance Document NEI 05–01, Revision A, to help clarify the NRC staff's expectations regarding the information that needs to be included in SAMA analyses. The NRC staff reviewed and concluded that NEI 05–01, Revision A, describes existing NRC regulations and facilitates complete preparation of SAMA analysis submittals. The staff finds that utilization of the guidance provided in NEI 05–01, Revision A, will result in improved quality in SAMA analyses and a reduction in the number of requests for additional information.

Attachment 2—Final License Renewal Interim Staff Guidance LR–ISG–2006–03: Staff Guidance for Preparing Severe Accident Mitigation Alternatives Analyses

Introduction

A severe accident mitigation alternatives (SAMA) analyses is required as part of a license renewal application, if a SAMA analysis has not already been performed for the plant and reviewed by the NRC staff. SAMA analyses have been performed and submitted to the NRC for all applications for license renewal received by the staff thus far. Therefore, this LR–ISG is being recommended as guidance consistent with our goal to more effectively and efficiently resolve license renewal issues identified by the staff or the industry.

Background and Discussion

After receiving extensive requests for additional information regarding the SAMA analyses, several applicants for license renewal concluded that they did not fully understand the kind of information that the NRC staff was expecting to see in SAMA analyses.

The Nuclear Energy Institute (NEI) developed a generic guidance document to help clarify the NRC staff's expectations regarding the information that should be submitted in SAMA analyses. On April 8, 2005, NEI submitted NEI 05–01, ''Severe Accident Mitigation Alternatives (SAMA) Analysis—Guidance Document.'' The NRC staff reviewed this guidance document, and by letter, dated July 12, 2005, provided comments on NEI 05–01. The NRC staff's comments were discussed during a public meeting between NEI and NRC on July 21, 2005.

On February 17, 2006, NEI submitted its NEI 05–01, Revision A, dated November 2005. The NRC staff reviewed and concluded that this version fully resolved the NRC staff's comments. In addition, the NRC staff concluded that NEI 05–01, Revision A, describes existing NRC regulations, and facilitates complete preparation of SAMA analysis submittals.

Some applicants for license renewal have submitted SAMA analyses using the guidance provided in NEI 05–01, Revision A. The NRC staff found improved quality in the submitted SAMA analyses and a reduction in the

number of requests for additional information for those applications that followed the guidance provided in NEI 05–01, Revision A.

Recommended Action

The staff is recommending that applicants for license renewal follow the guidance provided in NEI 05–01, Revision A, when preparing their SAMA analyses. The staff finds that NEI 05–01, Revision A, describes existing NRC regulations, and facilitates complete preparation of SAMA analysis submittals.

Although this proposed LR–ISG does not convey a change in the NRC's regulations or how they are interpreted, it is being provided to facilitate complete preparation of future SAMA analysis submittals in support of applications for license renewal. The NRC staff plans to incorporate the guidance provided in NEI 05–01, Revision A, into a future update of Supplement 1 to Regulatory Guide 4.2, ''Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses.'' This LR–ISG provides a clarification of existing guidance with no additional requirements. For those that are interested in reviewing NEI 05–01, Revision A, the Agencywide Documents Access and Management System (ADAMS) Accession Number is ML060530203.

[FR Doc. E7–15926 Filed 8–13–07; 8:45 am]
BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2007–4; Order No. 23]

Negotiated Service Agreement

AGENCY: Postal Regulatory Commission.
ACTION: Notice and order.

SUMMARY: This document establishes a docket for consideration of the Postal Service's request for approval of contract rates with The Bradford Group. It identifies key elements of the proposed agreement, which involves Standard Mail letters and flats rates, and addresses preliminary procedural matters.

DATES: 1. August 24, 2007: Deadline for intervention and responses to limitation of issues. 2. August 28, 2007: Prehearing conference, 11 a.m. in the Commission's hearing room.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, 202–789–6820 and *stephen.sharfman@prc.gov.*

SUPPLEMENTARY INFORMATION: On August 3, 2007, the United States Postal Service filed a request seeking a recommended decision from the Postal Regulatory Commission approving a Negotiated Service Agreement (NSA) with The Bradford Group.[1] The NSA is proffered as functionally equivalent to the Bookspan NSA recommended by the Commission in Docket No. MC2005–3 (baseline agreement). [70 FR 42602.] The Request, which includes six attachments, was filed pursuant to chapter 36 of title 39, United States Code.[2]

The Postal Service has identified The Bradford Group, along with itself, as parties to the NSA. This identification serves as notice of intervention by The Bradford Group. It also indicates that The Bradford Group shall be considered a co-proponent, procedurally and substantially, of the Postal Service's Request during the Commission's review of the NSA. Rule 191(b) [39 CFR 3001.191(b).] An appropriate Notice of The Bradford Group of Appearance and Filing of Testimony as Co-Proponent, August 3, 2007, has been filed.

In support of the direct case, the Postal Service has filed Direct Testimony of Broderick A. Parr on Behalf of the United States Postal Service, August 3, 2007 (USPS–T–1) and library reference USPS–LR–L–1, MC2004–3 Opinion and Further Recommended Decision Analysis for The Bradford Group NSA. The Bradford Group has separately filed direct testimonies of Steve Gustafson (BG–T–1) and Wendy Ring (BG–T–2) both on behalf of The Bradford Group, August 3, 2007. The Postal Service has reviewed The Bradford Group testimony and, in accordance with rule 192(b) [39 CFR 3001.192(b)], states that such testimony may be relied upon in presentation of the Postal Service's direct case. USPS–T–1 at 3.

The Request relies on record testimony entered in the baseline docket. This material is identified in the Postal Service's Compliance Statement, Request Attachment E.

Requests that are proffered as functionally equivalent to baseline NSAs are handled expeditiously, until a final determination has been made as to their proper status. The Postal Service's Compliance Statement, Request Attachment E, is noteworthy in that it provides valuable information to facilitate rapid review of the Request to aid participants in evaluating whether or not the procedural path suggested by the Postal Service is appropriate.

The Postal Service submitted several contemporaneous related filings with its Request. The Postal Service has filed a proposal for limitation of issues in this docket.[3] Rule 196(a)(6) [39 CFR 3001.196(a)(6)]. The proposal identifies issues that were previously decided in the baseline docket, and key issues that are unique to the instant Request.

Rule 196(b) [39 CFR 3001.196(b)] requires the Postal Service to provide written notice of its Request, either by hand delivery or by First Class Mail, to all participants of the baseline docket. This requirement provides additional time, due to an abbreviated intervention period, for the most likely participants to decide whether or not to intervene. A copy of the Postal Service's notice was filed with the Commission on August 3, 2007.[4]

The Request, accompanying testimonies of witnesses Parr (USPS–T–1), Gustafson (BG–T–1), and Ring (BG–T–2), the baseline agreement, and other related material can be accessed electronically, via the Internet, on the Commission's Web site (*http://www.prc.gov*).

I. Background: Baseline Bookspan Negotiated Service Agreement, Docket No. MC2005–3

If a request predicated on a NSA is found to be functionally equivalent to a previously recommended, and currently in effect, NSA, it may be afforded accelerated review. Rule 196 [39 CFR 3001.196]. The Postal Service asserts that the NSA in the instant Request is functionally equivalent to the now in effect Bookspan NSA recommended by the Commission in Docket No. MC2005–

[1] Request of the United States Postal Service for a Recommended Decision on Classifications and Rates to Implement a Functionally Equivalent Negotiated Service Agreement with Bradford Group, August 3, 2007 (Request).

[2] Attachments A and B to the Request contain proposed changes to the Domestic Mail Classification Schedule and associated rate schedules; Attachment C is a certification required by Commission rule 193(i) specifying that the cost statements and supporting data submitted by the Postal Service, which purport to reflect the books of the Postal Service, accurately set forth the results shown by such books; Attachment D is an index of testimony and exhibits; Attachment E is a compliance statement addressing satisfaction of various filing requirements; and Attachment F is a copy of the Negotiated Service Agreement.

[3] United States Postal Service Proposal for Limitation of Issues, August 3, 2007.

[4] Notice of the United States Postal Service Concerning the Filing of a Request for a Recommended Decision on a Functionally Equivalent Negotiated Service Agreement, August 3, 2007.

3.[5] The Bookspan NSA will remain in force from June 1, 2006 to June 1, 2009. *See* Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bookspan, Docket No. MC2005–3, May 31, 2006.

The Bookspan NSA is designed to provide incentives to Bookspan to increase its use of Standard Mail letters for the purpose of soliciting members for its various book clubs. Direct Testimony of Michelle K. Yorgey on Behalf of the United States Postal Service, Docket No. MC2005–3, July 14, 2005, at 2. The Bookspan agreement provides Bookspan with a per-piece discount for Standard Mail letter volumes that exceed specified volume thresholds. Discounts are only payable after certain specified minimum volume commitments have been reached. The volume commitment levels are subject to adjustment each year, based on the previous year's actual volume. *Id.*

The Bookspan NSA also provides for several other risk mitigation features to protect the Postal Service's interests. If Bookspan sends more than a maximum number of qualifying pieces in one year, the agreement automatically terminates. Either party may also unconditionally cancel the agreement with 30 days' notice. Additionally, the agreement contains a mechanism to adjust the volume blocks applicable to discounts if Bookspan merges or acquires other entities.

II. The Bradford Group NSA

The Postal Service proposes to enter into a three-year NSA with The Bradford Group. The agreement provides The Bradford Group with declining block rates for Standard Mail letters and flats soliciting new and existing customers for The Bradford Group's collectibles and other gift items. The total estimated net benefit to postal finances over the three-year period of this NSA is $5.3 million. Request at 4.

The Bradford Group NSA is based on the same key substantive functional elements that are central to the Bookspan agreement. *Id.* at 3. Like the Bookspan NSA this agreement provides declining block rates for Standard Mail letter solicitations. Additionally, The Bradford Group agreement provides declining block rates for Standard Mail flats. By providing discounts for both letters and flats, the potential for letter-flat conversion will be mitigated. USPS–T–1 at 2. Based on an analysis of The Bradford Group's volume histories and forecasts, the Postal Service does not anticipate a significant conversion between letters and flats.

The agreement contains several provisions to mitigate risk. These provisions include an annual adjustment mechanism for those volume commitments, based on actual experience, an automatic termination clause if volumes exceed a specified cap, and an unconditional right of cancellation for both parties. Request at 2.

In the first year of the agreement, the projected before-rates volumes are $146.5 million for letter pieces and $53.5 million for flat pieces. Discounts would be earned for volumes above the thresholds of 147 million and 53.5 million pieces for letters and flats respectively. The discounts will not be paid unless The Bradford Group actually mails 154 million letters and/or 54.5 million flats. *Id.* at 2–3.

Without an incentive such as that provided by the proposed NSA, The Bradford Group marketing volumes are expected to be flat or falling due to the highly volume variable nature of The Bradford Group's operations.

III. Commission Analysis

Applicability of the rules for functionally equivalent NSAs. For administrative purposes, the Commission has docketed the instant filing as a request predicated on an NSA functionally equivalent to a previously recommended and ongoing NSA. A final determination regarding the appropriateness of characterizing the NSA as functionally equivalent to the Bookspan NSA, Docket No. MC2005–3, and application of the expedited rules for functionality equivalent NSAs, will not be made until after the prehearing conference.

Representation of the general public. In conformance with section 3624(a) of title 39, the Commission designates Kenneth E. Richardson, acting director of the Commission's Office of the Consumer Advocate (OCA), to represent the interests of the general public in this proceeding. Pursuant to this designation, Mr. Richardson will direct the activities of Commission personnel assigned to assist him and, upon request, will supply their names for the record. Neither Mr. Richardson nor any of the assigned personnel will participate in or provide advice on any Commission decision in this proceeding.

Intervention. Those wishing to be heard in this matter are directed to file a notice of intervention on or before August 24, 2007. The notice of intervention shall be filed using the Internet (Filing Online) at the Commission's Web site (*http://www.prc.gov*), unless a waiver is obtained for hardcopy filing. Rules 9(a) and 10(a) [39 CFR 3001.9(a) and 10(a).] Notices should indicate whether participation will be on a full or limited basis. See rules 20 and 20a [39 CFR 3001.2 and 20a.] No decision has been made at this point on whether a hearing will be held in this case.

Prehearing conference. A prehearing conference will be held August 28, 2007, at 11 a.m. in the Commission's hearing room. Participants intending to object to the Postal Service's proposal for limiting issues, or intending to identify issue(s) that would indicate the need to schedule a hearing shall file a written explanation of their position by August 24, 2007. Participants shall be prepared to discuss these issues during the prehearing conference. The Commission intends to issue a ruling on these issues shortly after the prehearing conference.

Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. MC2007–4 to consider the Postal Service Request referred to in the body of this order.

2. The Commission will sit *en banc* in this proceeding.

3. Kenneth E. Richardson, acting director of the Commission's Office of the Consumer Advocate, is designated to represent the interest of the general public.

4. The deadline for filing notices of intervention is August 24, 2007.

5. A prehearing conference will be held August 28, 2007 at 11 a.m. in the Commission's hearing room.

6. Participants intending to object to proceeding under rule 196 [39 CFR 3001.196], intending to object to the Postal Service's proposal for limiting issues, or intending to identify issue(s) that would indicate the need to schedule a hearing shall file a written explanation of their position by August 24, 2007.

7. The Secretary shall arrange for publication of this notice and order in the **Federal Register**.

By the Commission.

Steven W. Williams,

Secretary.

[FR Doc. E7–15835 Filed 8–13–07; 8:45 am]

BILLING CODE 7710–FW–P

[5] *See* Opinion and Recommended Decision, Docket No. MC2005–3, May 10,

PRESIDIO TRUST

Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping; Public Museum at the Presidio

AGENCY: The Presidio Trust.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*), the Presidio Trust (Trust) is notifying interested parties that it will prepare an environmental impact statement (EIS) for a proposed museum at the Presidio (proposed action) and engage in a scoping process to seek public input. The EIS will address the significant environmental impacts of constructing a new public museum and related structures totaling approximately 100,000 square feet within the Main Post district of the Presidio of San Francisco (Presidio), California. The public scoping process will determine the range of actions, alternatives and impacts to be considered in the EIS.

SUPPLEMENTARY INFORMATION: The Trust has received for its review an offer to lease the area south of the Main Parade Ground on the Main Post bounded by Moraga Avenue to the south, Arguello Boulevard to the east, Montgomery Street to the west, and Sheridan Avenue to the north (Project Site) for the purpose of constructing a new 100,000 square-foot museum. The Trust is considering the proposal because it believes that the presence of a major cultural institution such as the one proposed could serve as a catalyst for attracting other compatible uses to the Main Post. The proposed action would entail the demolition of the existing 12,800 square-foot Bowling Center (Building 93), the 3,030 square-foot Red Cross Building (Building 97), a 450-square foot garage (Building 98) and a tennis court. The museum building would be planned and completed consistent with the general design and technical recommendations for new construction at the Project Site that are within the Trust's Main Post Planning & Design Guidelines. In order for the proposed action to be considered successful, it should:

1. Provide a cultural experience of distinction at the Main Post that engages the public and that enhances the Presidio as a national park.

2. In keeping with the Presidio's character as a national park, ensure broad public accessibility to the premises and the program of a cultural institution.

3. Site and design new construction to enhance historically significant open spaces within the Main Post and to preserve the integrity of the National Historic Landmark District (NHLD).

4. Incorporate ''green'' design and sustainable principles and practices that lower energy consumption, conserve natural resources and reduce pollution.

5. Promote alternative forms of transportation to minimize the need for vehicle use by visitors as well as employees.

6. Be economically feasible and enhance the viability of the Presidio as a self-sustaining national park.

The Trust has determined that the proposed action may have significant effects on the human environment within the meaning of the NEPA. Because the Project Site was not identified as a ''preferred location for a large museum'' in the Presidio Trust Management Plan, the Trust's formally adopted policy statement for land use planning for Area B of the Presidio, the Trust intends to prepare an EIS to address potential environmental impacts from the proposed action and the range of reasonable alternatives.

In seeking tenants, the Trust is required to provide for ''reasonable competition.'' The Trust will promote competition for the project site by widely publicizing a request for proposals (RFP). Proposals received in response to the RFP may yield alternatives for analysis in the EIS, including a ''preferred alternative'' that may differ from the proposed action. Other alternatives to be considered may include the museum's location at one or more sites at Crissy Field (Area B) or within existing buildings on the Main Post. Potential impacts to be evaluated in the EIS include those on parking and traffic, visual resources, and those to the NHLD. Compliance with Section 106 of the National Historic Preservation Act will be a component of the EIS utilizing the public input, alternatives development, and assessment processes to address historic preservation requirements.

The Trust will announce the release of the EIS (expected to occur in early 2008) for review and comment through the publication of a Notice of Availability in the **Federal Register**, through postings on its Web site at *http://www.presidio.gov* and its regular electronic newsletter (Presidio E-news), as well as direct mailing to the project mailing list and other appropriate means.

DATES: Written comments or suggestions to assist in identifying significant environmental issues and in determining the appropriate scope of the EIS should be submitted on or before October 15, 2007. A public meeting will be held on September 24, 2007 beginning at 6:30 p.m., at the Presidio Officers' Club (50 Moraga Avenue) to accept oral comments on the scope of the EIS.

ADDRESSES: Electronic comments concerning this notice can be sent to *PresidioMuseum@presidiotrust.gov.* Written comments may be faxed to Presidio Museum at 415.561.5308. Written comments may also be submitted to Presidio Museum, Attn: NEPA Compliance Manager, The Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052. Please be aware that all written comments and information submitted will be made available to the public, including, without limitation, any postal address, e-mail address, phone number or other information contained in each submission.

FOR FURTHER INFORMATION CONTACT: John Pelka, 415.561.5300.

Dated: August 8, 2007.

Karen A. Cook,

General Counsel.

[FR Doc. E7–15892 Filed 8–13–07; 8:45 am]

BILLING CODE 4310–4R–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56218; File No. SR–Amex–2007–74]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Listing and Trading of Shares of Funds of the Rydex ETF Trust

August 7, 2007.

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 July 13, 2007, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (''Exchange Notice'') as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. On July 31, 2007, Amex submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade the shares (the ''Shares'') of forty-five funds of the Rydex ETF Trust (the ''Trust'') [3] based on numerous domestic securities indexes. The text of the proposed rule change is available at Amex, the Commission's Public Reference Room, and *http://www.amex.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Amex Rules 1000A–AEMI and 1001A–1005A provide standards for the listing of Index Fund Shares, which are securities issued by an open-end management investment company for exchange trading. These securities are registered under the Investment Company Act of 1940 (''1940 Act''), as well as under the Act. Index Fund Shares are defined in Amex Rule 1000A–AEMI(b)(1) generally as securities based on a portfolio of stocks or fixed income securities that seek to provide investment results that correspond generally to the price and yield of a specified foreign or domestic stock index or fixed income securities index. Amex Rule 1000A–AEMI(b)(2) permits the Exchange to list and trade Index Fund Shares that seek to provide investment results that exceed the performance of an underlying securities index by a specified multiple or that seek to provide investment results that correspond to a specified multiple of the inverse or opposite of the index's performance.[4]

The Exchange proposes to list under Amex Rule 1000A–AEMI the Shares of forty-five new funds of the Trust that are designated as the Rydex Leveraged Funds (the ''Leveraged Funds''), Rydex Inverse Funds (the ''Inverse Funds''), and Rydex Leveraged Inverse Funds (the ''Leveraged Inverse Funds,'' and together with the Leveraged Funds and Inverse Funds, collectively, the ''Funds''). Each of the Funds will have a distinct investment objective by attempting, on a daily basis, to correspond to a specified multiple of the performance, or the inverse performance, of a particular equity securities index as described below.

The Funds will be based on the following benchmark indexes: (1) The S&P 500 Index; (2) the S&P MidCap 400 Index; (3) the S&P Small Cap 600 Index; (4) the Russell 1000 Index; (5) the Russell 2000 Index; (6) the Russell 3000 Index; (7) the S&P 500 Consumer Discretionary Index; (8) the S&P 500 Consumer Staples Index; (9) the S&P 500 Energy Index; (10) the S&P 500 Financials Index; (11) the S&P 500 HealthCare Index; (12) the S&P 500 Industrials Index; (13) the S&P 500 Information Technology Index; (14) the S&P 500 Materials Index; and (15) the S&P 500 Utilities Index (each index individually referred to as an ''Underlying Index,'' and all Underlying Indexes collectively referred to as the ''Underlying Indexes'').[5]

The Leveraged Funds will seek daily investment results, before fees and expenses, that correspond to twice (200%) the daily performance of the corresponding Underlying Indexes. The net asset value (''NAV'') of the Shares of each of these Leveraged Funds, if successful in meeting its objective, should increase, on a percentage basis, approximately twice as much as the respective Fund's Underlying Index gains when the prices of the securities in such Underlying Index increase on a given day, and should decrease approximately twice as much as the respective Underlying Index loses when such prices decline on a given day.

The Inverse Funds will seek daily investment results, before fees and expenses, that correspond to the inverse or opposite of the daily performance (−100%) of the Underlying Indexes. If each of these Inverse Funds is successful in meeting its objective, the NAV of the Shares of each Inverse Fund should increase approximately as much, on a percentage basis, as the respective Underlying Index loses when the prices of the securities in the Underlying Index decline on a given day, or should decrease approximately as much as the respective Underlying Index gains when the prices of the securities in the Underlying Index rise on a given day.

The Leveraged Inverse Funds will seek daily investment results, before fees and expenses, that correspond to twice the inverse (−200%) of the daily performance of the Underlying Indexes. If each of these Leveraged Inverse Funds is successful in meeting its objective, the NAV of the Shares of each Leveraged Inverse Fund should increase approximately twice as much, on a percentage basis, as the respective Underlying Index loses when the prices of the securities in the Underlying Index decline on a given day, or should decrease approximately twice as much as the respective Underlying Index gains when the prices of the securities in the Underlying Index rise on a given day.

Rydex Investments is the investment advisor (the ''Advisor'') to each Fund. The Advisor is registered under the Investment Advisers Act of 1940.[6]

[3] The Trust is registered as a business trust under the Delaware Corporate Code.

[4] *See* Amex Rule 1000A–AEMI(b)(2)(iii) and Commentary .02 thereto (providing that the listing and trading of Index Fund Shares under paragraph (b)(2) thereof cannot be approved by the Exchange pursuant to Rule 19b–4(e) under the Act (17 CFR 240.19b–4(e)).

[5] Amex states that certain exchange-traded funds (''ETFs'') and/or options based on each of the Underlying Indexes are currently listed and traded on the Exchange. *See infra* notes 10–21 and accompanying text. The Statement of Additional Information (''SAI'') for the Funds discloses that each Fund reserves the right to substitute a different Underlying Index. Substitutions can occur if an Underlying Index becomes unavailable, no longer serves the investment needs of shareholders, the Fund experiences difficulty in achieving investment results that correspond to the applicable Underlying Index, or for any other reason determined in good faith by the Board (as defined herein). In such instance, the substitute index would attempt to measure the same general market as the then current Underlying Index. Consistent with applicable law, shareholders would be notified (either directly or through their respective intermediary) if a Fund's Underlying Index is replaced. As explained herein, the continued listing standards under Amex Rule 1002A would apply to the Shares. *See* Amex Rule 1002A(b)(i)(B) (providing that the Exchange will consider the suspension of trading in, or removal from listing of, a series of Index Fund Shares if, among other circumstances, the Underlying Index or portfolio is replaced with a new index or portfolio, subject to certain exceptions).

[6] The Trust, Advisor, and Distributor (''Applicants'') have filed with the Commission an application for an order under the 1940 Act (the ''Application'') for the purpose of exempting the Funds of the Trust from various provisions of the 1940 Act. *See* Investment Company Act Release No. 27703 (February 20, 2007), 72 FR 8810 (February 27, 2007) (File No. 812–13337) (providing notification of an application for an order under Section 6(c) of the 1940 Act for an exemption from Sections 2(a)(32), 5(a)(1), 22(d), and 24(d) of the 1940 Act and Rule 22c–1 under the 1940 Act, and under Sections 6(c) and 17(b) of the Act for an exemption from Sections 17(a)(1) and (a)(2) of the 1940 Act).

While the Advisor will manage each Fund, the Trust's Board of Trustees (the ''Board'') will have overall responsibility for the Funds' operations. The composition of the Board is, and will be, in compliance with the requirements of Section 10 of the 1940 Act.[7] Rydex Distributors, Inc. (the ''Distributor''), a broker-dealer registered under the Act, will act as the distributor and principal underwriter of the Shares. State Street Bank & Trust will act as the index receipt agent (the ''Index Receipt Agent'') for which it will receive fees. The Index Receipt Agent will be responsible for transmitting the Deposit List (as defined herein) to the National Securities Clearing Corporation (''NSCC'') and for the processing, clearance, and settlement of purchase and redemption orders through the facilities of the Depository Trust Company (''DTC'') and NSCC on behalf of the Trust. The Index Receipt Agent will also be responsible for the coordination and transmission of files and purchase and redemption orders between the Distributor and the NSCC.

Shares of the Funds issued by the Trust will be a class of exchange-traded securities that represent an interest in the portfolio of a particular Fund.[8] The Shares will be registered in book-entry form only, and the Trust will not issue individual share certificates. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC participants.

Underlying Indexes

While the Exchange proposes to list and trade the Shares of the Funds pursuant to section 19(b)(1) of the Act, the Exchange represents that the Underlying Index components comply with the generic listing standards set forth in Commentary .02 to Amex Rule 1000A–AEMI.[9]

S&P 500 Index. The S&P 500 Index is a capitalization-weighted index composed of 500 common stocks, which are chosen by Standard & Poor's (''S&P'') on a statistical basis. As of July 10, 2007, the S&P 500 Index included companies with an average capitalization of $27.895 billion. This Underlying Index has been approved for options trading and is also the basis for an ETF.[10]

S&P MidCap 400 Index. The S&P MidCap 400 Index is a modified capitalization-weighted index composed of 400 mid-cap stocks chosen by S&P for market size, liquidity, and industry group representation. This Underlying Index covers approximately 7% of the total market capitalization of the U.S. equities market. As of July 10, 2007, the S&P MidCap 400 Index included companies with an average capitalization of $3.219 billion. This Underlying Index has been approved for options trading and is also the basis for an ETF.[11]

S&P SmallCap 600 Index. The S&P SmallCap 600 Index is a measure of small-cap company stock performance. It is a float-adjusted, market-capitalization-weighted index of 600 U.S. operating companies. Securities are selected for inclusion in this Underlying Index by an S&P committee through a non-mechanical process that factors criteria such as liquidity, price, market capitalization, financial viability, and public float. As of July 10, 2007, the S&P SmallCap 600 Index included companies with an average capitalization of $1.075 billion. This Underlying Index has been approved for options trading and is also the basis for an ETF.[12]

Russell 1000 Index. The Russell 1000 Index measures the performance of the 1,000 largest companies in, and represents approximately 92% of the total market capitalization of, the Russell 3000 Index. As of July 10, 2007, the Russell 1000 Index included companies with an average market capitalization of approximately $16.193 billion. This Underlying Index has been approved for options trading and is also the basis for an ETF.[13]

Russell 2000 Index. The Russell 2000 Index measures the performance of the 2,000 smallest companies in, and represents approximately 8% of the total market capitalization of, the Russell 3000 Index. As of July 10, 2007, the Russell 2000 Index included companies with an average market capitalization of approximately $899 million. This Underlying Index has been approved for options trading and is also the basis for an ETF.[14]

Russell 3000 Index. The Russell 3000 Index measures the performance of the 3,000 largest U.S. companies based on total market capitalization and represents approximately 98% of the investable U.S. equity market. As of July 10, 2007, the Russell 3000 Index included companies with an average market capitalization of approximately $6.165 billion. This Underlying Index has been approved for options trading and is also the basis for an ETF.[15]

S&P 500 Consumer Discretionary Index. The S&P 500 Consumer Discretionary Index consists of the common stocks of the following industries that comprise the Consumer Discretionary sector of the S&P 500 Index: automobiles and components, consumer durables, apparel, hotels, restaurants, leisure, media, and retailing. As of July 10, 2007, the S&P 500 Consumer Discretionary Index included companies with an average capitalization of $16.685 billion. This Underlying Index is the basis for both the Select Sector SPDR—Consumer Discretionary ETF and the Rydex S&P Equal Weight Consumer Discretionary ETF listed and traded on the Exchange.

S&P 500 Consumer Staples Index. The S&P 500 Consumer Staples Index consists of the common stocks of the following industries that comprise the Consumer Staples sector of the S&P 500 Index: food and drug retailing, beverages, food products, tobacco, household products, and personal products. As of July 10, 2007, the S&P 500 Consumer Staples Index included companies with an average capitalization of $35.494 billion. This Underlying Index is the basis for both the Select Sector SPDR—Consumer Staples ETF[16] and the Rydex S&P Equal Weight Consumer Staples ETF listed and traded on the Exchange.

S&P 500 Energy Index. The S&P 500 Energy Index consists of the common stocks of the following industries that comprise the Energy sector of the S&P 500 Index: oil and gas exploration, production, marketing, refining and/or transportation, and energy equipment and services industries. As of July 10,

[7] 15 U.S.C. 80a–10 (setting forth certain restrictions and requirements with respect to affiliations or interest of directors, officers, and employees of registered investment companies).

[8] The Trust is registered as a business trust under the Delaware Corporate Code.

[9] E-mail from Jeffrey P. Burns, Associate General Counsel, Amex, to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated August 1, 2007 (clarifying the basis for the Exchange's proposal to list and trade the Shares) (''Amex Confirmation'').

[10] *See* Securities Exchange Act Release No. 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (SR–Amex–92–18) (approving the listing and trading of portfolio depository receipts (''PDRs''), including receipts based on the S&P 500 Index).

[11] *See* Securities Exchange Act Release No. 35534 (March 24, 1995), 60 FR 16686 (March 31, 1995) (SR–Amex–94–52) (approving the listing and trading of PDRs based on the S&P 400 Midcap Index).

[12] *See* Securities Exchange Act Release No. 35532 (March 24, 1995), 60 FR 16518 (March 30, 1995) (SR–CBOE–94–43) (approving the listing and trading of options on the S&P SmallCap 600 Index).

[13] *See* Securities Exchange Act Release No. 53191 (January 30, 2006), 71 FR 6111 (February 6, 2006) (SR–Amex–2005–061) (approving the listing and trading of options on the Russell Indexes, including the Russell 1000, 2000, and 3000 Indexes).

[14] *See id.*

[15] *See id.*

[16] *See* Securities Exchange Act Release No. 40749 (December 4, 1998), 63 FR 68483 (December 11, 1998) (SR–Amex–98–29) (approving the listing and trading of certain Select SPDR ETFs).

2007, the S&P 500 Energy Index included companies with an average capitalization of $46.785 billion. This Underlying Index is the basis for both the Select Sector SPDR—Energy ETF [17] and the Rydex S&P Equal Weight Energy ETF listed and traded on the Exchange.

S&P 500 Financials Index. The S&P 500 Financials Index consists of the common stocks of the following industries that comprise the Financials sector of the S&P 500 Index: banks, diversified financials, brokerage, asset management insurance, and real estate, including real estate investment trusts. As of July 10, 2007, the S&P 500 Financials Index included companies with an average capitalization of $30.683 billion. This Underlying Index is the basis for both the Select Sector SPDR—Financials ETF [18] and the Rydex S&P Equal Weight Financials ETF listed and traded on the Exchange.

S&P 500 Health Care Index. The S&P 500 Health Care Index consists of the common stocks of the following industries that comprise the Health Care sector of the S&P 500 Index: health care equipment and supplies, health care providers and services, and biotechnology and pharmaceuticals. As of July 10, 2007, the S&P 500 Health Care Index included companies with an average capitalization of $29.614 billion. This Underlying Index is the basis for both the Select Sector SPDR—Health Care ETF and the Rydex S&P Equal Weight Health Care ETF listed and traded on the Exchange.

S&P 500 Industrials Index. The S&P 500 Industrials Index consists of the common stocks of the following industries that comprise the Industrials sector of the S&P 500 Index: aerospace and defense, building products, construction and engineering, electrical equipment, conglomerates, machinery, commercial services and supplies, air freight and logistics, airlines, and marine, road, and rail transportation infrastructure. As of July 10, 2007, the S&P 500 Industrials Index included companies with an average capitalization of $28.706 billion. This Underlying Index is the basis for both the Select Sector SPDR—Industrials ETF [19] and the Rydex S&P Equal Weight Industrials ETF listed and traded on the Exchange.

S&P 500 Information Technology Index. The S&P 500 Information Technology Index consists of the common stocks of the following industries that comprise the Information Technology sector of the S&P 500 Index: internet equipment, computers and peripherals, electronic equipment, office electronics and instruments, semiconductor equipment and products, diversified telecommunication services, and wireless telecommunication services. As of July 10, 2007, the S&P 500 Information Technology Index included companies with an average capitalization of $30.947 billion. This Underlying Index is the basis for both the Select Sector SPDR—Technology ETF [20] and the Rydex S&P Equal Weight Technology ETF listed and traded on the Exchange.

S&P 500 Materials Index. The S&P 500 Materials Index consists of the common stocks of the following industries that comprise the Materials sector of the S&P 500 Index: chemicals, construction materials, containers and packaging, metals and mining, and paper and forest products. As of July 10, 2007, the S&P 500 Materials Index included companies with an average capitalization of $15.358 billion. This Underlying Index is the basis for both the Select Sector SPDR—Materials ETF and the Rydex S&P Equal Weight Materials ETF listed and traded on the Exchange.

S&P 500 Utilities Index. The S&P 500 Utilities Index consists of the common stocks of the following industries that comprise the Utilities sector of the S&P 500 Index: electric utilities, gas utilities, multi-utilities, unregulated power and water utilities, and telecommunication service companies, including fixed-line, cellular, wireless, high bandwidth, and fiber-optic cable networks. As of July 10, 2007, the S&P 500 Utilities Index included companies with an average capitalization of $14.794 billion. This Underlying Index is the basis for both the Select Sector SPDR—Utilities ETF [21] and the Rydex S&P Equal Weight Utilities ETF listed and traded on the Exchange.

Investment Objective of the Funds

Each Leveraged Fund will seek investment results that correspond, before fees and expenses, to twice (200%) the daily performance of an Underlying Index and will invest its assets based upon the same strategies as conventional index funds. Rather than hold positions in equity securities and financial instruments intended to create exposure to 100% of the daily performance of an Underlying Index, these Funds will hold positions in equity securities and certain financial instruments [22] designed to create exposure equal to twice (200%), before fees and expenses, the daily performance of an Underlying Index. These Leveraged Funds generally will hold at least 80% of their net assets, *plus* any borrowings for investment purposes, in the component equity securities of the relevant Underlying Index and Financial Instruments with economic characteristics that should perform similar to that of the relevant Underlying Index. The remainder of assets will be devoted to certain Financial Instruments and money market instruments [23] that are intended to create the additional needed exposure to such Underlying Index necessary to pursue its investment objective.

The Inverse Funds will seek daily investment results, before fees and expenses, of the inverse or opposite (−100%) of the Underlying Index, and the Leveraged Inverse Funds will seek daily investment results, before fees and expenses, of twice the inverse or opposite (−200%) of the daily performance of the Underlying Index. Each of these Funds will generally hold at least 80% of their respective net assets, *plus* any borrowings for investment purposes, in instruments with economic characteristics that should perform opposite to that of the Underlying Index. Each Inverse and Leveraged Inverse Fund will rely on establishing positions in Financial Instruments that provide, on a daily basis, the inverse or opposite of, or twice the inverse or opposite of, as the case may be, the performance of the relevant Underlying Index. Normally, 100% of the value of the portfolios of each Inverse and Leveraged Inverse Fund will be devoted to Financial Instruments and Money Market Instruments.

While the Advisor will attempt to minimize any ''tracking error'' between the investment results of a particular Fund and the performance (and specified multiple thereof) or the inverse performance (and specified multiple thereof) of its Underlying Index, certain factors may tend to cause

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] The financial instruments to be held by any of the Funds may include stock index futures contracts, options on futures contracts, options on securities and indices, equity caps, collars and floors, as well as swap agreements, forward contracts, repurchase agreements, and reverse repurchase agreements (the ''Financial Instruments'').

[23] Money market instruments include U.S. government securities and repurchase agreements (the ''Money Market Instruments''). The Exchange states that repurchase agreements held by the Funds will be consistent with Rule 2a–7 of the 1940 Act (17 CFR 270.2a–7), *i.e.*, remaining maturities of 397 days or less and rated investment-grade.

the investment results of a Fund to vary from such relevant Underlying Index or specified multiple thereof.[24] The Leveraged Funds are expected to be highly correlated to each respective Underlying Index and investment objective (0.95 or greater). The Inverse and Leveraged Inverse Funds are expected to be highly inversely correlated to each respective Underlying Index and investment objective (−0.95 or greater).[25] In each case, the Funds are expected to have a daily tracking error of less than 5% (excluding expenses and interest, if any) relative to the specified multiple or inverse multiple of the performance of the relevant Underlying Index.

The Exchange believes that the Shares will not trade at a material discount or premium to the underlying securities held by a Fund based on potential arbitrage opportunities. The arbitrage process, which provides the opportunity to profit from differences in prices of the same or similar securities, increases the efficiency of the markets and serves to prevent potentially manipulative efforts. If the price of a Share deviates enough from the Creation Unit (as defined herein), on a per-Share basis, to create a material discount or premium, an arbitrage opportunity is created allowing the arbitrageur to either buy the Shares at a discount, immediately cancel them in exchange for the Creation Unit and sell the underlying securities in the cash market at a profit, or sell the Shares short at a premium and buy the Creation Unit in exchange for the Shares to deliver against the short position. In both instances the arbitrageur locks in a profit and the markets move back into line.

The Portfolio Investment Methodology

The Advisor will seek to establish an investment exposure in each portfolio corresponding to each Fund's investment objective based on its ''Portfolio Investment Methodology,'' as described below. The Exchange states that the Portfolio Investment Methodology is a mathematical model based on well-established principles of finance that are widely used by investment practitioners, including conventional index fund managers.

As set forth in the Application, the Portfolio Investment Methodology was designed to determine for each Fund the portfolio investments needed to achieve its stated investment objectives. The Portfolio Investment Methodology takes into account a variety of specified criteria, the most important of which are: (1) Net assets (taking into account creations and redemptions) in each Fund's portfolio at the end of each trading day; (2) the amount of required exposure to the Underlying Index; and (3) the positions in equity securities, Financial Instruments, and/or Money Market Instruments at the beginning of each trading day. The Advisor, pursuant to such methodology, will then mathematically determine the end-of-day positions to establish the required amount of exposure to the Underlying Index, which will consist of equity securities, Financial Instruments, and/or Money Market Instruments. The difference between the start-of-day positions and the required end-of-day positions is the actual amount of equity securities, Financial Instruments, and/or Money Market Instruments that must be bought or sold for the day (the ''Solution''). The Solution represents the required exposure and, when necessary, is converted into an order or orders to be filled that same day.

Generally, portfolio trades effected pursuant to the Solution are reflected in the NAV on the first business day (T+1) after the date the relevant trade is made. Therefore, the NAV calculated for a Fund on a given day should reflect the trades executed pursuant to the prior day's Solution. For example, trades pursuant to the Solution calculated on a Monday afternoon are executed on behalf of the Fund in question on that day. These trades will then be reflected in the NAV for that Fund that is calculated as of 4 p.m. Eastern Time (''ET'') on Tuesday.

The timeline for the Portfolio Investment Methodology is as follows. Authorized Participants (''APs'' or ''Authorized Participants'')[26] have a 3 p.m. ET cut-off for orders submitted by telephone, facsimile, and other electronic means of communication and a 4 p.m. ET cut-off for orders received via mail.[27] Orders are received by the Distributor and relayed to the Advisor within ten minutes. The Advisor will know by 3:10 p.m. ET the number of creation/redemption orders by APs for that day. Orders are then placed at approximately 3:40 p.m. ET as market-on-close orders. At 4 p.m. ET, the Advisor will again look at the exposure to make sure that the orders placed are consistent with the Solution, and as described above, the Advisor will execute any other transactions in Financial Instruments to assure that the Fund's exposure is consistent with the Solution.

Description of Investment Techniques

In attempting to achieve its individual investment objectives, a Fund may invest its assets in equity securities, Financial Instruments, and Money Market Instruments. The Leveraged Funds will hold at least 80% of their net assets in the equity securities comprising the relevant Underlying Index. The remainder of assets, if any, will be devoted to Financial Instruments and Money Market Instruments that are intended to create additional needed exposure to such Underlying Index necessary to pursue the Leveraged Funds' investment objectives. The Inverse and Leveraged Inverse Funds generally will not invest in equity securities comprising the applicable Underlying Index, but rather will hold only Financial Instruments and Money Market Instruments. To the extent, applicable, each Fund will comply with the requirements of the 1940 Act with respect to ''cover'' for Financial Instruments and, thus, may hold a significant portion of its assets in liquid instruments in segregated accounts.

Each Fund may engage in transactions in futures contracts on designated contract markets where such contracts trade and will only purchase and sell futures contracts traded on a U.S. futures exchange or board of trade. Each Fund will comply with the

[24] The Exchange states that several factors may cause a Fund to vary from the relevant Underlying Index and investment objective including: (1) A Fund's expenses, including brokerage fees (which may be increased by high portfolio turnover) and the cost of the investment techniques employed by that Fund; (2) less than all of the securities in the benchmark Underlying Index being held by a Fund and securities not included in the benchmark Underlying Index being held by a Fund; (3) an imperfect correlation between the performance of instruments held by a Fund, such as futures contracts, and the performance of the underlying securities in the cash market; (4) bid-ask spreads (the effect of which may be increased by portfolio turnover); (5) holding instruments traded in a market that has become illiquid or disrupted; (6) a Fund's Share prices being rounded to the nearest cent; (7) changes to the benchmark Underlying Index that are not disseminated in advance; (8) the need to conform a Fund's portfolio holdings to comply with investment restrictions or policies or regulatory or tax law requirements; (9) early and unanticipated closings of the markets on which the holdings of a Fund trade, resulting in the inability of the Fund to execute intended portfolio transactions; and (10) market movements that run counter to a Fund's investments.

[25] Correlation is the strength of the relationship between (1) the change in a Fund's NAV and (2) the change in the benchmark Underlying Index (investment objective). The statistical measure of correlation is known as the ''correlation coefficient.'' A correlation coefficient of +1 indicates a perfect positive correlation, while a value of −1 indicates a perfect negative (inverse) correlation. A value of zero would mean that there is no correlation between the two variables.

[26] An Authorized Participant is: (1) Either (a) a broker-dealer or other participant in the continuous net settlement system of the NSCC, or (b) a DTC participant; and (2) a party to a participant agreement with the Distributor.

[27] The Exchange states that AP orders by mail are exceedingly rare.

requirements of Rule 4.5 of the regulations promulgated by the Commodity Futures Trading Commission (''CFTC'').[28]

Each Fund may enter into swap agreements and/or forward contracts for the purposes of attempting to gain exposure to the equity securities of its Underlying Index without actually transacting such securities. The Exchange states that the counterparties to the swap agreements and/or forward contracts will be major broker-dealers and banks. The creditworthiness of each potential counterparty is assessed by the Advisor's credit committee pursuant to guidelines approved by the Board. Existing counterparties are reviewed periodically by the Board. Each Fund may also enter into repurchase and reverse repurchase agreements with terms of less than one year and will only enter into such agreements with: (1) Members of the Federal Reserve System; (2) primary dealers in U.S. government securities; or (3) major broker-dealers. Each Fund may also invest in Money Market Instruments, in pursuit of its investment objectives, as ''cover'' for Financial Instruments, as described above, or to earn interest.

The Trust will adopt certain fundamental policies consistent with the 1940 Act, and each Fund will be classified as ''non-diversified'' under the 1940 Act. Each Fund, however, intends to maintain the required level of diversification and otherwise conduct its operations so as to qualify as a ''regulated investment company'' or ''RIC'' for purposes of the Internal Revenue Code to relieve the Trust and the Funds of any liability for Federal income tax to the extent that its earnings are distributed to shareholders.[29]

Availability of Information About the Shares and Underlying Indexes

The Trust's Internet Web site (*http://www.rydexinvestments.com*), which is and will be publicly accessible at no charge, will contain the following information for each Fund's Shares: (1) The prior business day's closing NAV, the reported closing price, and a calculation of the premium or discount of such price in relation to the closing NAV; (2) data for a period covering at least the four previous calendar quarters (or the life of a Fund, if shorter) indicating how frequently each Fund's Shares traded at a premium or discount to NAV based on the daily closing price and the closing NAV, and the magnitude of such premiums and discounts; (3) its prospectus and product description; and (4) other quantitative information, such as daily trading volume. The prospectus and/or product description for each Fund will inform investors that the Trust's Internet Web site has information about the premiums and discounts at which the Fund's Shares have traded.[30]

Amex will disseminate for each Fund on a daily basis by means of the Consolidated Tape Association (''CT'') and CQ High Speed Lines information with respect to an Indicative Intra-Day Value (the ''IIV'') (as defined and discussed herein), recent NAV, number of Shares outstanding, and the estimated cash amount and total cash amount per Creation Unit. The Exchange will make available on its Web site daily trading volume, closing prices, NAV, and the final dividend amounts to be paid for each Fund.

Each Fund's total portfolio composition will be disclosed on the Web site of the Trust or another relevant Internet Web site as determined by the Trust and/or the Exchange. The Trust will provide Web site disclosure of each Fund's portfolio holdings daily and will include, as applicable, the names and number of Shares held of each specific equity security, the specific types of Financial Instruments and characteristics of such Financial Instruments, and the cash equivalents and amount of cash held in the portfolio of each Fund. This public Web site disclosure of the portfolio composition of each Fund and the disclosure by the Advisor of the ''IIV File'' (as described below) and the portfolio composition file or ''PCF'' (as described below) will occur at the same time. Therefore, the same portfolio information (including accrued expenses and dividends) will be provided on the public Internet Web site(s), as well as in the IIV File and PCF provided to Authorized Participants. The format of the public Web site disclosure and the IIV File and PCF will differ because the public Web site will list all portfolio holdings, while the IIV File and PCF will similarly provide the portfolio holdings, but in a format appropriate for Authorized Participants, *i.e.*, the exact components of a Creation Unit.[31] Accordingly, each investor will have access to the current portfolio composition of each Fund through the Trust's Web site and/or the Exchange's Web site.

Beneficial owners of Shares (''Beneficial Owners'') will receive all of the statements, notices, and reports required under the 1940 Act and other applicable laws. They will receive, for example, annual and semi-annual Fund reports, written statements accompanying dividend payments, proxy statements, annual notifications detailing the tax status of Fund distributions, and Form 1099–DIVs. Some of these documents will be provided to Beneficial Owners by their brokers, while others will be provided by the Fund through the brokers.

The daily closing value and the percentage change in the daily closing value for each Underlying Index will be publicly available on various Internet Web sites, and data regarding each Underlying Index will be available from the respective Underlying Index provider. Several independent data vendors also package and disseminate Underlying Index data in various value-added formats (including vendors displaying both securities and Underlying Index levels and vendors displaying Underlying Index levels only). The value of each Underlying Index will be updated intra-day on a real-time basis as its individual component securities change in price. These intra-day values of each Underlying Index will be disseminated at least every 15 seconds throughout the trading day by Amex or another organization authorized by the relevant Underlying Index provider.

Creation and Redemption of Shares

Each Fund will issue and redeem Shares only in aggregations of at least 50,000 (each aggregation, a ''Creation Unit''). Purchasers of Creation Units will be able to separate the Creation Units into individual Shares. Once the

[28] The Exchange states that CFTC Rule 4.5 provides an exclusion for investment companies registered under the 1940 Act from the definition of the term ''commodity pool operator'' upon the filing of a notice of eligibility with the National Futures Association.

[29] *See* Exchange Notice n.16 (providing a description of the Internal Revenue Code requirements pertaining to RICs). The Exchange Notice is available at Amex's Web site (*http://www.amex.com*).

[30] The Exchange states that the Application requests relief from Section 24(d) of the 1940 Act (15 U.S.C. 80a–24(d)), which would permit dealers to sell Shares in the secondary market unaccompanied by a statutory prospectus when prospectus delivery is not required by the Securities Act of 1933. Additionally, if a product description is being provided in lieu of a prospectus, Commentary .06 of Amex Rule 1000A–AEMI requires that Amex members and member organizations provide to all purchasers of a series of Index Fund Shares a written description of the terms and characteristics of such securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time of confirmation of the first transaction in such series is delivered to such purchaser. Furthermore, any sales material will reference the availability of such circular and the prospectus. Amex Confirmation (confirming the Amex rule requiring the delivery of a written description of the terms and characteristics of the Shares).

[31] The composition will be used to calculate the NAV later that day.

number of Shares in a Creation Unit is determined, it will not change thereafter (except in the event of a stock split or similar revaluation). The initial value of a Share for each of the Funds is expected to be in the range of $50–$250.

At the end of each business day, the Trust will prepare the list of names and the required number of Shares of each Deposit Security (as defined herein) to be included in the next trading day's Creation Unit for each Leveraged Fund (the ''Deposit List''). The Trust will then add to the Deposit List the cash information effective as of the close of business on that business day and create a PCF for each Fund, which will be transmitted to NSCC before the open of business the next business day. The information in the PCF will be available to all participants in the NSCC system.

Because the NSCC's system for the receipt and dissemination to its participants of the PCF is not currently capable of processing information with respect to Financial Instruments, the Advisor has developed an ''IIV File,'' which it will use to disclose the Funds' holdings of Financial Instruments.[32] The IIV File will contain, for each Leveraged Fund (to the extent that it holds Financial Instruments) and Inverse and Leveraged Inverse Fund, information sufficient by itself or in connection with the PCF and other available information for market participants to calculate a Fund's IIV and effectively value such Fund.

For example, the following information would be provided in the IIV File for a Leveraged Fund holding equity securities and Financial Instruments and an Inverse Fund and/or Leveraged Inverse Fund holding swaps and futures contracts (certain Financial Instruments): (A) The total value of the equity securities held by the Leveraged Fund; (B) the notional value of the swaps held by such Funds (together with an indication of the Underlying Index on which such swap is based and whether the Funds' position is long or short); (C) the most recent valuation of the swaps held by the Funds; (D) the notional value of any futures contracts (together with an indication of the Underlying Index on which such contract is based, whether the Funds' position is long or short, and the contract's expiration date) held by the Funds; (E) the number of futures contracts held by the Funds (together with an indication of the Underlying Index on which such contract is based, whether the Funds' position is long or short, and the contract's expiration date); (F) the most recent valuation of the futures contracts held by the Funds; (G) the total assets and total number of Shares outstanding of each Fund; and (H) a ''net other assets'' figure reflecting expenses and income of the Funds to be accrued during and through the following business day and accumulated gains or losses on the Funds' Financial Instruments through the end of the business day immediately preceding the publication of the IIV File. To the extent that any Fund holds cash or cash equivalents about which information is not available in a PCF, information regarding such Fund's cash and cash equivalent positions will be disclosed in the IIV File for such Fund.

The information in the IIV File will be sufficient for participants in the NSCC system to calculate the IIV for the Inverse and Leveraged Inverse Funds and, together with the information on equity securities contained in the PCF, will be sufficient for calculation of the IIV for the Leveraged Funds, during such next business day. The IIV File, together with the applicable information in the PCF in the case of Leveraged Funds, will also be the basis for the next business day's NAV calculation.

Under normal circumstances, the Leveraged Funds will be created and redeemed either entirely for cash and/or for a deposit basket of equity securities (''Deposit Securities''), *plus* a Balancing Amount (as defined herein), as described below. Under normal circumstances, the Inverse and Leveraged Inverse Funds will be created and redeemed entirely for cash. The IIV File published before the open of business on a business day will, however, permit NSCC participants to calculate (by means of calculating the IIV) the amount of cash required to create a Creation Unit and the amount of cash that will be paid upon redemption of a Creation Unit, for each Inverse and Leveraged Inverse Fund for that business day.

For the Leveraged Funds, the PCF will be prepared by the Trust after 4 p.m. ET and transmitted by the Index Receipt Agent to NSCC by 6:30 p.m. ET. All Authorized Participants who are NSCC participants and the Exchange will have access to the Internet Web site containing the IIV File. The IIV File will reflect the trades made on behalf of a Fund and the creation/redemption orders, in each case, for that business day. Accordingly, by 6:30 p.m. ET, Authorized Participants will know the composition of the Fund's portfolio for the next trading day.

Creation of the Leveraged Funds. Typically, persons[33] purchasing Creation Units from a Leveraged Fund must make an in-kind deposit of a basket of Deposit Securities consisting of the securities selected by the Advisor from among those securities contained in the Fund's portfolio, together with an amount of cash specified by the Advisor (the ''Balancing Amount''), *plus* the applicable transaction fee (the ''Transaction Fee''). The Deposit Securities and the Balancing Amount collectively are referred to as the ''Creation Deposit.'' The Balancing Amount is a cash payment designed to ensure that the value of a Creation Deposit is identical to the value of the Creation Unit. The Balancing Amount is an amount equal to the difference between the NAV of a Creation Unit and the market value of the Deposit Securities.[34]

The Balancing Amount will be determined shortly after 4 p.m. ET each business day. Although the Balancing Amount for most ETFs is a small amount reflecting accrued dividends and other distributions, for the Leveraged Funds it is expected to be larger due to changes in the value of the Financial Instruments, *i.e.*, daily mark-to-market. For example, assuming a basket of Deposit Securities is valued at $5 million for a Leveraged Fund, if the market increases 10%, such basket of Deposit Securities would be equal to $5.5 million at 4 p.m. ET. The value of the Leveraged Fund Shares would increase by 20% or $1 million to equal $6 million total. With such basket of Deposit Securities valued at $5.5 million, the Balancing Amount would be $500,000. The values of the next day's basket of Deposit Securities and Balancing Amount are announced between 5:30 p.m. ET and 6 p.m. ET each business day. The Balancing Amount may, at times, represent a significant portion of the aggregate purchase price (or in the case of redemptions, the redemption proceeds). This may occur because the mark-to-

[32] The Trust or the Advisor will post the IIV File to a password-protected Internet Web site before the opening of business on each business day, and all Authorized Participants and the Exchange will have access to a password and the Web site containing the IIV File. The Funds, however, will disclose each business day to the public identical information, but in a format appropriate to public investors, at the same time the Funds disclose the IIV File and PCF, as applicable, to industry participants.

[33] Authorized Participants are the only persons who may place orders to create and redeem Creation Units. Authorized Participants must be registered broker-dealers or other securities market participants, such as banks and other financial institutions that are exempt from registration as broker-dealers to engage in securities transactions, who are participants in DTC. *See supra* note 26.

[34] While not typical, if the market value of the Deposit Securities is greater than the NAV of a Creation Unit, then the Balancing Amount will be a negative number, in which case the Balancing Amount will be paid by the Leveraged Fund to the purchaser, rather than vice-versa.

market value of the Financial Instruments held by the Leveraged Funds, if any, is included in the Balancing Amount. The Transaction Fee is a fee imposed by the Funds on investors purchasing (or redeeming) Creation Units.

The Trust will make available through DTC or the Distributor on each business day, prior to the opening of trading on the Exchange, the Deposit List indicating the Deposit Securities to be included in the Creation Deposit for each Leveraged Fund.[35] The Trust also will make available on a daily basis information about the previous day's Balancing Amount.

The Leveraged Funds reserve the right to permit or require an Authorized Participant to substitute an amount of cash and/or a different security to replace any prescribed Deposit Security.[36] Substitutions might be permitted or required, for example, because one or more Deposit Securities may be unavailable or may not be available in the quantity needed to make a Creation Deposit. Brokerage commissions incurred by a Fund to acquire any Deposit Security not part of a Creation Deposit are expected to be immaterial, and in any event, the Advisor may adjust the relevant Transaction Fee to ensure that the Fund collects the extra expense from the purchaser. Orders to create or redeem Shares of the Leveraged Funds must be placed through an Authorized Participant.

Redemption of the Leveraged Funds. Leveraged Fund Shares in Creation Unit-size aggregations will be redeemable on any day on which the New York Stock Exchange LLC is open in exchange for a basket of securities (''Redemption Securities''). As it does for Deposit Securities, the Trust will make available to Authorized Participants on each business day prior to the opening of trading a list of the names and number of shares of Redemption Securities for each Fund. The Redemption Securities given to redeeming investors in most cases will be the same as the Deposit Securities required of investors purchasing Creation Units on the same day.[37] Depending on whether the NAV of a Creation Unit is higher or lower than the market value of the Redemption Securities, the redeemer of a Creation Unit will either receive from or pay to the Leveraged Fund a cash amount equal to the difference (the ''Redemption Balancing Amount''). In the typical situation where the Redemption Securities are the same as the Deposit Securities, this cash amount will be equal to the Balancing Amount described above in the creation process involving Deposit Securities. The redeeming investor also must pay to the Leveraged Fund a transaction fee (''Redemption Transaction Fee'') to cover transaction costs.[38]

A Leveraged Fund has the right to make redemption payments in cash, in-kind, or a combination of each, provided that the value of its redemption payments equals the NAV of the Shares tendered at the time of tender, and the Redemption Balancing Amount. The Advisor currently contemplates that Creation Units of each Leveraged Fund will be redeemed principally in-kind with respect to the Redemption Securities and the Redemption Balancing Amount in cash largely resulting from the value of the Financial Instruments included in the Leveraged Fund.

In order to facilitate delivery of Redemption Securities, each redeeming Authorized Participant, acting on behalf of a Beneficial Owner or DTC participant, must have arrangements with a broker-dealer, bank, or other custody provider in each jurisdiction in which any of the Redemption Securities are customarily traded. If neither the redeeming Beneficial Owner nor the Authorized Participant has such arrangements, and it is not otherwise possible to make other arrangements, the Leveraged Fund may, in its discretion, redeem the Leveraged Fund Shares for cash.

Creation and Redemption of the Inverse and Leveraged Inverse Funds. The Inverse and Leveraged Inverse Funds will be purchased and redeemed entirely for cash. The use of an all-cash payment for the purchase and redemption of Creation Unit aggregations of these Funds is due to the limited transferability of Financial Instruments.

Placement of Creation Unit Purchases and Redemption Orders. Creation Unit aggregations of the Funds will be purchased at NAV, *plus* a Transaction Fee. For the Inverse and Leveraged Inverse Funds, the purchaser will make a cash payment by 12 p.m. ET on the third business day following the date on which the request was made (T+3). For the Leveraged Funds, the purchaser will make an in-kind payment and/or all-cash payment generally on the third business day following the date on which the request was made (T+3). Purchasers of either Fund in Creation Unit aggregations must satisfy certain creditworthiness criteria established by the Advisor and approved by the Board, as provided in the participation agreement between the Trust and Authorized Participants.

Creation Unit aggregations of the Leveraged Funds will be redeemable either in-kind or all in cash equal to the NAV, *less* the Redemption Transaction Fee. Creation Unit aggregations of the Inverse and Leveraged Inverse Funds will be redeemable for an all-cash payment equal to the NAV, *less* the Redemption Transaction Fee. A Leveraged Fund has the right to make redemption payments in cash, in-kind, or a combination of each, provided that the value of its redemption payments equals the NAV of the Shares tendered for redemption at the time of tender.[39]

Dividends

Dividends, if any, from net investment income will be declared and paid at least annually by each Fund in the same manner as by other open-end investment companies. Certain Funds may pay dividends on a semi-annual or more frequent basis. Distributions of realized securities gains, if any, generally will be declared and paid once a year.

[35] In accordance with the Advisor's Code of Ethics, personnel of the Advisor with knowledge about the composition of a Creation Deposit will be prohibited from disclosing such information to any other person, except as authorized in the course of their employment, until such information is made public.

[36] In certain limited instances, a Leveraged Fund may require a purchasing investor to purchase a Creation Unit entirely for cash. For example, on days when a substantial rebalancing of a Fund's portfolio is required, the Advisor might prefer to receive cash rather than in-kind stocks so that it has liquid resources on hand to make the necessary purchases.

[37] The Exchange states that there may be circumstances, however, where the Deposit Securities and Redemption Securities could differ. For example, if ABC stock were replacing XYZ stock in a Fund's Underlying Index at the close of a day's trading session, the day's prescribed Deposit Securities might include ABC, but not XYZ, while the day's prescribed Redemption Securities might include XYZ, but not ABC.

[38] Redemptions in which cash is substituted for one or more Redemption Securities may be assessed a higher Redemption Transaction Fee to offset the transaction cost to the Fund of selling those particular Redemption Securities. This Redemption Transaction Fee is expected to be between $500 and $1,000.

[39] The Exchange states that, in the event an Authorized Participant has submitted a redemption request in good order and is unable to transfer all or part of a Creation Unit aggregation for redemption, a Fund may nonetheless accept the redemption request in reliance on the Authorized Participant's undertaking to deliver the missing Fund Shares as soon as possible, which undertaking shall be secured by the Authorized Participant's delivery and maintenance of collateral. The Authorized Participant's participant agreement will permit the Fund to buy the missing Shares at any time and will subject the Authorized Participant to liability for any shortfall between the cost to the Fund of purchasing the Shares and the value of the collateral.

Dividends and other distributions on the Shares of each Fund will be distributed, on a *pro rata* basis to Beneficial Owners of such Shares. Dividend payments will be made through DTC and DTC participants to Beneficial Owners then of record with proceeds received from each Fund.

The Trust will not make the DTC book-entry Dividend Reinvestment Service (the ''Dividend Reinvestment Service'') available for use by Beneficial Owners for reinvestment of their cash proceeds, but certain individual brokers may make a Dividend Reinvestment Service available to Beneficial Owners. The SAI will inform investors of this fact and direct interested investors to contact such investor's broker to ascertain the availability and a description of such a service through such broker. The SAI will also caution interested Beneficial Owners that they should note that each broker may require investors to adhere to specific procedures and timetables in order to participate in the service, and such investors should ascertain from their broker such necessary details. Shares acquired pursuant to such service will be held by the Beneficial Owners in the same manner and subject to the same terms and conditions as those for original ownership of Shares. Brokerage commissions, charges, and other costs, if any, incurred in purchasing Shares in the secondary market with the cash from the distributions generally will be an expense borne by the individual Beneficial Owners participating in reinvestment through such service.

Dissemination of Indicative Intra-Day Value (IIV)

In order to provide updated information relating to each Fund for use by investors, professionals, and persons wishing to create or redeem Shares, the Exchange will disseminate through the facilities of the CT: (1) Continuously throughout the trading day, the market value of a Share; and (2) at least every 15 seconds throughout the trading day, a calculation of the IIV,[40] as calculated by the Exchange (the ''IIV Calculator''). Comparing these two figures helps an investor to determine whether, and to what extent, the Shares may be selling at a premium or a discount to NAV.

The IIV Calculator will calculate an IIV for each Fund in the manner discussed below. The IIV is designed to provide investors with a reference value that can be used in connection with other related market information. The IIV does not necessarily reflect the precise composition of the current portfolio held by each Fund at a particular point in time. Therefore, the IIV on a per-Share basis disseminated during Amex trading hours should not be viewed as a real-time update of the NAV of a particular Fund, which is calculated only once a day. While the IIV that will be disseminated by Amex is expected to be close to the most recently calculated Fund NAV on a per-Share basis, it is possible that the value of the portfolio held by a Fund may diverge from the IIV during any trading day. In such case, the IIV will not precisely reflect the value of the Fund portfolio.

IIV Calculation for the Leveraged Funds. The IIV Calculator will disseminate the IIV throughout the trading day for the Leveraged Funds holding equity securities and Financial Instruments, if any. The IIV Calculator will determine such IIV by: (1) Calculating the estimated current value of equity securities held by such Fund by (a) calculating the percentage change in the value of the Deposit Securities indicated on the Deposit List (as provided by the Trust) and applying that percentage value to the total value of the equity securities in the Fund as of the close of trading on the prior trading day (as provided by the Trust) or (b) calculating the current value of all of the equity securities held by the Fund (as provided by the Trust); (2) calculating the mark-to-market gains or losses from the Fund's total return equity swap exposure based on the percentage change to the Underlying Index and the previous day's notional values of the swap contracts, if any, held by such Fund (which previous day's notional value will be provided by the Trust); (3) calculating the mark-to-market gains or losses from futures, options, and other Financial Instrument positions by taking the difference between the current value of those positions held by the Fund, if any (as provided by the Trust), and the previous day's value of such positions; (4) adding the values from (1), (2), and (3) above to an estimated cash amount provided by the Trust (which cash amount will include the swap costs), to arrive at a value; and (5) dividing that value by the total number of Shares outstanding (as provided by the Trust) to obtain current IIV.

IIV Calculation for the Inverse and Leveraged Inverse Funds. The IIV Calculator will disseminate the IIV throughout the trading day for the Inverse and Leveraged Inverse Funds. The IIV Calculator will determine such IIV by: (1) Calculating the mark-to-market gains or losses from the Fund's total return equity swap exposure based on the percentage change to the Underlying Index and the previous day's notional values of the swap contracts, if any, held by such Funds (which previous day's notional value will be provided by the Trust); (2) calculating the mark-to-market gains or losses from futures, options, and other Financial Instrument positions by taking the difference between the current value of those positions held by the Funds, if any (as provided by the Trust), and the previous day's value of such positions; (3) adding the values from (1) and (2) above to an estimated cash amount provided by the Trust (which cash amount will include the swap costs), to arrive at a value; and (4) dividing that value by the total number of Shares outstanding (as provided by the Trust) to obtain current IIV.

Criteria for Initial and Continued Listing

The Shares are subject to the criteria for initial and continued listing of Index Fund Shares under Amex Rule 1002A. A minimum of two Creation Units (at least 100,000 Shares) will be required to be outstanding at the start of trading. This minimum number of Shares required to be outstanding at the start of trading will be comparable to requirements that have been applied to previously listed series of Index Fund Shares. The Exchange believes that the proposed minimum number of Shares outstanding at the start of trading is sufficient to provide market liquidity. The Exchange, pursuant to Amex Rule 1002A(a)(ii), will obtain a representation from the Trust (for each Fund), prior to listing, that the NAV per Share for each Fund will be calculated daily and made available to all market participants at the same time. The Exchange represents that the Trust is required to comply with Rule 10A–3 under the Act[41] for the initial and continued listing of the Shares.

Amex Trading Rules and Trading Halts

The Shares are equity securities subject to Amex rules governing the trading of equity securities. The Exchange states that Amex Rule 154–AEMI(c)(ii)[42] and Amex Rule 190,

[40] The IIV is also referred to by other issuers as an ''Estimated NAV,'' ''Underlying Trading Value,'' ''Indicative Optimized Portfolio Value (IOPV),'' and ''Intraday Indicative Value'' in various places such as the prospectus and marketing materials for different exchange-traded funds.

[41] 17 CFR 240.10A–3 (setting forth listing standards relating to audit committees).

[42] Amex Rule 154–AEMI(c)(ii) provides that stop and stop limit orders to buy or sell a security, the price of which is derivatively priced based upon another security or index of securities, may be

Continued

Commentary .04,[43] apply to Index Fund Shares listed on the Exchange, including the Shares, and the Shares will be deemed ''Eligible Securities,'' as defined in Amex Rule 230, for purposes of the Intermarket Trading System Plan.

In addition to other factors that may be relevant, the Exchange may consider factors such as those set forth in Amex Rule 918C(b) in exercising its discretion to halt or suspend trading in Index Fund Shares. These factors include, but are not limited to, (1) The extent to which trading is not occurring in securities comprising an Underlying Index and/or the Financial Instruments of a Fund, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In the case of Financial Instruments held by a Fund, the Exchange represents that a notification procedure will be implemented so that timely notice from the Advisor is received by the Exchange when a particular Financial Instrument is in default or shortly to be in default. Notification from the Advisor will be made by phone, facsimile, or e-mail. The Exchange would then determine on a case-by-case basis whether a default of a particular Financial Instrument justifies a trading halt of the Shares. Trading in Shares of the Funds will also be halted if the circuit breaker parameters under Amex Rule 117 have been reached.

Amex Rule 1002A(b)(ii) sets forth the trading halt parameters with respect to Index Fund Shares. If the IIV or the Underlying Index value applicable to that series of Index Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the Underlying Index value occurs. If the interruption to the dissemination of the IIV or the Underlying Index value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

Information Circular

The Exchange, in an Information Circular to Exchange members and member organizations, prior to the commencement of trading, will inform members and member organizations regarding the application of Commentary .06 of Amex Rule 1000A–AEMI to the Funds.[44] The Information Circular will further inform members and member organizations of the prospectus and/or product description delivery requirements that apply to the Funds.[45]

The Information Circular will also provide guidance with regard to member firm compliance responsibilities when effecting transactions in the Shares and highlighting the special risks and characteristics of the Funds and Shares as well as applicable Exchange rules. In particular, the Information Circular will set forth the requirements relating to Commentary .05 to Amex Rule 411 (Duty to Know and Approve Customers). Specifically, the Information Circular will remind members of their obligations in recommending transactions in the Shares so that members have a reasonable basis to believe that: (1) The recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member; and (2) that the customer can evaluate the special characteristics, and is able to bear the financial risks, of such investment. In connection with the suitability obligation, the Information Circular will also provide that members make reasonable efforts to obtain the following information: (a) The customer's financial status; (b) the customer's tax status; (c) the customer's investment objectives; and (d) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer. In addition, the Information Circular will disclose that the procedures for purchases and redemptions of Shares in Creation Units are described in each Fund's prospectus and SAI, and that Shares are not individually redeemable, but are redeemable only in Creation Unit aggregations or multiples thereof.

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares. Specifically, Amex will rely on its existing surveillance procedures governing Index Fund Shares. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act,[46] in general, and furthers the objectives of section 6(b)(5),[47] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes the proposed rule change will impose no 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

The Exchange states that 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 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 Amex 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.

The Commission is considering granting accelerated approval of the proposed rule change at the end of a 15-day comment period.[48]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

elected by a quotation. The Exchange states that the Shares are eligible for this treatment.

[43] Commentary .04 states that nothing in Amex Rule 190(a) should be construed to restrict a specialist registered in a security issued by an investment company from purchasing and redeeming the listed security or securities that can be subdivided or converted into the listed security from the issuer as appropriate to facilitate the maintenance of a fair and orderly market.

[44] *See supra* note 30.

[45] The Exchange states that the any product description used in reliance on Section 24(d) of the 1940 Act (15 U.S.C. 80a–24(d)) will comply with all representations and conditions set forth in the Application. *See id.*

[46] 15 U.S.C. 78f(b).

[47] 15 U.S.C. 78f(b)(5).

[48] In the Exchange Notice, Amex requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of the notice of the filing thereof.

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–Amex–2007–74 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F. Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Amex–2007–74. 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–Amex–2007–74 and should be submitted on or before August 29, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[49]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–15818 Filed 8–13–07; 8:45 am]

BILLING CODE 8010–01–P

[49] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–28945]

Medical Review Board Public Meeting

AGENCY: Federal Motor Carrier Safety Administration (FMCSA) United States Department of Transportation (DOT).

ACTION: Notice of Medical Review Board (MRB) Public Meeting.

SUMMARY: FMCSA announces that the MRB will hold its next meeting on October 15, 2007. The meeting will provide the public an opportunity to observe and participate in MRB deliberations about the revision and development of Federal Motor Carrier Safety Regulation (FMCSR) medical standards, in accordance with the Federal Advisory Committee Act (FACA).

DATES: The MRB meeting will be held from 8 a.m.–11:30 p.m. on October 15, 2007. Please note the preliminary agenda for this meeting in the **SUPPLEMENTARY INFORMATION** section of this notice for specific information.

ADDRESSES: The meeting will take place at the U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Oklahoma Room, Washington, DC 20590–0001. The public must enter through the west entrance and comply with building security procedures, including provision of appropriate identification prior to being accompanied by a Federal employee to the meeting room. You may submit comments identified by DOT Docket Management System (DMS) Docket Number FMCSA–2007–28945 using any of the following methods:

- *Web Site: http://dmses.dot.gov/submit.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the Agency name and docket number for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading for further information.

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

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the U.S. Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; April 11, 2000). This information is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, 202–366–4001.

Information on Services for Individuals With Disabilities:

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Kaye Kirby at 202–366–4001.

SUPPLEMENTARY INFORMATION: The preliminary agenda for the meeting includes:

0800–0805 Call to Order, Introduction and Agenda Review
0805–0830 MRB Business, Action Items, Neurological Diseases Part I (Seizure Disorders), Sleep Disorders
0830–0900 Expert Panel Recommendations (Invited Speaker)
0900–0945 Deliberations on Evidence Report and Panel Comments
0945–1015 MRB Questions, Other Medical Topics
1015–1130 Public Comment Period
1130 Adjourn

Breaks will be announced on meeting day and may be adjusted according to schedule changes, and other meeting requirements.

Background

The U.S. Secretary of Transportation announced on March 7, 2006, the five

medical experts who serve on FMCSA's MRB. Section 4116 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) requires the Secretary of Transportation with the advice of the MRB to ''establish, review, and revise medical standards for operators of Commercial Motor Vehicles (CMVs) that will ensure that the physical condition of operators is adequate to enable them to operate the vehicles safely.'' FMCSA is planning updates to the physical qualification regulations of CMV drivers, and the MRB will provide the necessary science-based guidance to establish realistic and responsible medical standards.

The MRB operates in accordance with the Federal Advisory Committee Act (FACA) as announced in the **Federal Register** (70 FR 57642, October 3, 2005). The MRB is charged initially with the review of all current FMCSA medical standards (49 CFR 391.41), as well as proposing new science-based standards and guidelines to ensure that drivers operating CMVs in interstate commerce, as defined in CFR 390.5, are physically capable of doing so.

Meeting Participation

Attendance is open to the interested public, including medical examiners, motor carriers, drivers, and representatives of medical and scientific associations. Written comments for this MRB meeting will also be accepted beginning on August 14, 2007 and continuing until October 30, 2007, and should include the docket number that is listed in the **ADDRESSES** section.

During the MRB meeting, oral comments will be accepted on a first come, first serve basis as requestors register at the meeting, but may be limited depending on how many persons wish to comment. The comments must directly address relevant medical and scientific issues on the MRB meeting agenda. For more information, please view the following Web site: *http://www.mrb.fmcsa.dot.gov.*

Issued on: August 8, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–15838 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–28117]

Motor Carrier Safety Advisory Committee Public Meeting

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

ACTION: Notice of Motor Carrier Safety Advisory Committee Meeting.

SUMMARY: FMCSA announces that the Motor Carrier Safety Advisory Committee (MCSAC) will hold a committee meeting. The meeting is open to the public. Establishment of the advisory committee was announced in the **Federal Register** (71 FR 67200), on November 20, 2006.

DATES: The MCSAC meeting will be held from 1 p.m. to 4 p.m. on September 13, 2007, and 9 a.m. to 4 p.m. on September 14, 2007.

ADDRESSES: The meeting will take place at the U.S. Department of Transportation, Conference Center, West Wing, First Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Parks, Acting Chief, Strategic Planning and Program Evaluation Division, Office of Policy Plans and Regulation, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366–5370, *FMCSAregs@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU, Pub. L. 109–59) required the Secretary of the U.S. Department of Transportation to establish in FMCSA, a Motor Carrier Safety Advisory Committee. The advisory committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and motor carrier safety regulations. The advisory committee operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App 2). The FMCSA Administrator appointed 15 members to serve on the advisory committee on March 5, 2007.

II. Meeting Participation

The meeting is open to the public and FMCSA invites participation by all interested parties, including motor carriers, drivers, and representatives of motor carrier associations. As a general matter, the committee will make one hour available for public comments on Friday, September 14, 2007, 3 p.m. to 4 p.m. Individuals wishing to address the committee should sign up on the public comment sign-in sheet before noon on September 14, 2007. The time available will be reasonably divided among those who have signed up, but no one will have more than 15 minutes. Individuals wanting to present written materials to the committee should submit written comments identified by DOT Docket Management System (DMC) Docket Number FMCSA–2007–28117 using any of the following methods:

- *Web Site: http://dmses.dot.gov/submit.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Room W12–140, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Karen Lynch at 202–366–8997, or *Karen.Lynch@dot.gov.*

Issued on: August 8, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–15837 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2007–27801]

Qualification of Drivers; Exemption Applications; Diabetes

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

ACTION: Notice of applications for exemptions from the diabetes standard; request for comments.

SUMMARY: FMCSA announces receipt of applications from 52 individuals for exemptions from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate

commerce. If granted, the exemptions would enable these individuals with ITDM to operate commercial motor vehicles in interstate commerce.

DATES: Comments must be received on or before September 13, 2007.

ADDRESSES: You may submit comments identified by Department of Transportation (DOT) Docket Management System (DMS) Docket Number FMCSA–2007–27801 using any of the following methods:

- *Web Site: http://dmses.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Room PL–401 on the ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

All submissions must include the Agency name and docket number for this Notice. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading under Regulatory Notices.

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

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477; April 11, 2000). This information is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Dr. Mary D. Gunnels, Chief, Physical Qualifications Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue, SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 52 individuals listed in this notice have recently requested an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statute.

Qualifications of Applicants

Scott M. Aitcheson

Mr. Aitcheson, age 53, has had ITDM since 2000. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Aitcheson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License (CDL) from Michigan.

Arnulfo Amador

Mr. Amador, 61, has had ITDM since 1990. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Amador meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable nonproliferative diabetic retinopathy. He holds a chauffeur's license from Indiana.

Larry G. Becker

Mr. Becker, 37, has had ITDM since 1980. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Becker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Arkansas.

Alan R. Buck

Mr. Buck, 58, has had ITDM since 1991. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Buck meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from New York.

Fredrick J. Caldarelli, III

Mr. Caldarelli, 58, has had ITDM since 2002. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Caldarelli meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Kansas.

Eddie A. Camacho

Mr. Camacho, 42, has had ITDM since 2006. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Camacho meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from California.

Richard W. Clark

Mr. Clark, 57, has had ITDM since 2006. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Clark meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

William N. Climer

Mr. Climer, 67, has had ITDM since 2002. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Climer meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Illinois.

William J. Compton

Mr. Compton, 36, has had ITDM since 2002. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Compton meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class O operator's license from Michigan, which allows him to drive any motor vehicle with a gross vehicle rating of less than 26,001 pounds.

Andrew J. Corrao, Jr.

Mr. Corrao, 56, has had ITDM since 2006. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Corrao meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Massachusetts.

Edward W. Cream

Mr. Cream, 61, has had ITDM since 2005. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Cream meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Brian R. Current

Mr. Current, 58, has had ITDM since 2005. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Current meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Mark A. Davis

Mr. Davis, 42, has had ITDM since 1974. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Davis meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Arkansas.

Todd J. Donnelly

Mr. Donnelly, 41, has had ITDM since 2005. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Donnelly meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Tate D. Eakin

Mr. Eakin, 36, has had ITDM since 2006. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Eakin meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have

diabetic retinopathy. He holds a Class A CDL from Kansas.

Anthony W. Espinosa

Mr. Espinosa, 58, has had ITDM since 2005. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Espinosa meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Missouri.

Gary L. Everett

Mr. Everett, 60, has had ITDM since 2005. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Everett meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Ohio.

Carmine J. Fossile

Mr. Fossile, 36, has had ITDM since 1991. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Fossile meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Massachusetts.

Steve A. Ging

Mr. Ging, 49, has had ITDM since 2006. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Ging meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class A CDL from Texas.

Jeffrey M. Halavanja

Mr. Halavanja, 46, has had ITDM since 2004. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Halavanja meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Pennsylvania.

James K. Hay

Mr. Hay, 45, has had ITDM since 2006. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hay meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Vincent D. Hoagland

Mr. Hoagland, 67, has had ITDM since 1969. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hoagland meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from California.

James M. Holland

Mr. Holland, 49, has had ITDM since 1999. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Holland meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a CDL from Washington.

Matthew S. Hooker

Mr. Hooker, 33, has had ITDM since 1978. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hooker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he has stable proliferative diabetic retinopathy. He holds an operator's license from Indiana.

Gregory A. Iverson

Mr. Iverson, 44, has had ITDM since 1986. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Iverson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist

examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Iowa.

Bradley M. Johnson

Mr. Johnson, 51, has had ITDM since 2007. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Idaho.

Michael A. Johnson

Mr. Johnson, 30, has had ITDM since 1981. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Missouri.

Mark A. Jones

Mr. Jones, 51, has had ITDM since 2000. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Jones meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Michael J. Keating

Mr. Keating, 25, has had ITDM since 2003. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Keating meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Illinois.

Duane E. Koomen

Mr. Koomen, 45, has had ITDM since 2005. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Koomen meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Michigan.

Bruce A. Larson

Mr. Larson, 61, has had ITDM since 1975. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Larson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class C operator's license from Oregon.

Curtis W. Mahler

Mr. Mahler, 62, has had ITDM since 2006. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mahler meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

Hector Martinez

Mr. Martinez, 39, has had ITDM since 2001. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Martinez meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from California.

Stacy M. McCroskey

Mr. McCroskey, 35, has had ITDM since 1992. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McCroskey meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class C operator's license from Georgia.

Harold W. McCullough

Mr. McCullough, 62, has had ITDM since 2006. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. McCullough meets the

requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Nebraska.

Bruce L. Mitchell

Mr. Mitchell, 54, has had ITDM since 1999. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Mitchell meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Florida.

Thomas L. Nesbit

Mr. Nesbit, 64, has had ITDM since 2005. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nesbit meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Michael D. O'Brien

Mr. O'Brien, 47, has had ITDM since 2004. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. O'Brien meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Massachusetts.

Charles A. Parker

Mr. Parker, 40, has had ITDM since 1968. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Parker meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable proliferative diabetic retinopathy. He holds a Class A CDL from Utah.

Jeremy K. Redger

Mr. Redger, 21, has had ITDM since 1992. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Redger meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have *diabetic retinopathy. He holds a Class E operator's license from Louisiana.*

Michael C. Sapp

Mr. Sapp, 52, has had ITDM since 2004. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sapp meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Norma L. Shoop

Ms. Shoop, 60, has had ITDM since 1997. Her endocrinologist examined her in 2007 and certified that she has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of her diabetes using insulin, and is able to drive a CMV safely. Ms. Shoop meets the requirements of the vision standard at 49 CFR 391.41(b)(10). Her ophthalmologist examined her in 2007 and certified that she has stable nonproliferative diabetic retinopathy. She holds a Class B CDL from Missouri.

Chris W. Smaltz

Mr. Smaltz, 45, has had ITDM since 2005. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Smaltz meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Arizona.

Rodney C. Thompson

Mr. Thompson, 65, has had ITDM since 2000. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Thompson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2006 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class B CDL from New Hampshire.

Glen E. Townsend

Mr. Townsend, 48, has had ITDM since 2000. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes

using insulin, and is able to drive a CMV safely. Mr. Townsend meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Minnesota.

Randy E. Veit

Mr. Veit, 47, has had ITDM since 1978. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Veit meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Illinois.

Edwin C. Whitcomb

Mr. Whitcomb, 60, has had ITDM since 2002. His endocrinologist examined him in 2006 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Whitcomb meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Dakota.

James B. Wilson

Mr. Wilson, 22, has had ITDM since 1999. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wilson meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from California.

Daniel M. Winn

Mr. Winn, 42, has had ITDM since 1998. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Winn meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2007 and certified that he has stable nonproliferative diabetic retinopathy. He holds a Class C operator's license from Maryland.

Steve D. Workman

Mr. Workman, 51, has had ITDM since 2000. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Workman meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2006 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Derek J. Wright

Mr. Wright, 24, has had ITDM since 2000. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Wright meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Alabama.

Donald W. Yeager

Mr. Yeager, 38, has had ITDM since 2006. His endocrinologist examined him in 2007 and certified that he has had no hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 5 years; understands diabetes management and monitoring; and has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Yeager meets the requirements of the vision standard at 49 CFR 391.41(b)(10). His optometrist examined him in 2007 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated earlier in the Notice.

FMCSA notes that Section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441).[1] The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) The elimination of the requirement for three years of experience operating CMVs while being treated with insulin; and (2) the establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 Notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 U.S.C. 31136(e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and

[1] Section 4129(a) refers to the 2003 Notice as a ''final rule.'' However, the 2003 Notice did not issue a ''final rule,'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

medical requirements that are deemed medically necessary. FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 Notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 Notice, except as modified in the Notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Dated: August 8, 2007.

Larry W. Minor,

Associate Administrator for Policy and Program Development.

[FR Doc. E7–15833 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with Title 49 Code of Federal Regulations (CFR) sections 211.9 and 211.41, notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Union Pacific Railroad Company

[Docket Number FRA–2006–25862]

Union Pacific Railroad Company (UP) seeks amendment of a waiver for relief of sanctions from certain sections of 49 CFR Part 240. On October 17, 2006, FRA's Safety Board granted relief of sanctions from 49 CFR Sections 240.117(e)(1) through (4), 49 CFR sections 240.305(a)(1) through (4) and (6) (excluding supervisors as indicated), and 49 CFR section 240.307. See Docket FRA–2006–25862. These sections of the regulation relate to punitive actions that are required to be taken against locomotive engineers for the violation of certain railroad operating rules. Refer to 49 CFR Part 240 for a detailed listing of these sections.

UP and the employees of UP's North Platte Service Unit, represented by the Brotherhood of Locomotive Engineers and Trainmen (BLET) and the United Transportation Union (UTU), requested the waiver to facilitate participation in a Close Call Reporting System (C3RS) demonstration pilot project sponsored by FRA's Office of Research and Development. The C3RS Demonstration Pilot Project was one of the action items included in FRA's Rail Safety Action Plan announced on January 25, 2006.

UP, BLET, and UTU developed and signed an implementing memorandum of understanding (IMOU) for the C3RS project, based on FRA's March 2005, overarching memorandum of understanding with railroad labor organizations, as a first step in commencing the demonstration pilot project. The project involves approximately 1,200 yard and road service employees headquartered in North Platte, NE. The IMOU was sent to FRA for consideration and acceptance on August 28, 2006, and was incorporated by reference in the FRA Safety Board's October 17, 2006 decision letter on this waiver.

As referenced in the IMOU, certain close calls may be properly reported by the employee(s) involved and later discovered by UP, for example, through subsequent retrospective analysis of locomotive event recorder data, etc. In order to encourage employee reporting of close calls, the IMOU contains provisions to shield the reporting employee from UP discipline.

UP, BLET, and UTU also wanted to shield the reporting employee(s) and UP from punitive sanctions that would otherwise arise as provided in selected sections of 49 CFR Part 240 for properly reported close-call events as defined in the C3RS IMOU. The waiver petition was requested for the duration of the C3RS demonstration project (5 years from implementation or until the demonstration project is completed or parties to the IMOU withdraw as described in the IMOU, whichever occurs first).

In a letter dated July 5, 2007, UP petitioned for a modification of the waiver in the form of an amendment to the IMOU. In accordance with the Board's October 17, 2006 decision letter, any material modifications to the IMOU must be approved by the FRA Safety Board. UP, BLET, and UTU now request amendment of the initial IMOU by adding the following:

Amendment No. 1 to the Confidential Close Call Reporting System Implementing Memorandum of Understanding (C3RS/IMOU) dated August 17, 2006

Pursuant to the provision of Article 13 of the C3RS/IMOU dated August 17, 2006, the Parties to the IMOU have approved the following modifications:

In Article 1C. Add yardmasters to the list of UTU crafts;

In Article 2. Modify Milepost (MP) locations and add additional trackage to reflect the actual boundaries of the North Platte Service Unit. The Parties to the Agreement have indicated their approval of these modifications by signing this document. Due to oversight in securing signatures on the original C3RS/IMOU, there are three additional signatories to this Amendment.

Parties also recognize that the FRA must review and take appropriate action on a separate request to modify the waiver issued in support of this IMOU.

Article 1. Parties to C3RS/IMOU (Parties)

A. Union Pacific Railroad Company (UPRR, a common carrier railroad)

B. Brotherhood of Locomotive Engineers and Trainmen (BLET): the duly recognized collective bargaining representative of the craft of UPRR locomotive engineers working within the boundaries of the North Platte Service Unit of the UPRR (North Platte Service Unit).

C. United Transportation Union (UTU): the duly recognized collective bargaining representative of the crafts of UPRR conductors, trainmen, switchmen, yardmasters, and hostlers working within the boundaries of the North Platte Service Unit.

D. Federal Railroad Administration (FRA): an administration in the Department of Transportation charged with carrying out all railroad safety laws of the United States per 49 U.S.C. Section 103 and 49 CFR I.49.

E. Bureau of Transportation Statistics (BTS): the Federal Agency responsible for maintaining the security of the confidential database and all materials reviewed by the Peer Review Teams.

Article 2. PURPOSE

The parties are voluntarily entering into this C3RS/IMOU and implementing this C3RS Demonstration project for the North Platte Service Unit with the intent to improve the safety of railroad operations on the North Platte Service Unit. The boundaries of the North Platte Service Unit are defined as Milepost (MP) 506.35 Sidney Subdivision, MP 150 Kearney Subdivision, MP 156.9 on the South Morrill Subdivision to MP 271.4 on the Powder River Subdivision and MP 521.1 to MP 528.1 on the Casper Industrial Lead on the Powder River Subdivision, Yoder Subdivision, MP 146 Marysville Subdivision, and MP 81.1 Julesburg Subdivision. This pilot program is effective only in the boundaries as specified above and does not include any area outside these boundaries.

The parties have determined that based on over 20 years experience of airlines' and foreign railroads' close call reporting systems, safety may be improved by implementing a system of voluntary, confidential, discipline-free reporting of close call events.

The purposes of this reporting are the accumulation of data on currently unreported or underreported unsafe events, analysis of reported data by peer review teams, identification of corrective actions by the Parties to remedy identified safety hazards, provision of assistance by FRA in its safety oversight role, and publication of general trends and statistics by government agencies.

Interested parties are invited to participate in these proceedings by submitting written views, data, or

comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning this waiver petition should identify the appropriate docket number (e.g. Waiver Petition Docket Number FRA–2006–24646) and may be submitted by one of the following methods:

Web site: http://dms.dot.gov. Follow the instructions for submitting comments on the DOT electronic site;

Fax: 202–493–2251;

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

Hand Delivery: 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. Documents in the public docket are also available for review and copying on the Internet at the docket facility Web site at *http://dms.dot.gov.*

Communications received within 30 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.—5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at *http://dms.dot.gov.*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78). The Statement may also be found at *http://dms.dot.gov.*

Issued in Washington, DC on August 8, 2007.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. E7–15945 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2007–28692]

Notice of Tentative Decision That Certain Nonconforming Vehicles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Request for comments on tentative decision that certain nonconforming vehicles are eligible for importation.

SUMMARY: This notice requests comments on a tentative decision by the National Highway Traffic Safety Administration (NHTSA) that certain vehicles that do not comply with all applicable Federal motor vehicle safety standards, but that are certified by their original manufacturer as complying with all applicable Canadian motor vehicle safety standards, are eligible for importation into the United States. The vehicles in question either (1) Are substantially similar to vehicles that were certified by their manufacturers as complying with the U.S. safety standards and are capable of being readily altered to conform to those standards, or (2) have safety features that comply with, or are capable of being altered to comply with, all U.S. safety standards.

DATES: The closing date for comments on this tentative decision is September 13, 2007.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. [Docket hours are from 10 a.m. to 5 p.m.].

FOR FURTHER INFORMATION CONTACT: Coleman Sachs, Office of Vehicle Safety Compliance, NHTSA (202–366–3151).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards (FMVSS) shall be refused admission into the United States unless NHTSA has decided, either pursuant to a petition from the manufacturer or registered importer or on its own initiative, (1) That the nonconforming motor vehicle is substantially similar to a motor vehicle of the same model year that was originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with all applicable FMVSS, and (2) that the nonconforming motor vehicle is capable of being readily altered to conform to all applicable FMVSS. Where there is no substantially similar U.S.-certified motor vehicle, 49 U.S.C. 30141(a)(1)(B) permits a nonconforming motor vehicle to be admitted into the United States if NHTSA decides that its safety features comply with, or are capable of being altered to comply with, all applicable FMVSS based on destructive test data or such other evidence as NHTSA decides to be adequate.

Most Recent Decision

On September 19, 2002, NHTSA published a notice in the **Federal Register** at 67 FR 59107 announcing that it had made a final decision on its own initiative that certain motor vehicles that are certified by their original manufacturer as complying with all applicable Canadian motor vehicle safety standards (CMVSS) are eligible for importation into the United States. The notice identified these vehicles as:

(a) All passenger cars manufactured on or after September 1, 2002 and before September 1, 2007, that, as originally manufactured, are equipped with an automatic restraint system that complies with Federal Motor Vehicle Safety Standard (FMVSS) Nos. 208 *Occupant Crash Protection,* and that comply with FMVSS No. 201 *Occupant Protection in Interior Impact, 214 Side Impact Protection,* 225 *Child Restraint Anchorage Systems,* and 401 *Internal Trunk Release;* and

(b) All multipurpose passenger vehicles, trucks and buses with a gross vehicle weight rating (GVWR) of 4,535 kg (10,000 lb) or less that were manufactured on or after September 1, 2002, and before September 1, 2007, that, as originally manufactured, comply with FMVSS Nos. 201, 202 *Head Restraints,* 208, 214, and 216 *Roof Crush Resistance,* and insofar as it is applicable, with FMVSS No. 225.

In the notice of tentative decision that preceded the final decision, published on August 6, 2002 at 67 FR 50979, the agency explained that the identified standards incorporated requirements that were not adopted, in whole or in

part, by Canada. The notice proposed limiting the import eligibility decision to vehicles manufactured before September 1, 2007 so that the agency could assess, prior to that date, whether any other requirements were added to the FMVSS that Canada chose not to adopt. As previously discussed, the final eligibility decision published on September 19, 2002 included this limitation.

Additional Discrepancies Between U.S. and Canadian Standards

Since the last final eligibility decision covering Canadian-certified vehicles was issued, additional requirements have been proposed or added to several FMVSS that have yet to be adopted by Canada. Those requirements are as follows:

FMVSS No. 110 *Tire Selection and Rims for Motor Vehicles with a GVWR of 4,536 kilograms (10,000 pounds) or less:* This standard was amended to include new vehicle labeling and performance requirements, effective September 1, 2007, that have yet to be adopted by Canada.

FMVSS No. 118 *Power-Operated Window, Partition, and Roof Panel Systems:* Paragraph S5.2(b) of the U.S. standard has an optional requirement for automatic reversal systems that has yet to be adopted by Canada. Paragraph S5.3 has a requirement for proximity detection using infrared reflectance that also has yet to be adopted by Canada. Paragraph S6 specifies requirements for actuation devices that will apply to vehicles manufactured on or after September 1, 2008 and that also have yet to be adopted by Canada.

FMVSS No. *126 Electronic Stability Control Systems:* There is no Canadian equivalent to this standard, which will be phased in for vehicles manufactured on or after September 1, 2008 and apply to 100 percent of passenger cars and multipurpose passenger vehicles, trucks and buses with a gross vehicle weight rating (GVWR) of 4,535 kg (10,000 lb) or less manufactured on or after September 1, 2011.

FMVSS No. 138 *Tire Pressure Monitoring Systems:* Canada has no requirement for these components. By its terms, the standard does not apply to vehicles with dual wheels on an axle.

FMVSS No. 202a *Head Restraints:* There is no Canadian equivalent to the requirements of this standard, which become mandatory for vehicles manufactured on or after September 1, 2008.

FMVSS No. 206 *Door Locks and Door Retention Components:* Proposed revisions which, if adopted, will become effective on September 1, 2008, may be in disharmony with the Canadian standard. Those revisions would add requirements relating to displacement to the test procedure for sliding doors, add a requirement for a secondary latch position on double doors, and prevent rear door locks from being released by the same action used to release the door.

FMVSS No. 213 *Child Restraint Systems:* The U.S. standard measures head injury criteria in a manner that differs from that of the Canadian standard. The U.S. standard also prescribes a compression deflection test that is not found in the Canadian standard.

In light of these discrepancies, NHTSA has tentatively decided to require, as a condition for import eligibility, that Canadian-certified passenger cars and Canadian-certified multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less manufactured on or after September 1, 2007 comply, as originally manufactured, with FMVSS Nos. 110, 118 and 213, and, insofar as it is applicable, with FMVSS No. 138. The agency has also tentatively decided to require, as a condition for import eligibility, that Canadian-certified passenger cars and Canadian-certified multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less manufactured on or after September 1, 2008 comply, as originally manufactured, with FMVSS Nos. 110, 118, 202a, 206, 213, and, insofar as it is applicable, with FMVSS No. 138. We have also tentatively decided to require, as a condition for import eligibility, that Canadian-certified passenger cars and Canadian-certified multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less manufactured on or after September 1, 2011 comply, as originally manufactured, with FMVSS Nos. 110, 118, 126, 202a, 206, 213, and, insofar as it is applicable, with FMVSS No. 138.

Future Cut-Off Date

To avoid the need to amend any existing eligibility decisions in the event that there are any further requirements imposed under the FMVSS that are not carried into the corresponding CMVSS, NHTSA has tentatively decided to limit its import eligibility decisions for Canadian-certified passenger cars and for multipurpose passenger vehicles, trucks, and buses with a GVWR of 10,000 pounds or less to such vehicles manufactured before September 1, 2012. Prior to that date, the agency will assess whether there is a need to condition the import eligibility of any subsequently manufactured Canadian-certified vehicles on compliance with any additional FMVSS. The agency intends to issue new decisions covering vehicles manufactured on or after September 1, 2012 within a sufficient period before that date is reached.

Tentative Decision

Pending its review of any comments submitted in response to this notice, NHTSA hereby tentatively decides that:

(a) All passenger cars manufactured on or after September 1, 2007, and before September 1, 2008, that, as originally manufactured, comply with FMVSS Nos. 110, 118, 201, 208, 213, 214, 225, and 401, and, insofar as it is applicable, with FMVSS No. 138;

(b) All passenger cars manufactured on or after September 1, 2008 and before September 1, 2011 that, as originally manufactured, comply with FMVSS Nos. 110, 118, 201, 202a, 206, 208, 213, 214, 225, and 401, and, insofar as it is applicable, with FMVSS No. 138;

(c) All passenger cars manufactured on or after September 1, 2011 and before September 1, 2012 that, as originally manufactured, comply with FMVSS Nos. 110, 118, 126, 201, 202a, 206, 208, 213, 214, 225, and 401, and, insofar as it is applicable, with FMVSS No. 138;

(d) All multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less manufactured on or after September 1, 2007 and before September 1, 2008, that, as originally manufactured, comply with FMVSS Nos. 110, 118, 201, 208, 213, 214, and 216, and insofar as they are applicable, with FMVSS Nos. 138 and 225;

(e) All multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less manufactured on or after September 1, 2008 and before September 1, 2011, that, as originally manufactured, comply with FMVSS Nos. 110, 118, 201, 202a, 206, 208, 213, 214, and 216, and insofar as they are applicable, with FMVSS Nos. 138 and 225; and

(f) All multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less manufactured on or after September 1, 2011 and before September 1, 2012, that, as originally manufactured, comply with FMVSS Nos. 110, 118, 126, 201, 202a, 206, 208, 213, 214, and 216, and insofar as they are applicable, with FMVSS Nos. 138 and 225, that are certified by their original manufacturer as complying with all applicable Canadian motor vehicle safety standards, are eligible for importation into the United States on the basis that either:

1. They are substantially similar to vehicles of the same make, model, and model year originally manufactured for importation into and sale in the United States, or originally manufactured in the United States for sale therein, and certified as complying with all applicable FMVSS, and are capable of being readily altered to conform to all applicable FMVSS, or

2. They have safety features that comply with, or are capable of being altered to comply with, all applicable FMVSS.

Vehicle Eligibility Number

The importer of a vehicle admissible under any final decision must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. Vehicle Eligibility Number VSA–80 is currently assigned to Canadian-certified passenger cars and Vehicle Eligibility Number VSA–81 is currently assigned to Canadian-certified multipurpose passenger vehicles, trucks, and buses with a GVWR of 4,536 kg (10,000 lb) or less. If this tentative decision is made final, all passenger cars admissible under the final decision will be assigned vehicle eligibility number VSA–80, and all multipurpose passenger vehicles, trucks, and buses admissible under the final decision will be assigned vehicle eligibility number VSA–81.

Comments

Section 30141(b) of Title 49, U.S. Code requires NHTSA to provide a minimum period for public notice and comment on decisions made on its own initiative consistent with ensuring expeditious, but full consideration and avoiding delay by any person. NHTSA believes that a comment period of 30 days is appropriate for this purpose. Interested persons are invited to submit written comments on this tentative decision. Comments must refer to the docket and notice number identified at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays.

c. Electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov.* Click on ''Help'' to obtain instructions for filing the document electronically. Comments may be faxed to 1–202–493–2251, or may be submitted to the Federal eRulemaking Portal. To access the portal, go to *http://www.regulations.gov* and then follow the online instructions for submitting comments.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered.

Notice of NHTSA's final decision will be published in the **Federal Register** pursuant to the authority identified below.

Authority: 49 U.S.C. 30141(a)(1)(A), (a)(1)(B), and (b)(1); 49 CFR 593.8; delegation of authority at 49 CFR 1.50.

Issued on: August 8, 2007.

Nicole R. Nason,

Administrator.

[FR Doc. E7–15829 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2007–28970]

Reliance Trailer Company, LLC; Receipt of Application for a Temporary Exemption From Federal Motor Vehicle Safety Standard No. 224

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

ACTION: Notice of receipt of application for a temporary exemption from Federal Motor Vehicle Safety Standard No. 224, *Rear impact protection.*

SUMMARY: In accordance with the procedures of 49 CFR Part 555, Reliance Trailer Company, LLC (Reliance) has applied for a Temporary Exemption from Federal Motor Vehicle Safety Standard (FMVSS) No. 224, *Rear impact protection* for three years. The basis of the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

We are publishing this notice of receipt of the application in accordance with the requirements of 49 U.S.C. 30113(b)(2), and have made no judgment on the merits of the application.

DATES: You should submit your comments early enough to ensure that Docket Management receives them not later than September 13, 2007.

ADDRESSES: You may submit comments (identified by the DOT DMS Docket Number in the heading of this document) by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site by clicking on ''Help and Information'' or ''Help/Info.''
- *Fax:* 1–202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue, SE., West Building, Ground Floor, Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140, West Building, Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number for this notice. Note that all comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided.

Docket: For access to the docket in order to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room W12–140, West Building, Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; pages 19477–78) or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Ms. Dorothy Nakama, Office of the Chief Counsel, National Highway Traffic Safety Administration, NCC–112, 1200 New Jersey Avenue, SE., Mail Code: W41–227, Washington, DC 20590 (Phone: 202–366–2992; Fax 202–366–3820).

SUPPLEMENTARY INFORMATION: We are asking for comments on the application of Reliance Trailer Co., LLC (Reliance) for an exemption for three years from Federal Motor Vehicle Safety Standard (FMVSS) No. 224, *Rear Impact Protection.* As explained below, Reliance states that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

I. Background Information About Reliance Trailer Co., LLC

Reliance, a small trailer manufacturer in Spokane, Washington, produces three different product lines: Reliance trailer products; Alloy trailer products; and Sturdyweld products. FMVSS No. 224 has required since 1998, that trailers with a gross vehicle weight rating (GVWR) of 4536 kg or more, including Reliance's trailers, be fitted with a rear impact guard that conforms to FMVSS No. 224.

Reliance petitions for a temporary exemption from FMVSS No. 224 for its Sturdyweld ''Pony Trailer.'' Reliance describes the ''Pony Trailer'' as having a chassis frame, attached to a tow point at the rear of a dump truck, and an accompanying open top body structure, comprised mainly of a front wall, two sidewalls, a floor, and a tailgate. The force of gravity unloads ''Pony Trailers,'' which are unloaded by lifting the front of the body, using an extendable hydraulic cylinder. Reliance states that it has been unable to successfully design or purchase an acceptable bumper that would both meet FMVSS No. 224 requirements and permit use of the ''Pony Trailer'' in conjunction with asphalt paving equipment. Reliance states its belief that developing and producing a compliant underride bumper is not the issue, but rather, that if a compliant bumper were to be installed on these ''Pony Trailers,'' the ''Pony Trailers'' would ''be rendered virtually useless to the paving industry, the primary end user of this product.''

Reliance states that asphalt lay-down equipment has a hopper, into which the ''Pony Trailer'' dumps hot mix. The ''Pony Trailer'' is a gravity feed dump trailer that dumps material into a hopper positioned directly behind the rear axle. This requires that Reliance's rear axle be set so that the back edge of the rear tire is 18 inches to 24 inches ahead of the rearmost point of the vehicle. Reliance states that anything behind the rear axle would interfere with the operation of the lay-down equipment. Reliance states that the area behind the rear axle is where the underride bumper would be placed. Any underride bumper would either have to be moved out of the way, or removed during the paving operation. Reliance states that it is unaware of any manufacturer of similar trailers that has been able to economically design or purchase a movable bumper that meets the requirements set forth by FMVSS No. 224.

Reliance asks that the ''Pony Trailer'' receive a temporary exemption from FMVSS No. 224 for three years.

II. Previous Federal Register Documents Addressing Reliance's Applications of Temporary Exemptions From FMVSS No. 224

On July 10, 2001 (66 FR 36032) (DOT Docket No. NHTSA–2001–10044), we published a notice of receipt of Reliance's application for temporary exemption from FMVSS No. 224 for its ''dump body trailers.'' We noted that Reliance's product appeared to be a horizontal discharge trailer that is used in the road construction industry to deliver asphalt and other road building materials to the construction site. However, the sole commenter on the notice, Dan Hill & Associates, stated that there is a ''very substantial difference between controlled horizontal discharge semi-trailers and dumping-type semi-trailers.'' Dan Hill stated that Reliance's trailer is a ''dump body/gravity feed'' trailer. Dan Hill distinguished this type of trailer as one that ''can handle everything from 9-foot-plus slabs of concrete all the way down to sand, whereas the * * * controlled horizontal discharge products are limited to the transportation of hot-mix asphalt and, on occasion, other related processed road-building materials under 2″ in size.'' Dan Hill stated that the horizontal discharge trailer manufacturers share a market of fewer than 400 unit sales per year. Dan Hill further stated that in contrast, the ''dumping type trailer'' manufacturers produce on average 7,451 units per year. Dan Hill cited as the source of its information, the U.S. Census Bureau, measurement period 1991 through 1997.

In a **Federal Register** document published on October 21, 2001 (66 FR 53471) (DOT Docket No. NHTSA–2001–10044), we granted Reliance's application of temporary exemption from FMVSS No. 224 for ''dump body trailers.'' The basis of the grant was that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. Reliance was granted NHTSA Temporary Exemption No. 2001–6, which expired October 1, 2003.

In a **Federal Register** document published on June 1, 2004 (69 FR 30989) (DOT Docket No. NHTSA–2001–10044), we granted Reliance's application of temporary exemption from FMVSS No. 224 for ''dump body trailers.'' The basis of the grant was that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. Reliance was granted NHTSA Temporary Exemption No. EX 04–01, which expired on June 1, 2006.

III. 2004 Final Rule Excluding Horizontal Discharge Trailers From FMVSS No. 224

In a final rule published on November 19, 2004 (69 FR 67663) (DOT Docket No. NHTSA–2004–19033) we amended FMVSS No. 224 to exclude from its coverage, road construction controlled horizontal discharge trailers (RCC horizontal discharge trailers). RCC horizontal discharge trailers are used in the road construction industry to deliver asphalt to construction sites and gradually discharge asphalt mix into the paving machines overlaying the road surface. The agency decided to exclude RCC horizontal discharge trailers from FMVSS No. 224 after concluding that installation of rear impact guards would interfere with the RCC horizontal discharge trailers' intended function and is therefore impracticable due to the unique design and purpose of these vehicles.

In public comments responding to a notice of proposed rulemaking (NPRM) published on September 19, 2003, proposing to amend FMVSS No. 224 to exclude RCC horizontal discharge trailers, Reliance wrote to request that NHTSA amend the definition of an RCC horizontal discharge trailer to include gravity feed dump trailers. We declined Reliance's request for the following reasons:

> A RCC horizontal discharge trailer is a single-purpose vehicle designed to deliver and discharge asphalt materials into paving equipment in a controlled manner. Unlike the RCC horizontal discharge trailers, gravity feed dump trailers are versatile vehicles used for a multitude of tasks. Often, gravity feed dump trailers are used in a way that does not require controlled offloading or interaction with other equipment such as paving machines. Further, many gravity feed dump trailers fall under wheels back exception. Others can easily accommodate an underride guard.
>
> Because it is not impracticable for all gravity feed dump trailers to comply with FMVSS No. 224, the agency prefers to review the necessity of exempting gravity feed dump body trailers within the context of temporary exemptions pursuant to 49 CFR Part 555. In certain limited circumstances, the agency grants temporary exemptions to gravity feed dump trailer manufacturers based, in part, on impracticability of compliance. In fact, several gravity feed dump trailer

manufacturers, including Reliance, have previously received exemptions from FMVSS No. 224.* * *

The agency notes that gravity feed dump trailers are more common and represent a larger vehicle population compared to RCC horizontal discharge trailers. Accordingly, we are concerned that exempting a larger vehicle population from the requirements of the standard may lead to negative safety consequences exceeding those associated with exempting only the RCC horizontal discharge trailers. Because of a larger vehicle population and because of their versatility of use, the agency cannot conclude that a risk of an underride collision with a gravity feed dump trailer is negligible. Finally, we note that Reliance's request is outside the scope of the NPRM, and this rulemaking action cannot exempt other types of vehicles from the requirements of FMVSS No. 224 without further notice.

(See 69 FR at 67666.)(Emphasis added.)

Thus, in the November 2004 final rule, we declined to provide a blanket exemption from FMVSS No. 224 for gravity feed dump trailers.

IV. Reliance's Current Application for a Temporary Exemption From FMVSS No. 224

The application, dated June 15, 2006, addressed in today's document is the third from Reliance requesting a temporary exemption from FMVSS No. 224. Pursuant to 49 CFR Part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* Reliance presents the following arguments in favor of its application.

A. Reliance's Statement of Economic Hardship

Reliance stated that during the past year, the ''Pony Trailers'' have accounted for 55 percent of its manufacturing profits. Reliance stated that if it must comply with FMVSS No. 224, the ''Pony Trailers'' would be ''rendered inefficient'' for the paving industry, the primary end user of the product, and Reliance would have no alternative than to discontinue production of the Sturdyweld product line. If Reliance discontinues production of the Sturdyweld product line, it will be forced to reduce its workforce, commensurate with the decline in overall sales and profits. This would cause approximately thirty employees to lose their jobs. With the discontinuation of the Sturdywell product line, and subsequent loss of profit, Reliance would fall well below profitability, and may ultimately be forced to cease operations.

B. Reliance's Statement of Good Faith Efforts To Comply

Reliance states that asphalt lay-down equipment has a hopper, into which the ''Pony Trailer'' dumps hot mix. Reliance states that the ''Pony Trailer'' is a gravity feed dump trailer that dumps material into a hopper positioned directly behind the rear axle. Reliance states that this requires that the ''Pony Trailer's'' rear axle be set so the back edge of the rear tire is 18 inches to 24 inches ahead of the rear most point of the trailer, and that anything behind the rear axle would interfere with the operation of the lay-down equipment.

Reliance states that the area behind the rear axle is where the underride bumper would be, and provides an illustration. Reliance states that any underride bumper would either have to be moved out of the way, or removed during the paving operation. Reliance stated that it is unaware of any manufacturer of similar trailers that has been able to design economically or purchase a movable bumper that meets FMVSS No. 224 requirements.

Reliance states that the 18 to 24 inches behind the rear tires required for paving is only slightly more than the 12 inches required to meet the axle back requirement. Reliance considers this to be a much safer position than the typical over the road freight hauling trailer, where the distance from the back of the tire to the end of the trailer can reach upwards of 110 inches if no rear impact guard were in place.

Reliance states that it has continued to explore any options that the company believes would permit compliance with FMVSS No. 224 and allow operation of the ''Pony Trailers'' in conjunction with paving equipment. Reliance states that it has exhausted ''all known possibilities.'' Reliance stated that it will continue to work with its customers to look for a ''viable solution'' to this issue.

C. Reliance's Statement of Public Interest

Reliance states that it anticipates building fewer than 100 units of the ''Pony Trailer'' per year, and concludes that the quantity of ''Pony Trailers'' produced is very small in comparison to over the road type units. Reliance states that the typical hauls for ''Pony Trailers'' are short with a minimal amount of time spent traveling on highways, compared with most freight trailers. Reliance states that asphalt batch plants are typically set up close to the paving site, so that the asphalt can remain hot enough to flow from the trailer into the paver and spread effectively. Reliance states that the vehicles spend very little time traveling on busy roads to the job location. Reliance states that special access is often provided to the job site, reducing exposure to other vehicles, and that ''at this time'' it is unaware of any collisions or subsequent injuries related to the ''Pony Trailer.''

Reliance states that it is in the public interest to grant the temporary exemption so that it can continue as a profitable company, can allow Reliance to retain and expand its current workforce, thus stimulating the economy, and so that Reliance can continue to ''produce a quality product'' to serve the paving industry, and the needs of the American people by continuing safe and effective operation of paving equipment, to produce, new, as well as maintain existing roads for transportation needs.

Authority: 49 U.S.C. 30113; delegations of authority at 49 CFR 1.50. and 501.8.

Issued on: August 8, 2007.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. E7–15836 Filed 8–13–07; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration Office of Hazardous Materials Safety; Notice of Delays in Processing Special Permits Applications

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications delayed more than 180 days.

SUMMARY: In accordance with the requirements of 49 U.S.C. 5117(c), PHMSA is publishing the following list of special permit applications that have been in process for 180 days or more. The reason(s) for delay and the expected completion date for action on each application is provided in association with each identified application.

FOR FURTHER INFORMATION CONTACT: Delmer F. Billings, Director, Office of Hazardous Materials Special Permits and Approvals, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001, (202) 366–4535.

Key to ''Reason for Delay''

1. Awaiting additional information from applicant.

2. Extensive public comment under review.

3. Application is technically complex and is of significant impact or precedent-setting and requires extensive analysis.

4. Staff review delayed by other priority issues or volume of special permit applications.

Meaning of Application Number Suffixes

N—New application.
M—Modification request.
PM—Party to application with modification request.

Issued in Washington, DC, on August 8, 2007.

Delmer F. Billings,

Director, Office of Hazardous Materials, Special Permits and Approvals.

MODIFICATION TO SPECIAL PERMITS

Application number	Applicant	Reason for delay	Estimated date of completion
10481–M	M–1 Engineering Limited, Bradfrod, West Yorkshire	4	09–30–2007
14167–M	Trinityrail, Dallas, TX	1,3,4	09–30–2007
8915–M	Matheson Tri Gas, East Rutherford, NJ	4	08–31–2007

NEW SPECIAL PERMIT APPLICATIONS

Application number	Applicant	Reason for delay	Estimated date of completion
14385–N	Kansas City Southern Railway Company, Kansas City, MO	4	09–30–2007
14442–N	Trinityrail, Dallas, TX	4	09–30–2007
14482–N	Classic Helicopters, Woods Cross, UT	1	08–31–2007
14483–N	WEW Westerwaelder Eisenwerk, Weitefeld Germany	4	10–31–2007
14470–N	Marsulex, Inc., Springfield, OR	4	08–31–2007
14457–N	Amtrol Alfa Metalomecanica SA, Portugal	4	09–30–2007
14436–N	BNSF Railway Company, Topeka, KS	4	09–30–2007
14402–N	Lincoln Composites, Lincoln, NE	1	12–31–2007

[FR Doc. 07–3974 Filed 8–13–07; 8:45 am]
BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 664]

Methodology To Be Employed in Determining the Railroad Industry's Cost of Capital

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice.

SUMMARY: The Board proposes to revise its method for calculating the railroad industry's cost of capital by computing the cost of equity using a capital asset pricing model.

DATES: Comments on this proposal are due by September 13, 2007. Reply comments are due by October 15, 2007.

ADDRESSES: Comments may be submitted either via that Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 664, 395 E Street, SW., Washington, DC 20423–0001.

Copies of written comments will be available from the Board's contractor, ASAP Document Solutions (mailing address: Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: *asapdc@verizon.net;* telephone number: 202–306–4004). The comments will also be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Paul A. Aguiar at (202) 245–0323. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: The Surface Transportation Board (the Board) has issued a notice seeking public comments on the following proposed change to the methodology to calculate the railroad industry's cost of capital. To calculate the cost of equity component of the cost of capital, we propose to replace the Discounted Cash Flow method currently used with a Capital Asset Pricing Model (CAPM).

To calculate the cost of equity, we propose to use the following simple single-Beta version of the CAPM model: Cost of equity = RF + β*RP. In this equation, RF is the annual economy-wide risk-free rate, RP is the annual market-wide risk premium, and β (or Beta) is the measure of systematic, non-diversifiable risk of a particular carrier. The industry-wide cost of capital will be determined as a weighted average of individual railroad costs, using the same methodology as is used now.

To calculate the annual risk-free rate, we propose to use the 10-year Treasury Bond rate. The FRB uses a short-term Treasury Bill rate and the CTA uses both short-term and long-term rates. We believe a longer rate is superior and the 10-year is the longest Treasury Bond that has been continuously issued. A comprehensive study found that 70% of corporate and financial advisors use Treasury bond yields of maturities of 10 years or greater. *See* Bruner, Eades, Harris, and Higgins, *Best Practices in Estimating the Cost of Capital: Survey and Synthesis,* Fin. Practice & Educ. at 13–29 (Spring/Summer 1998) (*Best Practices*). Moreover, the risk-free rate used by investors should be risk free over the time period of the investment, and railroad assets are often long-lived. Finally, an advantage of using long-term rates is that they contain long-term inflation expectations. Using a 10-year risk-free rate therefore makes the proposed CAPM calculation more forward looking.

To calculate the annual market-wide risk premium, we propose to use monthly New York Stock Exchange (NYSE) data over a 50-year time period. Because this calculation is essentially an average return, a longer time period is usually chosen. We invite comments on the appropriate time period. While we propose to calculate the market risk premium each year, we also seek

comments on the use of a fixed number instead.

To calculate the Beta for each carrier, we propose to use that carrier's monthly, merger-adjusted [1] stock return data for the prior 10 years in the following standard equation:

$$R - RF = \beta (RM - RF) + \varepsilon$$

R = merger-adjusted monthly stock return for the railroad;
RF = monthly 10-year U.S. Treasury bond rate;
RM = monthly return on the NYSE; and
ε = random error term

Using a simple, ordinary least squares (OLS) regression technique, the Board would estimate β, the coefficient of systematic, non-diversifiable risk. OLS regression technique is a simple but accepted statistical tool one can use to develop an unbiased estimate of the true Beta. There would always be 120 months of data. Each year, 12 months of new data would be added to the data set and the oldest 12 months of observations would be removed.

In selecting a 10-year time period to estimate Beta, we seek to balance the desire to eliminate statistical noise and achieve stability in the estimate, while allowing for the fact that Beta may change over time. Using earlier data might cause results to be skewed by events that are no longer important. On the other hand, using a shorter timeframe—while capturing changes in industry risk profiles more rapidly—would introduce more variability and noise in the estimate. We also invite comment on the use of 25-year or 5-year time periods. Anything less than five years appears to add too much noise. Green, Lopez, & Wang, *Formulating the Imputed Cost of Equity Capital for Priced Services at Federal Reserve Banks,* FRBYU Econ. Policy Rev. at 70 (Sept. 2003).

We invite comments on whether it would be reasonable to assume that Beta equals 1, thereby eliminating the need to estimate Beta. Finance theory predicts that Beta will move towards 1 over time, and this has proved true for banks and other firms that provide payment processing services. *See* Hearing Tr. at 25. We also invite comments on the inclusion of an intercept term in the regression.

We have reviewed and reject other suggested changes to our existing procedures. First, we reject WCTL's suggestion that parties should be permitted to argue for an alternate approach to be used in a particular year. Second, we will not adjust the debt portion of capital to reflect the capitalization of operating leases, as requested by WCTL. Third, we reject WCTL's suggestion to replace the current-year debt-to-equity ratio with a multi-year average to avoid alleged ''artificial'' fluctuations in the capital structure used to calculate the weighted average. Finally, we will not expand the scope of this rulemaking to re-examine how this cost-of-capital determination is used in the Board's annual revenue adequacy determinations and consider using a replacement-cost analysis, as suggested by the AAR.

In a decision served on August 14, 2007, the Board has discussed each of these proposals in detail and explained how each addresses concerns raised in this proceeding. Because these proposals have significance for rail carriers and their shippers, all interested parties are invited to comment.

Additional information is contained in the Board's decision. To obtain a free copy of the full decision, visit the Board's *http://www.stb.dot.gov* Web site.

Pursuant to 5 U.S.C. 605(b), the Board certifies that the proposed action should not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: August 8, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams,

Secretary.

[FR Doc. E7–15888 Filed 8–13–07; 8:45 am]

BILLING CODE 4915–01–P

[1] ''Merger-adjusted'' means that, in instances where a carrier has been formed by merger of several predecessor railroads, data for the shares of predecessor railroads are included in such a way as to show total performance as if the merger had already occurred.

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35044]

Buffalo & Pittsburgh Railroad Inc.—Lease and Operation Exemption—Norfolk Southern Railway Company

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of exemption.

SUMMARY: Under 49 U.S.C. 10502, the Board is granting a petition for exemption from the prior approval requirements of 49 U.S.C. 10902 for Buffalo & Pittsburgh Railroad, Inc., a Class II rail carrier, to lease and operate approximately 35.9 miles of a line of railroad owned by the Norfolk Southern Railway Company. The rail line extends from milepost BR 8.8 near Gravity, NY, to milepost BR 44.7+/−, immediately south of the northbound home signal and insulated joint for CP-Machias near Machias, NY. The exemption is subject to employee protective conditions.

DATES: The exemption will be effective on August 27, 2007. Petitions to stay must be filed by August 21, 2007. Petitions to reopen must be filed by September 4, 2007.

ADDRESSES: An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35044, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, one copy of all pleadings must be served on petitioner's representative: Eric M. Hocky, Gollatz, Griffin & Ewing, P.C., Four Penn Center, Suite 200, 1600 John F. Kennedy Blvd., Philadelphia, PA 19103–2808.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision. To purchase a copy of the full decision, write to, e-mail, or call: ASAP Document Solutions, 9332 Annapolis Rd., Suite 103, Lanham, MD 20706; e-mail *asapdc@verizon.net;* telephone: (202) 306–4004. [Assistance for the hearing impaired is available through FIRS at 1–800–877–8339.]

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: August 8, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams,

Secretary.

[FR Doc. E7–15861 Filed 8–13–07; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–2007–0013]

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

[Docket No. OP–1292]

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket ID OTS–2007–0016]

NATIONAL CREDIT UNION ADMINISTRATION

Proposed Illustrations of Consumer Information for Subprime Mortgage Lending

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS); and National Credit Union Administration (NCUA).

ACTION: Notice of proposed illustrations of consumer information with request for comment.

SUMMARY: The OCC, Board, FDIC, OTS, and NCUA (the Agencies), request comment on these Proposed Illustrations of Consumer Information for Subprime Mortgage Lending. The illustrations are intended to assist institutions in providing consumer information as discussed in the consumer protection portion of the Agencies' Statement on Subprime Mortgage Lending (Subprime Statement). The illustrations are not intended as model forms, and institutions will not be required to use them. Rather, they are provided to respond to the requests of commenters that the Agencies provide uniform disclosures for, or illustrations of, the type of consumer information contemplated by the Subprime Statement.

DATES: Comments must be submitted on or before October 15, 2007.

ADDRESSES: The Agencies will jointly review all of the comments submitted. Therefore, interested parties may send comments to any of the Agencies and need not send comments (or copies) to all of the Agencies. Please consider submitting your comments by e-mail or fax, since paper mail in the Washington area and at the Agencies is subject to delay. Interested parties are invited to submit comments to:

OCC: You may submit comments by any of the following methods:

- *E-mail: regs.comments@occ.treas.gov.*
- *Fax:* (202) 874–4448.
- *Mail:* Office of the Comptroller of the Currency, 250 E Street, SW., Mail Stop 1–5, Washington, DC 20219.
- *Hand Delivery/Courier:* 250 E Street, SW., Attn: Public Information Room, Mail Stop 1–5, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2007–0013'' in your comment. In general, OCC will enter all comments received into the docket without change, including any business or personal information that you provide such as name and address information, e-mail addresses, or phone numbers. Comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials by any of the following methods:

- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC's Public Information Room, 250 E Street, SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–5043. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

Docket: You may also view or request available background documents and project summaries using the methods described above.

Board: You may submit comments, identified by Docket No. OP–1292, by any of the following methods:

- Agency Web Site: *http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* 202/452–3819 or 202/452–3102.
- *Mail:* Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551. All public comments are available from the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed in electronic or paper form in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

FDIC: You may submit comments by any of the following methods:

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal.* Follow instructions for submitting comments on the Agency Web Site.
- *E-mail: Comments@FDIC.gov.* Include ''Proposed Illustrations'' in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal* including any personal information provided. Comments may be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1002, Arlington, VA 22226, between 9 a.m. and 5 p.m. (EST) on business days. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

OTS: You may submit comments, identified by ID OTS–2007–0016, by any of the following methods:

- *E-mail: regs.comments@ots.treas.gov*. Please include ID OTS–2007–0016 in the subject line of the message and include your name and telephone number in the message.
- *Fax:* (202) 906–6518.
- *Mail:* Regulation Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention: ID OTS–2007–0016.
- *Hand Delivery/Courier:* Guard's Desk, East Lobby Entrance, 1700 G

Street, NW., from 9 a.m. to 4 p.m. on business days. Address envelope as follows: Attention: Regulation Comments, Chief Counsel's Office, Attention: ID OTS–2007–0016.

Instructions: All submissions received must include the agency name and docket number for this proposed Guidance. All comments received will be posted without change to the OTS Internet Site at *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1*, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.ots.treas.gov/pagehtml.cfm?catNumber=67&an=1.*

In addition, you may inspect comments at the Public Reading Room, 1700 G Street, NW., by appointment. To make an appointment for access, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov*, or send a facsimile transmission to (202) 906–7755. (Prior notice identifying the materials you will be requesting will assist us in serving you.) We schedule appointments on business days between 10 a.m. and 4 p.m. In most cases, appointments will be available the next business day following the date we receive a request.

NCUA: You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on'' in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT:

OCC: Michael S. Bylsma, Director, Stephen Van Meter, Assistant Director, or Kathryn D. Ray, Special Counsel, Community and Consumer Law Division, (202) 874–5750.

Board: Kathleen C. Ryan, Counsel, or Jamie Z. Goodson, Attorney, Division of Consumer and Community Affairs, (202) 452–3667; or Kara Handzlik, Attorney, Legal Division, (202) 452–3852. For users of Telecommunications Device for the Deaf (''TDD'') only, contact (202) 263–4869.

FDIC: Victoria M. Pawelski, Policy Analyst, (202) 898–3571, or Mira N. Marshall, Acting Chief, CRA/Fair Lending Section, (202) 898–3912, Compliance Policy & Exam Support Branch, Division of Supervision and Consumer Protection; or Richard B. Foley, Counsel, Legal Division, (202) 898–3784.

OTS: Montrice G. Yakimov, Assistant Managing Director, (202) 906–6173 or Glenn Gimble, Senior Project Manager, (202) 906–7158, Compliance and Consumer Protection Division.

NCUA: Cory W. Phariss, Program Officer, Examination and Insurance, (703) 518–6618.

SUPPLEMENTARY INFORMATION:

I. Background

On March 8, 2007, the Agencies published for comment a proposed Statement on Subprime Mortgage Lending, 72 FR 10533 (Mar. 8, 2007) (proposed statement). The consumer protection portion of the proposed statement set forth recommended practices to ensure that consumers have clear and balanced information about the relative benefits and risks of certain adjustable rate mortgage (ARM) products. The proposed statement specifically indicated that consumers should be informed about issues relating to potential payment shock—i.e., significant increases in monthly payments that may occur when the interest rate adjusts to a fully-indexed rate—as well as other features that may be present in these loans, including prepayment penalties, balloon payments, pricing premiums for reduced documentation loans, and the borrower's responsibility for real estate taxes and insurance if not escrowed.

The Agencies revised the proposed statement based on the comments received, and recently published the final Statement on Subprime Mortgage Lending in the **Federal Register** (Subprime Statement). 72 FR 37569 (July 10, 2007). Like the Interagency Guidance on Nontraditional Mortgage Product Risks, 71 FR 58609 (Oct. 4, 2006), the Subprime Statement is applicable to all banks and their subsidiaries, bank holding companies and their nonbank subsidiaries, savings associations and their subsidiaries, savings and loan holding companies and their subsidiaries, and credit unions.

The Subprime Statement, including the consumer protection portion, provides recommended practices to assist institutions in addressing particular risks and consumer protection concerns raised by certain ARM products typically offered to subprime borrowers. Some industry group commenters on the proposal asked the Agencies to provide uniform disclosures for these products, or to publish illustrations of the consumer information contemplated by the Subprime Statement similar to those previously proposed by the Agencies in connection with nontraditional mortgage products. 71 FR 58609 (Oct. 4, 2006). The Agencies recently published final Illustrations of Consumer Information for Nontraditional Mortgage Products. 72 FR 31825 (June 8, 2007). As was done with those illustrations, the Agencies believe that it would be desirable to seek public comment before issuing these illustrations in order to determine the types of illustrations that would be most useful to consumers and institutions.

II. Proposed Illustrations

The Agencies believe that illustrations of consumer information may be useful to institutions as they implement the consumer information recommendations of the Subprime Statement. The Agencies appreciate that some institutions, including community banks, may prefer not to incur the costs and other burdens of developing their own consumer information documents to address the issues raised in the Subprime Statement, and could benefit from illustrations like those below.

Use of the proposed illustrations is entirely voluntary. Accordingly, there is no Agency requirement or expectation that institutions must use the illustrations in their communications with consumers.

Institutions seeking to follow the recommendations set forth in the Subprime Statement could, at their option, elect to:

- Use the illustrations;
- Provide information based on the illustrations, but expand, abbreviate, or otherwise tailor any information in the illustrations as appropriate to reflect, for example:
  - the institution's product offerings, such as by deleting information about loan products and loan terms not offered by the institution and by revising the illustrations to reflect specific terms currently offered by the institution;
  - the consumer's particular loan requirements or qualifications;
  - current market conditions, such as by changing the loan amounts, interest rates, and corresponding payment

amounts to reflect current local market circumstances; and

○ other material information relating to the loan consistent with the Subprime Statement; or

• Provide the information described in the Subprime Statement, as appropriate, in an alternate format.

Whether or not an institution chooses to use the proposed illustrations, the Subprime Statement provides that communications with consumers, including advertisements, oral statements, and promotional materials, should provide clear and balanced information about the relative benefits and risks of certain ARM products. Further, product descriptions and advertisements are to provide clear, detailed information about the costs, terms, features, and risks of the loan to the borrower. In particular, the Subprime Statement indicates that ''[i]nformation provided to consumers should clearly explain the risk of payment shock and the ramifications of prepayment penalties, balloon payments, and the lack of escrow for taxes and insurance, as necessary.'' [1] Consumers also should be informed about any pricing premium associated with a stated income or reduced documentation loan program.

This recommended information could be presented as shown in the two illustrations set forth below. Illustration 1 is a narrative explanation of some of the key features of certain ARM loans that are identified in the Subprime Statement, including payment shock, responsibility for taxes and insurance, prepayment penalties, balloon payments, and increased costs associated with stated income or reduced documentation loans. The Subprime Statement indicates that information provided to consumers should clearly explain these features and their ramifications in a timely manner. Illustration 1 seeks to provide both the general and loan-specific information contemplated in the Subprime Statement in a format that could be used by creditors seeking to implement the consumer protection recommendations in the guidance. Creditors that use Illustration 1 should, of course, delete or modify the prepayment penalty or other language in the illustration in order to reflect the actual terms being offered. Illustration 1 is also intended to enable creditors to implement the Subprime Statement with minimal burden.

Illustration 2 is a chart with numerical examples that is designed to show the potential consequences of payment shock in a concrete, readily understandable manner for a loan structured with a discounted interest rate for the first two years. Illustration 2 provides information on payments for an ARM loan, assuming caps on annual and aggregate interest rate increases based on typical terms in the market,[2] and information for a comparable fixed rate mortgage.

Creditors could satisfy the consumer information recommendations by simply photocopying the illustrations (after making any necessary deletions or modifications) and distributing them to consumers in a timely manner. In addition, once the Agencies adopt illustrations as final, to assist institutions that wish to use them, the Agencies will post them on their respective Web sites in a form that can be downloaded, modified as appropriate, and printed for easy reproduction.

III. Request for Comment

The Agencies request comment on all aspects of the proposed illustrations. We encourage specific comment on whether the illustrations, as proposed, would be useful to institutions, including community banks, seeking to implement the ''Consumer Protection Principles'' portion of the Subprime Statement, or whether changes should be made to them. We also encourage specific comment on the following: whether the illustrations, as proposed, would be useful in promoting consumer understanding of the risks and material terms of certain ARM products, as described in the Subprime Statement, or whether changes should be made to them. We also seek comment on whether the information in the proposed illustrations is set forth in a clear manner and format; whether these illustrations or a modified form should be adopted by the Agencies; and whether there are additional illustrations relating to certain ARM products that would be useful to consumers and institutions.

The Agencies are aware that individual institutions and industry associations have developed and are likely to continue developing documents that can be effective in conveying critical information discussed in the ''Consumer Protection Principles'' portion of the Subprime Statement. These illustrations are not intended to dissuade institutions and associations from developing their own means of delivering important information about these products to consumers. In this regard, the Agencies note that they have not conducted any consumer testing to assess the effectiveness of any existing documents currently used by institutions, or of the proposed illustrations set forth below. Commenters are specifically invited to provide information on any consumer testing they have conducted in connection with comparable disclosures.

[1] 72 FR at 37574.

[2] The ARM loan in Illustration 2 assumes a start rate of 7 percent, an initial index of 5.5 percent and a margin of 6 percent. It assumes annual payment adjustments after the initial discount period, a 3 percent cap on the interest rate increase at the end of year 2, and a 2 percent annual payment adjustment cap on interest rate increases thereafter, with a lifetime payment adjustment cap of 6 percent (or a maximum rate of 13 percent). It also assumes no change in the index through year 4.

Illustration 1

Important Facts About Your Adjustable Rate Mortgage

Whether you are buying a house or refinancing your mortgage, this information can help you decide if an adjustable rate mortgage (ARM) is right for you. ARMs can be complicated. If you do not understand how they work, you should not sign any loan contracts, and you might want to consider other loans.

With an ARM, the interest rate on your loan is not fixed. Instead, it changes over time according to a formula – typically, a base interest rate (index) plus a certain percent (margin) (for example, the Prime Rate plus 3 percent). So, if the base interest rate increases, your interest rate and monthly payment will also increase.

Some specific terms of your ARM loan are explained below.

►Your loan will have a reduced initial interest rate.
Some ARMs have a reduced interest rate (start rate) for a short period of time – for example, the first two years of the loan. This rate is less than the index plus margin rate. This means that your interest rate and monthly payments will be lower than normal for the first two years. However, your interest rate and monthly payment may increase significantly when that period is over – even if market rates stay the same. And, your interest rate and monthly payment will increase even more if market rates rise.

►Your monthly payment will not include an amount to cover taxes and insurance.
In some mortgages, your monthly payment includes both principal and interest and an amount to cover real estate taxes and home insurance – and your lender pays your taxes and insurance out of these funds. In other mortgages, your monthly payment covers only principal and interest, and you are responsible for paying real estate taxes and insurance premiums when the bills arrive. When you are comparing mortgages, or deciding whether you can afford a mortgage, you need to consider whether or not the monthly payment includes an amount to cover estimated taxes and insurance.

►You will be required to pay a prepayment penalty if you pay off your loan more than 60 days before the initial interest rate is adjusted. The amount of the penalty will be a percentage of the outstanding balance of the loan.
Some ARMs require you to pay a large prepayment penalty if you sell your home or refinance during the first few years of the loan. A prepayment penalty can make it difficult, or very expensive, to sell your home or refinance – which you may need to do if your interest rate, and therefore your payment, is about to increase significantly.

►Your loan will have a balloon payment.
Most mortgages are set up so that you pay off the loan gradually by the monthly payments that you make over the loan term (for example, 30 years). Some ARMs, however, are set up with "balloon payments" – you make the same monthly payments that you would for a 30-year loan, but after a shorter period of time (for example, 10 years), the entire remaining balance of the loan is due. When the balloon payment is due you will usually need to refinance your loan to pay it, or sell your home if you cannot refinance the loan.

►Your loan will have a higher price because of reduced documentation.
"Reduced documentation" or "stated income" loans usually have higher interest rates or other costs compared to "full documentation" loans available if you document your income, assets, and liabilities. These higher costs can be substantial.

Illustration 2

SAMPLE MORTGAGE COMPARISON *(Not actual loans available)*		
Sample Loan Amount $200,000 – 30-Year Term – Interest Rates For Example Purposes Only		
	Fixed Rate Mortgage 7.5%	**Reduced Initial Rate "2/28" ARM** 7% for two years, then adjusting to variable rate; 10% maximum rate in Year 3; 11.5% maximum rate in Year 4; 13% maximum rate in Years 5-30
	REQUIRED MONTHLY PAYMENTS **(includes $200 per month for real estate tax and insurance escrow)**	
Years 1-2	**$1,598**	**$1,531**
Year 3 – if rates don't change	**$1,598**	**$1,939**
Year 4 – if rates don't change	**$1,598**	**$2,152**
Year 5 – if rates rise 2%	**$1,598**	**$2,370**

Dated: August 2, 2007.

John C. Dugan,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, August 2, 2007.

Jennifer J. Johnson,

Secretary of the Board.

Dated at Washington, DC the 31st day of July, 2007.

By order of the Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

Dated: August 7, 2007.

By the Office of Thrift Supervision.

John M. Reich,

Director.

Dated: August 3, 2007.

By the National Credit Union Administration.

JoAnn M. Johnson,

Chairman.

[OCC–4810–33–P 20%]
[FRB–6210–01–P 20%]
[FDIC–6714–01–P 20%]
[OTS–6720–01–P 20%]
[NCUA–7535–01–P 20%]

[FR Doc. 07–3945 Filed 8–13–07; 8:45 am]

BILLING CODE 4810–33–P, 6210–01–P, 6714–01–P, 6720–01–P, 7535–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Wage and Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Wage and Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, September 6, 2007 from 1 p.m. ET.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Wage and Investment Reducing Taxpayer Burden (Notices) Issue Committee of the Taxpayer Advocacy Panel will be held Thursday, September 6, 2007 from 1 p.m. ET via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Road, Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7979, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include: Various IRS issues.

Dated: August 7, 2007.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–15860 Filed 8–13–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 3 Taxpayer Advocacy Panel (Including the States of Florida, Georgia, Alabama, Mississippi, Louisiana, and Arkansas, and the Territory of Puerto Rico)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 3 Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 11, 2007, from 11:30 a.m. ET.

FOR FURTHER INFORMATION CONTACT: Sallie Chavez at 1–888–912–1227, or 954–423–7979.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 3 Committee of the Taxpayer Advocacy Panel will be held Tuesday, September 11, 2007, from 11:30 a.m. ET via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 954–423–7979, or write Sallie Chavez, TAP Office, 1000 South Pine Island Rd., Suite 340, Plantation, FL 33324. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Sallie Chavez. Ms. Chavez can be reached at 1–888–912–1227 or 954–423–7979, or post comments to the Web site: *http://www.improveirs.org.*

The agenda will include: Various IRS issues.

Dated: August 7, 2007.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–15862 Filed 8–13–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Assistance Center Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Taxpayer Assistance Center Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Tuesday, September 4, 2007.

FOR FURTHER INFORMATION CONTACT: Dave Coffman at 1–888–912–1227, or 206–220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Assistance Center Committee of the Taxpayer Advocacy Panel will be held Tuesday, September 4, 2007 from 9 a.m. to 10 a.m. Pacific Time via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or 206–220–6096, or write to Dave Coffman, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174 or you can contact us at *http://www.improveirs.org.* Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Dave Coffman. Mr. Coffman can be reached at 1–888–912–1227 or 206–220–6096.

The agenda will include the following: Various IRS issues.

Dated: August 7, 2007.

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–15864 Filed 8–13–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Joint Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Joint Committee of the Taxpayer Advocacy Panel will be conducted via conference call. The Taxpayer Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Wednesday, September 5, 2007, at 1 p.m., Eastern Time.

FOR FURTHER INFORMATION CONTACT: Barbara Foley at 1–888–912–1227, or (414) 231–2360.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Joint Committee of the Taxpayer Advocacy Panel (TAP) will be held Wednesday, September 5, 2007, at 1 p.m. Eastern Time via a conference call. If you would like to have the Joint Committee of TAP consider a written statement, please call 1–888–912–1227 or (414) 231–2360, or write Barbara Foley, TAP Office, MS–1006—MIL, 211 West Wisconsin Avenue, Milwaukee, WI 53203–2221, or FAX to (414) 231–2363, or you can contact us at *http://www.improveirs.org.* For information on participating in the Joint Committee conference call meeting, contact Barbara Foley at the above number.

The agenda will include the following: discussion of issues and responses brought to the Joint Committee, office report, and discussion of next meeting.

Dated: August 7, 2007

John Fay,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. E7–15866 Filed 8–13–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Enhanced-Use Lease for a Mixed-Use Development at the William Jennings Bryan Dorn Department of Veterans Affairs Medical Center in Columbia, South Carolina

AGENCY: Department of Veterans Affairs.

ACTION: Notice of intent to enter into an enhanced-use lease.

SUMMARY: The Secretary of the Department of Veterans Affairs (VA) intends to enter into an enhanced-use lease of approximately 26 acres at the William Jennings Bryan Dorn VA Medical Center in Columbia, South Carolina. The selected lessee will finance, design and construct, manage, maintain and operate a mixed-use development, to include expansion of existing facilities at the University of South Carolina School of Medicine, a new office building, and a new fire/police station for the City of Columbia. The lessee also would be required to provide VA with ground rent payments, or at VA's option, in lieu of a portion of the ground rent, in-kind consideration consisting of clinical/administrative space for use by the VAMC.

FOR FURTHER INFORMATION CONTACT: Alan Hackman, Office of Asset Enterprise Management (004B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–5875.

SUPPLEMENTARY INFORMATION: Title 38 U.S.C. 8161 *et seq.* states that the Secretary may enter into an enhanced-use lease if he determines that the implementation of a business plan proposed by the Under Secretary for Health for applying the consideration under such a lease to the provision of medical care and services would result in a demonstrable improvement of services to eligible veterans in the geographic service-delivery area within which the property is located. This project meets this requirement.

Approved: August 7, 2007.

R. James Nicholson,

Secretary of Veterans Affairs.

[FR Doc. E7–15923 Filed 8–13–07; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register

Vol. 72, No. 156

Tuesday, August 14, 2007

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Notice of Meeting

Correction

In notice document 07–3897 appearing on page 45006 in the issue of Friday, August 10, 2007, make the following correction:

On page 45006, in the first column, under the heading **SUMMARY**, in the first paragraph, in the last line, ''Vicksburg, MS at 9 a.m.'' should read ''Vicksburg Convention Center, 1600 Mulberry Street, Vicksburg, MS at 9 a.m.''.

[FR Doc. C7–3897 Filed 8–13–07; 8:45 am]

BILLING CODE 1505–01–D

Federal Register

Tuesday,
August 14, 2007

Part II

Department of the Interior

Bureau of Land Management

Notice of Final Action To Adopt Revisions to the Bureau of Land Management's Procedures for Managing the NEPA Process, Chapter 11 of the Department of the Interior's Manual Part 516; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[516 DM 11; WO–210–1610 24 1A]

Notice of Final Action To Adopt Revisions to the Bureau of Land Management's Procedures for Managing the NEPA Process, Chapter 11 of the Department of the Interior's Manual Part 516

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of final action.

SUMMARY: The Bureau of Land Management (BLM) gives notice of revised policies and procedures for implementing the National Environmental Policy Act (NEPA), as amended, Executive Order (E.O.) 11514, as amended, E.O. 12114, and Council on Environmental Quality (CEQ) regulations implementing NEPA. These final implementing procedures are being issued as Chapter 11 of the Department of the Interior's Departmental Manual Part 516 (516 DM 11) and supersedes previous implementation guidance. These revisions update the procedures used to implement NEPA for actions taken in managing public lands. The BLM's NEPA compliance procedures can be found at the Department of the Interior (DOI) Electronic Library of Interior Policies (ELIPS) *http://elips.doi.gov.*

The following sections in 516 DM 11 (dated 5/27/04) are affected by this **Federal Register** notice: Purpose (11.1); NEPA Responsibilities (11.2); External Applicant's Guidance (11.3); General Requirements (11.4), Parts A–G; Plan Conformance (11.5); Existing Documentation (11.6), Parts A–E; Actions Requiring an Environmental Assessment (11.7), Parts A–E; and Actions Eligible for Categorical Exclusions (11.9), categories B–D and G–J. New sub-parts have been added to the Oil, Gas and Geothermal Energy (B), Forestry (C), and Rangeland Management (D) categories. Two new categories have been added: Recreation Management (H) and Emergency Stabilization (I). Transportation category sub-parts G(1), (2), and (3) have been expanded to include trails.

DATES: *Effective Date:* The revised 516 DM 11, including changes and additions to the categorical exclusions (CXs), is effective upon the date of publication of this notice in the **Federal Register**.

ADDRESSES: The BLM's revisions to 516 DM 11 can be accessed electronically via the Internet at *http://elips.doi.gov.* Hard copies are available by contacting Peg Sorensen, Division of Planning and Science Policy, at 202–452–0364.

FOR FURTHER INFORMATION CONTACT: Peg Sorensen, Division of Planning and Science Policy, at 202–452–0364.

SUPPLEMENTARY INFORMATION: Final revised NEPA procedures for the DOI were published in the **Federal Register** (69 FR 10866–10866, March 8, 2004), and (70 FR 32840–32844, June 6, 2005). The DOI bureau and office specific procedures are published as chapters in Part 516 of the Departmental Manual. The 516 DM 11 addresses the BLM policy and procedures to assure compliance with the spirit and intent of NEPA.

A notice of the proposed revisions to the BLM's ''National Environmental Policy Act Revised Implementing Procedures'' for 516 DM 11 was published in the **Federal Register** (71 FR 4159–4167, January 25, 2006), with additional information available at *http://www.blm.gov/planning/news.html.* A 30-day public comment period followed that publication. Consideration of the comments received resulted in the following modifications to the proposed revised implementing procedures.

11.1. Purpose: No Change.

11.2. NEPA Responsibilities: Edited title to emphasize that there are multiple responsibilities.

Parts A–E: Edited to improve readability.

Parts B–E: Clarified executive and delegated leadership responsibilities.

Parts E & F: Moved sub-part E(1) to a new part F.

11.3. *External Applicants' Guidance:* Edited title to clarify that this section only applies to external applicants who are proposing an action. Language was added from the NEPA to clarify text within the section.

Part A. General, sub-parts A(2)–(4): Edited to improve readability.

Sub-part A(3): Replaced the ''State Director'' with ''the Responsible Official'' to clarify that the authorized activity is not limited to State Directors.

Part B. Regulations, preamble: Edited to improve readability.

11.4. General Requirements:

Part A–H: Revised section titles to create parallel structure. Edited and reorganized all sections to clarify requirements and improve readability.

Part A: Added ''integrating NEPA requirements with other environmental review and consultation requirements'' (from the former part D) to reduce paperwork and delays.

Part B: Addressed the elimination of duplicate tribal, State, and local government procedures, and the use of common databases and joint planning processes, meetings, investigations, and NEPA analyses.

Part C: Addressed consultation and coordination requirements.

Part D, sub-parts (1) & (2): Addressed public involvement requirements. Eliminated the reference to ''consensus-based decision-making'' and replaced it with ''consensus-based management'' to be consistent with direction provided by the DOI. Inserted the DOI's definition of ''consensus-based management'' and expectations regarding the process.

Part E: Redefined ''adaptive management'' to match the DOI definition.

Part F: Clarified a training requirement for the BLM employees facilitating public and community involvement.

Part G: Clarified action limits during environmental review.

11.5 Plan Conformance: Edited to improve readability. Clarified what the Responsible Official's options are when a proposed action does not conform to an approved plan.

11.6 Existing Documentation (Determination of NEPA Adequacy): Edited the title to create a section header that conforms to a standardized format. This section was rewritten to clarify the BLM's policy regarding the use of existing documentation. Operational information on how to conduct a Determination of NEPA Adequacy (DNA) will be provided in the BLM NEPA Handbook (H–1790–1).

11.7 Actions Requiring an Environmental Assessment (EA):

Part A: Moved part A information to a new part D. Part A now defines the purpose and need for an EA.

Part B: Inserted a new requirement to consult 40 CFR 1508.9(b) which outlines ''discussion'' requirements in an EA.

Part C: Edited to clarify and enhance general understanding of when an EA is appropriate.

Part D: Directs the Responsible Official to consider an EA if there are uncertain impacts.

Part E: This new part directs the Responsible Official to prepare an Environmental Impact Statement (EIS) if it is determined that a CX or an EA is not appropriate. Removed unnecessary text ''processed in accordance with 40 CFR 1502.''

11.8 Major Actions Requiring an Environmental Impact Statement (EIS):

Part A(1): Refined the text to clarify criteria used to consider when determining whether to prepare an EIS level analysis or not. Removed the following statement: ''or the impact

analysis of an action is likely to be highly controversial.'' This edit was made to clarify the criteria the BLM considers when determining whether an EIS level analysis is needed. Supplementary guidance on how to determine significance when considering whether to prepare an EIS, such as when effects should be considered ''highly controversial,'' will be placed in the BLM NEPA Handbook (BLM H–1790–1).

Part B: Dropped the term ''Wilderness'' from the list of actions typically requiring an EIS. This edit reflects current program policy that there will no longer be proposals to designate Wilderness Areas under Section 603 of FLPMA. Supplementary guidance on how to implement policy regarding preparation of EISs will be placed in the BLM NEPA Handbook (BLM H–1790–1).

Part C: Removed unnecessary text ''processed in accordance with 40 CFR 1501.4(e)(2).''

11.9 Actions Eligible for a Categorical Exclusion:

Preamble: Replaced ''exceptions'' with ''extraordinary circumstances'' to reflect a revision to 516 DM 2.3A(3) made by the DOI in June 2005. Added a statement identifying the DOI-wide CX in 516 DM 2, appendix 1, available for the BLM consideration. The BLM reviewed supporting data and conclusions of no significant effect for all proposed CXs based on comments received. Identified below are revisions to final CX language based on this review. Some additional information was added to the administrative file based on the review. In addition, the BLM reviewed the proposed CXs and this final action establishing the final CXs in light of CEQ's proposed guidance, ''Establishing, Revising and Using Categorical Exclusions under the National Environmental Policy Act,'' (71 FR 54816–54820, September 19, 2006). The BLM believes that the establishment of the new CXs is consistent with CEQ's proposed guidance. Based on discussions, review, and to clarify the intent of the BLM, language has been added indicating the need for all proposed actions and activities to be, at a minimum, consistent with the DOI and the BLM regulations, manuals, handbooks, policies, and applicable Land Use Plans (LUP) regarding design features, Best Management Practices, Terms and Conditions, Conditions of Approval, and Stipulations.

A. Fish and Wildlife: Fixed a typographical error in sub-category (2) by replacing ''value'' with ''valve.''

B. Oil, Gas, and Geothermal Energy:

Sub-category (6): Removed text ''including the establishment of terms and conditions,'' and edited language to more accurately describe the actions covered.

Sub-category (7): The BLM has decided not to finalize this proposed CX (CX B(7)) for the category of actions described as, ''approving the drilling or subsequent operations of a geothermal well within a developed field for which a LUP and/or an environmental document, prepared pursuant to NEPA, analyzed such drilling as within the scope of a reasonably foreseeable future activity.'' When these actions are within the scope of the previous NEPA document and sufficiently analyzed therein, and that determination is documented, no further NEPA analysis is required. In consultation with CEQ, the BLM has decided that more focused NEPA documents should be prepared at the outset to support subsequent implementation of the geothermal field development plan or utilization plan, and that this practice, combined with a DNA, would provide a more appropriate method for streamlining the documentation of the evaluation of subsequent infill well proposals than a new CX.

Sub-category (8): The BLM has decided not to finalize this proposed CX. In consultation with CEQ, it was determined that the action of issuing a geothermal site license or operational permit (CX B(8)) is an administrative/ministerial function subsequent to the approval of a utilization plan. Approval of a utilization plan involves analysis of the environmental effects of constructing and operating the planned facility. The administrative action of issuing the site license and permit to operate does not result in additional environmental effects. Therefore, the BLM will eliminate this additional NEPA review, as unnecessary and redundant.

C. Forestry:

Sub-category (6): Modified the proposed language and format to eliminate confusion about the sample tree area limitation and restricted activities. Added Lakeview District, Klamath Falls Resource Area to the list of locations where this CX may be used. The Resource Area was mistakenly left out of the proposed limitation and is now included because the effects are comparable to the others previously listed in this section.

Sub-categories (7)–(9): Modified the proposed format and syntax. Text that defines and limits ''temporary road'' building activities was added to be consistent with the U.S. Forest Service (FS) standards and regulations. Text that defines and clarifies ''a dying tree'' was added for purposes of this category of actions.

Sub-category (9): Modified the example (a) by replacing southern pine beetle with mountain pine beetle to represent a type of beetle that occurs in western Oregon.

D. Rangeland Management:

The National Research Council published *Rangeland Health: New Methods to Classify, Inventory, and Monitor Rangelands* in 1994. The concepts identified in that publication were incorporated in the BLM's grazing regulations and the agency used the term ''rangeland health'' in much of their initial policy and guidance related to implementing those grazing regulations. Although the term ''rangeland health'' was first introduced in the grazing regulations, the ''rangeland health standards'' really apply to the condition of the land itself regardless of the uses that may influence the health of that land. As a result, the BLM has begun using the term ''land health'' to avoid the misperception that these concepts only apply to the grazing program. For this reason, the term ''land health'' is used in the description of this proposed CX, even though both terms are likely to be found within this document or in other background material supporting this document. Use of the term ''land health'' does not represent any substantive change in the original definition, concept or use of the term ''rangeland health'' and the reader should view these terms as interchangeable. The proposed rangeland management sub-categories (10) and (11) are finalized with the following changes:

Sub-category (10): Lettered the bullet statements, so the first bullet is criteria (a); moved text (bullets two & three) ''shall be conducted consistent with the BLM and Departmental procedures and applicable land and resource management plans (RMP);'' from here to the general CX introduction to reflect that text applies more generally and not only to this CX. Modified text of bullet four to exclude use of this CX for otherwise qualifying ''vegetation management activities'' in Wilderness Study Areas and text becomes new criteria (b). Modified bullet five to become criteria (c) and added text to indicate that the CX cannot be used for biological treatments. Finally, added text to define and limit the use of temporary roads as criteria (d) and (e).

Sub-category (11): Moved criteria (a) to (b) and modified the phrase ''not meeting standards solely due to factors

other than existing livestock grazing'' to ''not meeting land health standards due to factors that do not include existing livestock grazing.'' Changed the text to clarify that the CX requires land health assessments be completed prior to considering the application of the CX. Dropped proposed criteria (b) and replaced it with criteria (a) that limits the leases/permits eligible for the CX to those where the lease/permit is consistent with the use specified in the previous lease/permit, there is no change in the type of livestock, the previously authorized active use is not exceeded, and grazing does not occur more than 14 days earlier or later than specified on the previous lease/permit.

Sub-category (12): Dropped the proposed CX based on further review of supporting data.

E. Realty:

The proposed revision of sub-category (16) was dropped upon further review.

F. Solid Minerals: No change was proposed or made.

G. Transportation:

Sub-categories (1), (2), and (3): The word ''existing'' which originally was used in (1) and (2) has been eliminated because it was potentially confusing, and the words ''and trails'' have been approved as proposed.

Sub-category (1) and (2): Replaced ''Incorporating'' for ''Placing'' in sub-category (1), and added ''eligible'' to modify the language to clarify that only roads and trails meeting criteria developed in a LUP are to be incorporated into the transportation plan, or be subject to the actions specified in sub-category (2).

H. Recreation Management:

Sub-category (1): The proposed revision of the previous Category ''H. Other'' to ''Recreation Management and sub-category ''H(5)'' to ''H(1)'' was approved as revised. Increased the day and overnight use threshold to 14 consecutive nights to be consistent with the practice of Responsible Officials under provisions in Title 43 of the Code of Federal Regulations (CFR) that allow such officials to set allowable length of stay applicable to any casual visitor using public lands (See 43 CFR 8365.1–2 ''Occupancy and Use,'' and 43 CFR 8365.1–6 ''Supplementary Rules''). This change has also been made to provide consistency with the typical length of stay for any casual visitor using public lands (43 CFR 8364). Changed wording from ''contiguous acres'' to ''staging area acres'' to better define the limits on area of impact. Replaced ''travel management areas or networks that are designated in an approved LUP'' with ''recreational travel along roads, trails, or in areas authorized in a LUP'' because of confusion over what constitutes a travel management area or network. Text was added to include a limitation that this CX cannot be used for the establishment or issuance of Special Recreation Permits (SRP) for ''Special Area'' management (43 CFR 2932.5). The requirement for Special Area SRPs and the issuance of individual SRPs in ''Special Areas'' must be directed by specific land use planning decisions and commensurate NEPA analysis.

I. Emergency Stabilization: This new section was adopted as proposed with the addition of text to define and limit the use of temporary roads. The section included a requirement to treat temporary roads for rehabilitation.

Sub-category (1)(e): Moved text ''shall be conducted consistent with the BLM and the Department procedures, applicable land and RMPs.'' to general CX introduction to reflect that text applies more generally and not only to this CX. Renumbered numbered criteria based on the removal of this text.

J. Other: The previous existing sub-part H was moved to sub-part J and adopted as proposed with one exception. An existing CX was mistakenly left out of the January 25, 2006, **Federal Register** notice. The following existing CX will be placed in sub-part J (12): ''Rendering formal classification of lands as to their mineral character and waterpower and water storage values.'' There is no change to the language.

Appendix 11.1: The DNA Worksheet appendix was deleted. Supplemental guidance regarding the use of Existing Documentation remains in section 11.6.

Comments on the Proposal

The BLM received more than 72,000 ''comments'' during the 30-day comment period (January 25, 2006, to February 24, 2006). A ''comment'' is a single, whole submission that may take the form of a letter, postcard, email, or fax. These comments came from private citizens, elected officials, and groups and individuals representing businesses, private organizations, and state and federal agencies. All comments received were considered in preparing this final action notice.

Public comment on the proposed revisions addressed a wide range of topics. Many comments support one or more of the proposed revisions or favor broadening the scope of the revision, while many others oppose one or more of the proposed revisions or recommend more narrowly limiting the qualifying criteria for a particular CX. Some comments state that the 30-day comment period provided insufficient time to review and comment on the BLM's proposed revisions. The BLM received extensive and varied comments during the 30-day comment period. Based on this robust response, the BLM determined that it was unnecessary to extend the public comment period. Some general comments state that the BLM is using dated and inadequate scientific information to support management decisions. They recommend that the BLM adopt a specific process to systematically incorporate the best available science in all elements of the BLM public lands management. The BLM Science Strategy (September 2000) discusses the role of science in the BLM management of the public lands, and articulates a conceptual framework for integrating science into the BLM decision-making process. Relevant scientific information is brought to the decision-maker's attention by members of the interdisciplinary team of professionals, and through contract and in-house investigations, science sharing forums, and technical reports. In addition, the public, cooperators and partners bring scientific information forward during the environmental review process. Many comments addressed matters beyond the scope of the proposed revisions to the 516 DM 11. These included requests for the BLM to add policy statements to the 516 DM 11 pertaining to conformance with the Clean Air Act, preserving and honoring valid existing rights, and conducting cost-benefit analyses. Some comments addressed land management activities that were neither proposed nor analyzed. Some comments state that grazing is incompatible with good land stewardship. Other comments suggested that the proposed changes to 516 DM 11 ''denied [the public] their constitutional rights'' or would ''cause unrestricted use'' of public lands. Responses to most out-of-scope comments are not provided.

Responses to Specific Comments on Sections 11.1–11.8

11.1 Purpose

Comment: Some comments ask how to access 516 DM 11 and the DOI's Environmental Statement Memoranda (ESM).

Response: The BLM provided the Web site address to access procedures (516 DM 11) that are being replaced by this **Federal Register** notice in the Summary portion of 71 FR 4159–4167, January 25, 2006. The proposed changes to these procedures were published in full in the same **Federal Register** notice and were

posted on the DOI, ELIPS Web site in the Departmental Manual chapters at *http://elips.doi.gov.* The DOI's ESMs can be accessed through the DOI's Web site at *http://www.doi.gov/oepc* via the descriptions in the left-hand column.

11.3 External Applicants' Guidance

Comment: Some comments ask for information to guide applicants interested in the BLM program regulations.

Response: The purpose of this section is to provide guidance to external parties making applications to the BLM. The title has been changed to make this clear. A list of potentially relevant regulations is located in part B. Additional regulations, policies, directives, and guidelines that affect BLM programs may be provided when the applicant contacts a Responsible Official and describes their proposed action(s).

Comment: A concern was expressed about the absence of NEPA compliance in the ''applicants'' guidance'' section.

Response: The text has been clarified to address NEPA requirements for private applicants and other non-federal entities as required by 40 CFR 1501.2(d).

11.4 General Requirements

Comment: Some comments state that local, state, and federal agencies should not be provided ''cooperating agency status'' because it blurs the lines of NEPA responsibility.

Response: The NEPA regulations specifically provide for and encourage the use of ''cooperating agencies'' (40 CFR 1501.6). The participation of other agencies in the BLM's NEPA processes in no way ''blurs'' the BLM's status as the agency responsible for the NEPA analysis and the associated decision-making affecting public lands.

Comment: Some comments ask the BLM to revise the language regarding consensus-based decision-making to clarify that only federal managers have decision-making authority.

Response: The new language in 516 DM 11.4 D(2) has been added to describe consensus-based management (as per ESM 03–7) and to clarify that the BLM has exclusive responsibility for decision-making.

Comment: Some comments recommend that more detailed guidance be placed in 516 DM 11 to promote consistency between the BLM offices undertaking public involvement.

Response: The recommended detailed guidance will be considered for placement in the BLM's NEPA Handbook (H–1790–1). The BLM's public involvement guidance in 516 DM 11 is consistent with policies and procedures specified in the NEPA, E.O.s 11514 and 12114, and CEQ regulations. Federal decision-makers have discretion as to how they enable public involvement because of the broad range and variety of potential proposed actions and public interests at stake.

Comment: Some comments state that the BLM should revise 516 DM 11 to require public notice about ''decision documents'' and Findings of No Significant Impacts (FONSIs) statements.

Response: The CEQ regulations implementing the NEPA have specific public notification requirements. The BLM will consider adding more specific guidance regarding public notice of a FONSI in the BLM NEPA Handbook (H–1790–1). Distinct from its obligations under the NEPA, the BLM is required under other statutes to provide public notification regarding management decisions. This notification is done in accordance with program specific regulations and guidance.

Comment: Some comments state that the public's involvement in the NEPA process should be more limited, while other comments state that the public should be given more involvement opportunities than they are currently provided.

Response: The CEQ regulations implementing the NEPA require agencies to involve the public in the environmental analysis process. The timing of public involvement for EISs is set by regulation; however, the timing and manner of the subject involvement for EAs and CXs is left to the discretion of the Responsible Official. The BLM is not changing existing public involvement procedures as a part of the process of revising this 516 DM 11.

Comment: Some comments suggested that the BLM revise 516 DM 11 to provide further guidance regarding facilitating public involvement during NEPA review processes.

Response: Because the range of activities the BLM undertakes is so broad and varied, and because public involvement can take many forms, specific guidance on facilitating such public involvement is more appropriate for inclusion in the BLM's NEPA Handbook (H–1790–1). The NEPA Handbook provides operational guidance on how to implement the BLM policy regarding public involvement.

Comment: Some comments state that the BLM should revise the language in section 11.4 to include reference to the Data Quality Act (Pub. L. 106–554).

Response: Specific reference to the Data Quality Act in 516 DM 11 was not added. The BLM managers are responsible for ensuring compliance with all applicable laws and regulations including the Data Quality Act.

Comment: Some comments ask the BLM to prevent excessive data collection during the NEPA analysis.

Response: The BLM uses best available data or collects new data appropriate to the level of the NEPA analysis needed to make an informed decision regarding the proposed action. The provisions described in 516 DM 11.4(A–C) are intended to aid in this effort, provided that the data and analysis compiled by other permitting agencies is complete, available and sufficient to meet the BLM's needs.

Comment: Some comments express concern that direction for limiting actions during the NEPA analysis process was too narrowly framed and did not adequately reflect regulatory requirements.

Response: In addition to noting these limits, the BLM revised section 11.4G to refer readers directly to the CEQ regulation regarding the limitation on action during the NEPA analysis as provided in 40 CFR 1506.1, and to provide guidance to aid in fulfilling the regulations.

Comment: Some comments point out that the **Federal Register** notice failed to use the DOI's most recently adopted definition of adaptive management (AM).

Response: The BLM revised the AM definition in 516 DM 11.4E to be consistent with the DOI definition found in 516 DM 4.16.

Comment: Some comments question the use of AM and request more information about when it should be used. There is concern that AM not be used as sole mitigation to justify a FONSI.

Response: The BLM does not use AM as a sole mitigation to justify a FONSI. Section 11.4E states that the Responsible Official is encouraged to build AM practices into proposed actions and NEPA compliance activities and train personnel in this important environmental concept. The DOI is developing additional guidance for bureaus on the use of an AM approach to management activities.

Comment: Some comments state that using AM violates the NEPA by (1) allowing the BLM to defer decisions regarding mitigation—and the impacts that might result if the mitigation fails—without addressing those decisions in a NEPA document; (2) removing significant agency decisions about mitigation, and the possible impacts, from public review and comment; (3) removing significant impacts that may be detected during the monitoring process from NEPA analysis; and (4)

relying heavily on monitoring and evaluation, which the BLM is often unable to support.

Response: (1) Adaptive Management is a planning tool; it does not relieve the BLM of the responsibility of meeting the requirements of the NEPA or other laws. The use of AM does not permit the BLM to defer ''decisions on mitigation and impacts if mitigation fails.'' In fact, a more vigorous monitoring strategy will help determine if mitigation is working, and if not, it will help speed up the change in management action or mitigation strategy. Mitigation and impacts will still be addressed in the NEPA document as will the AM process itself. Adaptive Management will not be applied to all resource decisions made. (2) Stakeholder involvement is a critical aspect of AM. New DOI policy clearly links stakeholder involvement to implementation of AM from plan development through implementation. Agency decisions on mitigation and impacts will not be removed from public review and comment and it is hoped that there will be an increased level of public involvement. (3) ''Significant impacts'' that are detected during monitoring will not be removed from the NEPA analysis. Rather, any actions taken to address ''significant impacts'' that may arise will themselves be subject to appropriate NEPA review, including appropriate public involvement. It is hoped that a more vigorous stakeholder involvement process using AM will improve the BLM's ability to detect impacts earlier and make the necessary resource management changes in partnership with stakeholders. (4) The AM process will only be used when adequate monitoring and evaluation can be assured. Successful AM is dependent on good monitoring and evaluation. If the monitoring strategy goes unfulfilled, the BLM will need to fall back on a more prescriptive approach.

11.5 Plan Conformance

Comment: Some comments requested that 516 DM 11 direct the BLM offices to reject proposals unless and until their LUPs are updated to thoroughly address potential environmental consequences.

Response: Section 11.5 clarifies the requirement for conformance with LUPs, including when a proposal may be rejected.

11.6 Existing Documentation (Determination of NEPA Adequacy)

Comment: Some comments suggest that 516 DM 11 be revised to prescribe a minimum level of interdisciplinary review for completing a DNA.

Response: Section 11.6 has been revised to provide policy guidance on the use of existing documentation. Operational specifics on how to implement the policy, such as levels of interdisciplinary review, will be provided in the BLM NEPA Handbook (H–1790–1).

Comment: Some comments state that the BLM DNA Worksheet does not meet the requirements of NEPA compliance.

Response: In certain situations, the BLM undertakes a DNA process to review whether a proposed action has already been fully analyzed in a NEPA document. Where the proposed action has not already been analyzed or where it has been analyzed, but new circumstances or information has come to light, appropriate NEPA analysis and documentation will be prepared. Operational guidance on how to implement this policy will be provided in the BLM NEPA Handbook (H–1790–1). The DNA Worksheet in appendix 1 and implementation-specific guidance proposed in the January 25, 2006 **Federal Register** notice has been deleted from 516 DM 11.

Comment: Some comments state that using the DNA Worksheet process provides the potential to overlook environmental differences from widely separated projects and to underestimate the cumulative effects of nearby projects.

Response: In accordance with 40 CFR 1502.9(c), section 11.6D states that if existing NEPA documentation is inadequate to cover the proposed action, an appropriate level NEPA analysis document will be prepared. The BLM NEPA Handbook (H–1790–1) provides guidance regarding consideration of cumulative impacts when determining whether a DNA can be used.

11.7 Actions Requiring an EA

Comment: Some comments expressed confusion about the differences between actions typically requiring an EA and some of the same actions proposed in the existing and new CXs.

Response: The January 25, 2006, proposal included several editorial errors in this sub-part. Sub-part 11.7C(1) was revised for the sake of clarity.

11.8 Major Actions Requiring an EIS

Comment: Some comments requested clarification of the term ''highly controversial'' with regard to impacts in sub-part 11.8A(1). The concern centered on whether the term referred to matters of public/political controversy versus matters of scientific controversy.

Response: This sub-part has been revised to remove the term ''highly controversial'' as criteria for when an EIS is required. Guidance on how to determine significance, including when effects should be considered ''highly controversial'' is applied in accordance with CEQ regulations and requires agencies to consider the degree to which effects are likely to be controversial when determining whether to prepare an EIS. The BLM applies the ''highly controversial'' concept to disagreements about the nature of the effects. Additional clarification and examples will be provided in the BLM NEPA Handbook (H–1790–1).

Comment: Some comments express concern that the lists of actions that typically require an EA or an EIS were prescriptive, rather than discretionary, and did not allow for any flexibility.

Response: Although 516 DM 11.7C and 11.8A provide lists of actions generally requiring EAs or EISs respectively, 516 DM 11.7D, 11.7E and 11.8B specify the flexibility or discretion allowed regarding the actions on these lists, based on potential impact significance.

11.9 Categorical Exclusions

Responses to section 11.9 comments are divided into two blocks. Comments of a general nature that may or may not apply to more than one of the proposed CXs are summarized and responded to as ''general comments.'' Comments specific to a proposed CX are summarized and responded to in order of category (e.g., B. Oil, Gas and Geothermal; C. Forestry; D. Rangeland Management; and so forth) as they occur in 516 DM 11.

General Comments on Categorical Exclusions

Comment: Some comments state that the CX revisions are illegal; could short circuit important safeguards; circumvent existing laws, E.O., and the BLM policies; violate the BLM's multiple use mission; and provide insufficient protection despite the application of ''extraordinary circumstances'' (516 DM 2.3(A) and appendix 2).

Response: The BLM disagrees. The CEQ regulations (40 CFR 1508.4 and 1507.3) authorize Federal agencies to establish and apply CXs. The BLM followed CEQ regulations in proposing additional CXs to reduce paperwork and delays (40 CFR 1500.4 and 1500.5) and enable the BLM to concentrate on environmental issues that are associated with proposed actions that require further analysis in an EA or an EIS. Each of the categories of actions in the new CXs were subjected to an administrative review. This review determined whether there is sufficient supporting

evidence, (based on past NEPA analyses) and a review of actions to support the finding that the activity would not cause individually or cumulatively significant environmental impacts (*http://www.blm.gov/planning/news.html*). When the CXs are used for particular proposed actions, those actions are reviewed to ensure that they do not involve ''extraordinary circumstances'' and are consistent with all applicable laws for protection of the environment. In addition, proposed actions or activities must be, at a minimum, consistent with the DOI and the BLM regulations, manuals, handbooks, policies, and applicable LUPs regarding design features, best management practices, terms and conditions, and conditions of approval, and stipulations. These reviews ensure proper application of the CXs and act as a ''safeguard'' (516 DM 2.3(A) and appendix 2). Finally, some of the information collected to prepare the CXs was made available for public review and comment available at *http://www.blm.gov/planning/news.html.* Additional information clarifying these reports is now available at the same Web site. The establishment and use of CXs has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd* 230 F.3d 947, 954–55 (7th Cir. 2000).

Comment: Some comments indicate support for the CX revisions and some comments would like to expand the categories of activities excluded from further review under NEPA.

Response: The BLM will continue to compile and review evidence to determine if additional categories of actions should be excluded from additional NEPA review. The BLM may propose additional CXs in the future.

Comment: Some comments state that the BLM erroneously assumes that ''the only function of an EA is to determine whether an EIS is needed.'' Therefore, ''any EA that resulted in a FONSI need never have been prepared.''

Response: The BLM disagrees. There are three tasks served by completing an EA as identified at 40 CFR 1508.9(a)(1)–(3). The BLM analyzed past environmental documents, including EAs and FONSIs and the underlying activities in establishing the CXs described in this final action. Categories of actions were considered eligible for CXs when the EAs, FONSIs, and subsequent review of these actions showed no individually or cumulatively significant impacts on the environment.

Comment: Some comments state an opinion that the BLM should ban the use of CXs.

Response: The BLM disagrees. The BLM establishes CXs in compliance with the CEQ regulations implementing the NEPA, particularly 40 CFR 1508.4 and 1507.3, which require agencies to develop procedures for establishing CXs for categories of actions that do not normally require either an EA or an EIS. The appropriate use of CXs also reduces paperwork and delays (40 CFR 1500.4 and 1500.5), and enables the BLM to concentrate on issues that are truly significant and merit review in an EA or EIS, rather than amassing needless detail for actions demonstrated not to have significant impacts (40 CFR 1500.1(b)).

Comment: Some comments, while recognizing that the ''extraordinary circumstances'' review is to occur before an action is determined to be eligible for use of a CX, express concern that the BLM ''often 'defers' special status species and/or cultural resource inventories on the sites of proposed actions until after the NEPA process and documentation is complete.'' The comments go on to question the BLM practice of ''add[ing] stipulations saying that before any actual ground disturbance occurs it will conduct the required inventories and avoid any identified resources.''

Response: The BLM must comply with the NEPA, as well as all applicable environmental and resource protection laws, such as the National Historic Preservation Act, 16 U.S.C. 470 et seq., and the Endangered Species Act, 16 U.S.C. 1531 et seq. (ESA), before any action is taken. Other than the broad mandate of the Federal Land Policy and Management Act, 43 U.S.C. 1701 et seq., which directs the BLM to prepare and maintain an inventory of resource values, there are no required ''inventories.'' Rather, the BLM has discretion as to when and how to gather information required to comply with these statutes; that is, sufficient information may come in different forms, including but not limited to inventories. In terms of applying the CXs, the NEPA requires that the BLM first determine whether any extraordinary circumstances exist that would preclude use of a CX. Several of the extraordinary circumstances that the BLM must consider directly address resources mentioned in the comments. For example, extraordinary circumstances prohibiting the use of a CX include instances where an individual action may ''have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources'' (516 DM 2 appendix 2(2.2)), ''have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places as determined by either the bureau or office'' (516 DM 2, appendix 2(2.7)), or ''limit access to and ceremonial use of Indian sacred sites on federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites'' (516 DM 2, appendix 2(2.11)). This means that the Responsible Official must have sufficient information regarding ''cultural resources'' to complete the ''extraordinary circumstances'' review before a CX can be used to comply with the NEPA.

Comment: Some comments state that the BLM lacks the staff and funding for appropriate monitoring of categorically excluded activities. Some comments express concern that by categorically excluding more activities, there will be insufficient data to analyze the impacts of these activities. Other comments ask the BLM to assure the public that impacts from the implementation of categorically excluded activities be monitored.

Response: An activity that is subject to a CX by definition is an activity that is within a category of actions that have previously been found not to have significant impacts, either individually or cumulatively. That being said, regardless of whether a proposed activity is reviewed under an EA, EIS or CX, the BLM monitors the effects of these activities to the extent its budget allows. The BLM's program management and associated staffing decisions regarding the monitoring of effects are subject to the appropriations process. (See, Anti-Deficiency Act, 31 U.S.C. 1341).

Comment: Some comments state that the BLM should increase public notification of CX decisions made.

Response: The CEQ regulations (40 CFR 1506.6) require public notice about the completion of NEPA analysis under certain circumstances. These regulations do not require public notification of the use of a CX. Some BLM offices currently support Web sites that list the decisions made in their management area, including the NEPA documents associated with those decisions (including applying a CX). For example, see the Utah State Office Environmental Notification Bulletin Board at *https://www.ut.blm.gov/enbb/index.php.*

Comment: Some comments state that the BLM should include the CXs from the Energy Policy Act of 2005 in the 516 DM 11 revisions.

Response: The CXs included in the Energy Policy Act of 2005 are statutory CXs; therefore, do not need to be listed in 516 DM 11.

Comment: Some comments ask the BLM to describe how cumulative impacts of the proposed CX activities would be evaluated. Some comments suggest that 516 DM 11 be revised to ensure that the cumulative impacts of projects covered by a CX are analyzed.

Response: An action can only be categorically excluded from further NEPA analysis when it has been shown that the action fits within a category of actions that has already been determined not to have a significant environmental effect on the human environment, individually or cumulatively (see 40 CFR 1508.4). For all of the categories of actions for which the CXs were proposed, the analysis of the NEPA documents prepared for such actions, as well as subsequent evaluations of the effects of the actions, showed that the actions did not cause significant effects. Further, when considering whether to use a CX, one of the ''extraordinary circumstances'' that must be evaluated is whether the proposed action may ''have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects'' (516 DM 2.3(A)3 and appendix 2 (2.6)). If it might, then an EA or an EIS must be completed for the action, and a CX cannot be applied.

Comment: Some comments ask the BLM to evaluate the cumulative impacts of the proposed CXs, the revisions to the Northwest Forest Plan's (NWFP) Survey and Management Program and Aquatic Conservation Strategy; the National Forest Management Act Planning regulations; and the National Forest Management Act notices, comment, and appeal regulations.

Response: The new or modified CXs are specific to a revision of the procedures described in the 516 DM 11 for implementing the NEPA within the BLM. The determination that establishing CXs does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd* 230 F.3d 947, 954–55 (7th Cir. 2000) (holding creation of CXs to be an establishment of agency procedure for which CEQ regulations do not require preparation of an EA or EIS). The CXs proposed in January 2006 and finalized here are part of the BLM's effort to update internal NEPA implementing procedures. A cumulative effects analysis of the establishment of these CXs, in relation to the NWFP, the National Forest Management Act Planning regulations, and the National Forest Management Act is not appropriate in this context. However, in developing the Forestry CXs, the BLM reviewed past actions and associated NEPA documents. These NEPA documents included analyses of cumulative effects, which in relevant instances, included actions taken by the Forest Service. The BLM's review of these past actions, the NEPA analyses specific to the actions, and anticipated effects, as well as the actions' actual effects, allowed the BLM to determine that the actions had no individual or cumulative significant impacts, and that development of a CX covering such actions was warranted. The final determination whether a specific proposed action will have a significant cumulative effect or not, is completed at the time the specific proposal is reviewed by considering the applicability of any extraordinary circumstances.

Comment: Some comments state that the BLM needs to ensure that implementation of all the CXs will not cumulatively result in jeopardy to listed endangered species.

Response: The Responsible Official must ensure that no BLM action will jeopardize a listed species under the ESA. Before a CX can be used, the Responsible Official must determine that no ''extraordinary circumstances'' apply. If ''extraordinary circumstances'' (516 DM 2.3(A)3 and appendix 2 (2.8)), which addresses endangered species, applies, a CX may not be used.

Responses to Specific Comments on Section 11.9—Categorical Exclusions

B. Oil, Gas, and Geothermal Energy (Sub-parts B(6)–(8))

B(6)—Comments.

Comment: Some comments state that the proposed CX 11.9B(6) should not be implemented because geophysical operations were excluded when Congress authorized additional energy development-related CXs under the Energy Policy Act of 2005.

Response: Section 390 of the Energy Policy Act of 2005 does not provide for a CX for the geophysical activities described in the proposed CXs. The Act does not preclude the appropriate exercise of authority to administratively establish CXs in accordance with the NEPA, the CEQ regulations, and the DOI and the BLM NEPA procedures.

Comment: Some comments state that the proposed CX 11.9B(6) is a policy change aimed specifically at benefiting the oil and gas industry and that as such, is a ''scheme'' to make energy exploration companies more money.

Response: No change to the CX was requested by these comments, no changes were made in response. The BLM proposed CX 11.9B(6) because CEQ implementing regulations (40 CFR 1509.4 and 1507.3) allow federal agencies to identify categories of actions, which normally do not require either an EA or an EIS. The development of this CX was based on generally accepted analytical procedures, which included completion of a census of available data on geophysical exploration. See *http://www.blm.gov/planning/news.html.* One benefit to all stakeholders of adopting new CXs for activities, which have been shown to have no individually or cumulatively significant effects, is additional federal resources can be redirected to analyzing and mitigating activities likely to have significant adverse environmental consequences.

Comment: Some comments suggest that the proposed CX 11.9B(6) would promote the segmentation of a major project into several categorically excluded small projects, which would prevent appropriate consideration of cumulative impacts.

Response: The BLM disagrees. Geophysical exploration activities are independent actions and not connected actions as defined in NEPA (40 CFR 1508.25 (a)(1)). Geophysical exploration activities are data collection activities used to gather information that may be used to inform future decision-making regarding oil, gas or geothermal development proposals by providing information on the location of energy resources. It is not a forgone conclusion that the energy resources identified through this data collection will actually be developed. Before a CX can be used, a proposed action must be reviewed to determine whether or not any of the ''extraordinary circumstance'' (516 DM 2.3(A)3 and appendix 2), applies. In particular, ''extraordinary circumstance'' 2.6 addresses the potential for significant cumulative impacts; if it does apply, the CX cannot be used.

Comment: Some comments state that federal court and administrative decisions have either remanded the BLM decisions to approve geophysical exploration or affirmed agency decisions, only after the BLM proposed additional mitigation measures.

Response: The data analyzed and reviewed by the BLM validate the assertion that the impacts from geophysical operations would not be significant. Specific to the comment related to litigation, the data indicate that out of 244 projects reviewed, the NEPA analyses of eight geophysical exploration projects, supported by EAs, were challenged through administrative appeals or litigation. Only two of the eight were remanded to the BLM. In one

situation, the NEPA document was found inadequate where the BLM failed to consider reasonable alternatives (such as limiting use to existing roads) that had been suggested, and in the other, the BLM failed to provide a comment period that had been promised and that the court found to be appropriate under the circumstances of that case. Neither was due to a finding of significant impacts associated with geophysical exploration. Geophysical exploration (the impacts from those activities and how the BLM field personnel address the approval process) has changed over the last several years. There have been lessons learned from the results of this litigation, from personal observation by field staff associated with the projects, field data collection through monitoring, and systematic evaluation of information received from the proponents. Accumulation of professional knowledge resulted in design features that previously were not part of proponent geophysical proposals, yet are now considered routine. Proponents either with or without the BLM consultation now incorporate best management practices into proposals. Project design features are site specific to the local concerns and resource values. They represent a commonality of best management practices that are integral to the project being authorized. Field personnel that routinely permit these actions know the needs based on accumulated professional knowledge of resource concerns in the area at issue, and either assure these aspects appear in the proponent's proposal or include them as conditions of approval in the authorization. ''Conditions of approval'' or ''terms and conditions'' are terms of art that represent the practices and standards that are routinely applied to geophysical projects specific for that particular office. Their application does not require a new analysis each time a project is submitted, but results in a list of measures that the proponent must implement based on local conditions. In all cases, proposed actions or activities must be, at a minimum, consistent with the DOI and the BLM regulations, manuals, handbooks, policies, and applicable LUPs regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations. Also associated with this improved professional knowledge base, of the BLM field experience, has been the steady improvement of geophysical techniques and best management practices by the geophysical industry. Low impact techniques have allowed for substantial reductions in the amount of actual surface disturbance and associated resource impacts. Physical impacts such as road construction are rare and the impacts to soil or vegetation resources are minimal or short-term.

Comment: Some comments state that geophysical exploration activities cause ''disturbance'' and related erosion impacts, such as landslides and slumps. Therefore, they recommend that the CX not be adopted.

Response: Available data supports adoption of the CX. The CX 11.9B(6) was established after careful review of 244 geophysical exploration projects previously approved by the BLM. The data examined for these projects included project-specific information on the location, the type of NEPA review performed, predicted environmental impacts of proposed actions, and actual environmental impacts after the action was completed. No projects were shown to have significant impacts, individually or cumulatively. According to the review of the NEPA analysis completed for these 244 geophysical exploration projects, including review of the effects of the completed projects themselves, predicted significant impacts, including erosion-related impacts as a result of geophysical exploration, did not occur. In addition, with respect to the resources mentioned in the comments, the BLM applies specific ''Terms and Conditions''—as indicated in number seven of the BLM Form 3150–4 and requires suspension of operations when unnecessary disturbance to soils may occur. This term and condition is a part of all geophysical Notices of Intent (see the BLM Form 3150–4). In addition, if the required ''extraordinary circumstances'' review conducted for any proposed action indicated such impacts as ''landslides'' and ''slumps'' might be significant, the CX would not be used.

Comment: Some comments state that the use of the geophysical exploration CX would have negative impacts on non-commercial uses, such as scientific, educational, recreational, aesthetic, and spiritual purposes.

Response: See response above. The BLM reviewed 244 geophysical exploration projects. None of the projects reviewed during the establishment of this CX resulted in a significant impact, either individually or cumulatively. In addition, the BLM will review all future projects against the DOI's ''extraordinary circumstances.'' If the review indicates that the action may have a direct relationship to other actions with individually insignificant, but cumulatively significant environmental effects (i.e., to non-commercial uses, such as scientific, educational, recreational, aesthetic and spiritual purposes), the CX cannot be used.

Comment: Some comments state that geophysical (e.g. seismic) exploration activities have potentially significant impacts to environmental and cultural resources.

Response: None of the 244 geophysical exploration projects reviewed during the establishment of this CX resulted in a significant impact, either individually or cumulatively. Further, the BLM believes the established permitting process ensures that if there are potential individually or cumulatively significant environmental effects, an EA or EIS, as appropriate, would be done. Included in the permitting process is the requirement to review the DOI list of ''extraordinary circumstances'' (516 DM 2.3A(3) & appendix 2) for every proposed action. ''Cultural resources'' are specifically provided for in this list. If the required ''extraordinary circumstances'' review indicated that significant impacts to environmental or cultural resources might occur, the CX would not be used.

Further, the use of the CX during the NEPA review process does not eliminate the need to comply with Section 106 of the National Historical Preservation Act (Pub. L. 89–665) or the Archeological Resources Protection Act (Pub. L. 96–95), or any other applicable resource protection law.

Comment: Some comments express concern that geophysical exploration activities can damage roadless areas by creating noticeable vehicle routes, which can attract traffic by ''unauthorized'' off-highway vehicle drivers.

Response: Historically, older geophysical exploration operations required the use of some type of road construction. These operations left travelways that would take time to completely reclaim. In the interim, these routes would remain visible and may have encouraged off-highway travel by some members of the public. Best management practices over time have reduced the visibility of noticeable vehicle tracks through project design features so that non-authorized use is discouraged. Further, the proposed CX was specifically limited to geophysical exploration projects that do not involve road construction. The BLM reviewed 244 geophysical exploration projects during the establishment of this CX. None of the projects resulted in a significant impact, either individually or cumulatively. As an additional limitation, the BLM has added a

requirement to this CX that when road construction is involved, the CX would not be used and additional NEPA review would be completed. Further, the proposed geophysical exploration activities can only proceed using this CX where none of the ''extraordinary circumstances'' apply (516 DM 2.3A(3) & appendix 2).

Comment: Some comments state that the proposed CX 11.9B(6) would ''wrongly exclude'' the covered actions from compliance with federal laws protecting wildlife, such as the ESA.

Response: The use of a CX does not eliminate the need to comply with Section 7 of the ESA or other federal laws. None of the 244 projects reviewed during the establishment of this CX resulted in a significant impact, either individually or cumulatively. Further, if the proposed geophysical exploration activity has the potential to significantly impact listed threatened or endangered species, or their critical habitat, ''extraordinary circumstance'' 2.8 (516 DM 2 appendix 2.8) applies, and an EA or EIS, as appropriate, is required.

Comment: Some comments state that weed invasion follows the network of seismic activities across the landscape, which can result in irreversible weed invasions that radically alter fire cycles and endanger wildlife habitat.

Response: None of the 244 projects reviewed during the establishment of this CX resulted in a significant impact, either individually or cumulatively. In addition, specific to the resource commented on, if the proposed geophysical exploration action may contribute to the introduction, continued existence, or spread of noxious weeds, ''extraordinary circumstance'' 2.12 (516 DM 2, appendix 2.12) would eliminate the decision-maker's ability to use CX 11.9B(6). An EA or EIS, as appropriate, would be required.

Comment: Some comments ask the BLM to revise the proposed geophysical exploration CX 11.9B(6) to prohibit seismic activity during migratory bird breeding season.

Response: None of the 244 projects reviewed during the establishment of this CX resulted in a significant impact, either individually or cumulatively. In addition, the DOI and the BLM use a NEPA review process that ensures that if any of the ''extraordinary circumstances,'' as defined in 516 DM 2.3A(3) and appendix 2, apply, a CX cannot be used. ''Extraordinary circumstance'' 2.2 (516 DM 2 appendix 2) affords protection specifically for migratory birds. Therefore, if a project design feature intended to provide protection of migratory bird breeding activities in an area occupied by these birds were to be refused by the applicant, or if its efficacy has not been sufficiently assured, an EA or EIS, as appropriate, would be required. Proposed actions or activities must be, at a minimum, (as is stated in the preamble to this section) consistent with Laws (such as the Migratory Bird Treaty Act (Pub. L. 86–732), DOI and BLM regulations, manuals, handbooks, policies, and applicable LUPs regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations.

Comment: Some comments ask the BLM to revise the proposed geophysical exploration CX 11.9B(6) to ensure that operations do not result in cumulative impacts.

Response: An activity that is subject to a CX by definition is an activity that has been found not to have significant impacts, individually or cumulatively. Geophysical exploration activities that would be authorized under the CX have been shown not to have significant impacts, either individually or cumulatively based upon the BLM administrative review of 244 geophysical exploration projects. The analysis report is available at the BLM Web site at *http://www.blm.gov/planning/news.html.* None of the NEPA documentation for the 244 geophysical exploration projects analyzed in the study during the establishment of the CX indicates the occurrence of significant impacts. The BLM also employs a NEPA review process that ensures, if any of the ''extraordinary circumstances,'' as defined in 516 DM 2.3A(3) and appendix 2, apply, a CX cannot be used. One of these ''extraordinary circumstances'' that precludes the use of a CX addresses cumulative impacts.

Comment: Some comments state that establishment of terms and conditions for specific proposed actions depends on the soil, weather, ground cover, and type of machinery to be used in each case; therefore, the proposed CX would not adequately account for these site-specific issues.

Response: The BLM agrees that the design of each proposed action depends on soil, weather, ground cover, and type of machinery to be used; however, as proposed actions are designed and then reviewed against the CX list, such actions or activities must be, at a minimum, consistent with the DOI and the BLM regulations, manuals, handbooks, policies, and applicable LUPs regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations. The geophysical exploration techniques, impacts resulting from the techniques, and the BLM's field personnel knowledge and experience in reducing impacts from this type of activity have improved over time. The lessons learned based on personal observation by field staff associated with the projects, field data collection through monitoring, and systematic evaluation of information received from the proponents has resulted in accumulation of professional knowledge that has led to development of design features that were not previously part of proponent geophysical proposals. Use of design features to minimize impacts to soil and ground cover are now routinely included based on local conditions. The BLM alerts proponents regarding resource values of concern in a given area, and proponents incorporate best management practices into the proposal so that impacts are now minimal. In addition, the BLM's review of 244 projects determined that there is no significant impact from this activity. Further, each proposed action is reviewed against the DOI's ''extraordinary circumstances'' as described in 516 DM 2.3A(3) and appendix 2. Any proposed geophysical exploration activity that does not satisfy these requirements must be analyzed through the EA or EIS process, as appropriate.

B(7) & (8)—Comments.

Comment: Several comments were received related to proposed CXs 11.9 B(7) for permitting infill wells within the [reasonable foreseeable development] RFD for an established geothermal field, and B(8) for the issuance of site licenses to operate geothermal facilities whose construction and operation were included in a utilization plan NEPA document. Comments addressed such concerns as the potential for geothermal activity to affect water-confining soil layers and potentially result in the loss of wetted playa areas; impacts on special-status species and endangered species and their habitats that may result from use of the proposed CXs; and currency of LUPs with respect to the ecological status of lands and waters under discussion. Some commenters sought to expand the use of these CXs beyond the State of Nevada; they felt that Nevada should not be granted special consideration over other states and asserted that projects in other states could meet the same criteria as used in Nevada. Commenters also asked why there was a need for further NEPA analysis, rather than a DNA, where the NEPA document for the field

development or the utilization plan included the activities proposed for Geothermal CX 11.9 B(7). In addition, comments expressed interest in clarification of what actions CX 11.9 B(8) was intended to cover, and what actions would be covered by methods of complying with the NEPA.

Response: Upon review of the BLM's NEPA compliance procedures, in general, and in consultation with CEQ, the BLM has decided not to finalize proposed CXs 11.9B(7) and 11.9B(8). As explained above in the description of modifications made from the January 2006 proposal, the BLM has determined first that, regarding B(7) (infill wells), a DNA combined with more focused development-stage NEPA documents should normally suffice for NEPA compliance, as some commenters suggested, and second, that a CX (or an EA) for B(8) is redundant and thus unnecessary because no new environmental impacts result from the administrative/ministerial action of issuing a site license where operation of the plant was already covered in the NEPA analysis and documentation prepared for the utilization plan. Both of these solutions are applicable nationwide. To the extent that comments express concern regarding particular resources, the method an agency uses to fulfill its NEPA obligations is distinct from the agency's continuing obligation to comply with other environmental protection statutes such as the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the Endangered Species Act, 16 U.S.C. 1531 *et seq.* (special status species are addressed as part of the BLM's conservation plans under Section 2 of the Endangered Species Act), and the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.* (land use planning). The BLM LUPs are routinely evaluated to determine whether the LUP decisions and NEPA analysis are still valid. All actions, including those categories of actions considered here, must be consistent with an approved LUP. Regardless of the age of the LUP(s) affected, each proposed action would also be evaluated on its own merits, and updated information provided as necessary in the more site- and/or more project-specific NEPA analysis. In most cases, for instance, the initial development plans for the types of actions contemplated here would have already been analyzed in a project-level NEPA document in addition to the LUP.

Responses to Specific Comments on Section 11.9—Categorical Exclusions

C. Forestry (Sub-Parts C(6)–(9))

Broad Concerns That Apply to the New Forestry CXs

Comment: Some comments state that the proposed Forestry CX parameters are inadequate to protect elements of the environment, specifically predatory bird nesting sites, woodpecker habitat, soils compaction, weed dispersal, small mammal burrows, and surface water quality.

Response: The BLM analysis available at *http://www.blm.gov/planning/news.html* demonstrates this is not the case. Three of the four proposed Forestry CXs, 11.9C(7)–(9), are based on three U.S. Department of Agriculture Forest Service (FS) CXs, their supporting data, and an analysis by the BLM demonstrating that such proposed actions and their environmental effects are comparable when the action is taken by the BLM. The FS considered the potential for significant effects during the NEPA review process (68 FR 44598–44608, July 29, 2003). Based on assessments of local wildlife habitat conditions after the actions were taken, no significant cumulative effects were observed by the FS. A few of the projects reviewed resulted in minor soil disturbance and compaction, and a few others showed that small numbers of noxious weeds or invasive plants entered the area where the trees had been removed. The FS subject-matter specialists and Responsible Officials found that these impacts were within forest plan standards and were not significant in the NEPA context (40 CFR 1508.27). Based upon the comparison between the FS and the BLM lands, policies, and business practices as outlined in the BLM analysis, the BLM actions are not expected to result in significant introductions, continued existence, or spread of noxious weeds or non-native invasive species. In addition, when applying the CXs to the BLM lands, the BLM only considers use of the CXs when there are no ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2.12), which will cause individually or cumulatively significant impacts on the human environment.

The fourth proposed CX 11.9C(6), which addresses sample tree felling (STF) to gather net timber volume data, is based on a 100 percent census of STF surveys conducted in five BLM management districts in western Oregon from October 1, 2001, through September 30, 2005. These five Districts (Coos Bay, Eugene, Medford, Roseburg, and Salem) wrote EAs for the timber sales that were associated with the 59 STFs performed. The EAs addressed a range of environmental impacts for the five districts including the types mentioned in the comments. The STF business practices and skills of those conducting the action on lands similar to the original five Districts are the same. The BLM believes there are sufficient data to show that no individually or cumulatively significant environmental effects were predicted or occurred as a result of the 59 STF surveys, and therefore the BLM is confident that no individually or cumulatively significant environmental effects will occur due to future STF actions within the Districts identified. The Lakeview District Klamath Field Office was inadvertently left out of the area of coverage of the proposed CX, but has been added to the revised CX proposal. Actions in the Klamath Field Office are the same as those taken in the five Districts identified above and result in the same non-significant environmental effects. In addition, proposed actions in the Klamath Field Office will also be subject to the ''extraordinary circumstances'' test, and are expected to have no significant environmental effects.

Comment: Some comments state that the BLM does not disclose that ''it is in the process of implementing several internal and administrative regulatory changes that, in addition to the proposed small timber harvest [CXs (11.9C(7)–(9)], will have a cumulative effect on the environment that has not been analyzed as required by law.'' The ''internal and administrative regulatory changes'' the comments refer to are the NWFP, the National Forest Management Act Planning regulations and the National Forest Management Act.

Response: The BLM disagrees with the comments, and believes that it is following CEQ guidelines by notifying the public on proposed changes to the 516 DM 11 (See 71 FR 4159–4167, January 25, 2006; see also *http://www.blm.gov/planning/news.html*). The new forestry CXs are specific to the DOI's 516 DM 11 for implementing NEPA within the BLM. A cumulative impacts evaluation in relation to the referenced ''changes'' is not appropriate, since there is no effect on the environment by this administrative change. The proposed CXs are part of the BLM's effort to update internal NEPA implementing procedures. The establishment of CXs, as internal agency procedures for implementing the NEPA, has been held not to require the preparation of an EA or an EIS, under the CEQ regulations, see *Heartwood,*

Inc. v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), aff'd 230 F.3d 947, 954–55 (7th Cir. 2000). The final determination on whether a specific proposed forestry-related action will have a significant cumulative effect, is completed at the time the proposal is reviewed and evaluated using the ''extraordinary circumstances'' test, or if necessary, through an EA or EIS.

Comment: Some comments state that the forestry activities proposed for CX process review are ''beyond the intended scope and purpose of the categorical exclusion clause'' in NEPA; and by ''exempting such activities, the BLM is essentially advocating that actions with significant environmental impacts escape close scrutiny under the requirements of NEPA.''

Response: The BLM disagrees that using a categorical exclusion allows actions with significant environmental impacts to escape scrutiny. To avoid repetitive documentation of known non-significant effects, the CEQ regulations (40 CFR 1500.4(p), 1507.3 and 1508.4; also see CEQ's testimony before the House Committee on Resources Task Force on Updating the NEPA Lessons Learned Oversight Hearing on November 17, 2005), provide for defining ''categories of activities'' whose effects do not normally require review in an EA or an EIS. The process of defining these categories is an integral part of the NEPA regulatory framework. In this case, the BLM collected data on the NEPA analyses used for sample tree felling (CX 11.9C(6)). The BLM analyzed the NEPA review activities documented by the FS related to live tree harvests, salvage tree harvesting, and sanitation harvesting projects. The BLM and the FS data and analysis support a determination that (1) the proposed Forestry CX activities do not have significant effect(s) on the human environment, and (2) these CXs meet the intent of the CEQ regulations that govern the establishment of CXs. The BLM is establishing these categories of Forestry activities because the appropriate implementation of the NEPA requires concentrating agency analysis efforts on major federal actions and not expending scarce resources analyzing agency actions where experience has demonstrated the insignificance of predictable effects.

Comment: Some comments state that the new live tree harvest, salvage tree harvesting, and sanitation harvest CXs 11.9C(7)–(9) will, when combined with new opportunities for energy development, affect available open space and could be ''devastating to the environment,'' specifically air and water quality, wildlife, and tourism.

Response: The BLM disagrees that the use of CXs 11.9C(7)–(9) will affect available open space, or be ''devastating'' to the environment and tourism. As discussed above, the BLM analyzed the FS information and determined the BLM forestry activities included in the CXs and their effects are comparable. The FS reviewed activities related to live tree harvests, salvage tree harvesting, and sanitation harvesting projects, and determined that the proposed CXs do not have significant effects on the human environment, including air and water quality and wildlife. Further, if there are ''extraordinary circumstances'' listed in 516 DM 2, appendix 2 that apply, the Responsible Official cannot use the new forestry CXs. The use of the CX does not eliminate the need to comply with other applicable resource protection laws. The BLM will determine whether a specific proposed Forestry-related action will have a significant cumulative effect on the environment, including wildlife and tourism values, at the time the proposal is reviewed using the extraordinary circumstances test. If the proposal does not pass the extraordinary circumstances review, an EA or an EIS will be completed.

Comment: Some comments state that tree harvesting is ''never completely uncontroversial, and it often imposes significant impacts on the terrestrial and aquatic ecosystems of the area.'' The comments further state that a CX that enables tree harvesting for any reason provides insufficient opportunity for public review.

Response: Based on the BLM's reviews of the FS tree harvesting projects, the BLM determined that similar projects would have similar effects on the BLM land, and would have no significant effects on the terrestrial and aquatic ecosystems in the area of the projects. In the development of the three harvesting and salvaging CXs, the FS reviewed the effects of 154 tree harvesting projects across the country, with actions similar to those allowed in the three categories (See *http://www.fs.fed.us/emc/nepa/library/20030108_fr_notice.pdf*). Prior to implementation, none of the projects reviewed predicted significant effects on the human environment. After implementation, on-site reviews of environmental effects of these projects were conducted by interdisciplinary teams of resource specialists. The reviews by the BLM concluded that none of the projects had a significant effect on the human environment. In addition, the BLM applies the review of extraordinary circumstances to projects, including whether an action has highly controversial environmental effects or involves unresolved conflicts concerning alternative uses of available resources. If one or more of the extraordinary circumstances listed in 516 DM 2, appendix 2.3 apply, the Responsible Official cannot use the new forestry CXs. Applying a CX to a proposed action does not preclude public involvement with the proposal. Interested publics will be involved as appropriate throughout the decision-making process. The type and level of public involvement should be commensurate with the decision at hand. Forest management decisions, including those where a CX is applied, are protestable under 43 CFR 5003.3.

Comment: Some comments state that using the FS data to justify the proposed BLM live tree harvest, salvage tree harvesting, and sanitation harvesting activities CXs 11.9C(7)–(9) is inappropriate because the FS lands and projects in ''different regions may not be comparable for a variety of reasons.''

Response: The data is applicable to the BLM lands because forestry related projects and their predictable environmental impacts are substantially the same on the BLM and the FS administered public lands as demonstrated by the comparability analysis conducted by the BLM (*http://www.blm.gov/planning/handouts/CX_Report-Forestry-FS_CXs.pdf*). Laws governing forest management for the BLM and the FS are very similar. While the agencies have separate enabling legislation, both require that forest lands be managed according to sustained-yield and multiple-use principles. As part of land management, the agencies are further mandated to meet the requirements of environmental laws including the Clean Water Act, Clean Air Act, Endangered Species Act, and the National Historic Preservation Act when making decisions. Finally, the proposed actions designed and reviewed for application of a CX must be, at a minimum, consistent with DOI and BLM regulations, manuals, handbooks, policies, and applicable LUPs regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations.

Comment: Some comments state that standing dead trees (snags) and dying trees ''play an important ecosystem role'' that is ''highly valued'' and ''under represented.'' Some comments state that the BLM and the FS policies for conserving snags do not reflect an adequate appreciation of the current state of knowledge about their ecological value. Still other comments want the BLM to develop ''snag

retention guidelines for each physiographic province * * *'' They state that until this is done, the BLM should not allow any snag larger than 20 inches diameter at breast height (dbh) to be removed based on a report prepared for the DOI Final Draft Recovery Plan for the Northern Spotted Owl issued in1992.

Response: The BLM agrees that standing dead and down woody material is an important component of a healthy forest ecosystem. The BLM's LUPs in the Pacific Northwest are based on the *Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl* (ROD) and *Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl* (S&G), April 1994. The Final Draft Recovery Plan for the Northern Spotted Owl (1992), referenced by the commenters, was considered when writing the Final Supplemental EIS and Record of Decision (ROD) (page 17). The S&G addressed physiographic provinces (Introduction page A–3) and both the retention and removal of snags (S&G, pages C–14, 15). The ROD and S&G do not set a diameter limit on snag retention. Since the BLM LUPs are based on the ROD and S&G, the BLM rejects setting an arbitrary limit of 20 inches dbh on snag retention.

Comment: Some comments express preference for a 100 or 250-acre upper size limit on the new forestry CXs 11.9C(7)–(9) while others ask that the upper limit be reduced to 10 acres for all potentially eligible harvest activities. Some comments state that establishing ''a higher [acres] limit for salvage and insect/disease timber sales makes absolutely no sense'' and that ''allowing commercial projects to be included heightens [environmental] risk * * *.''

Response: The BLM is finalizing the proposed CX language as written. The BLM analyzed the FS data, and determined that the FS size acres limits, which are based on their data, are appropriate for the CXs. Having the BLM and the FS using the same size limits for similar treatments will help maintain consistency between the agencies. The BLM would need to gather new data to support using a CX for larger treatment areas. The BLM's CXs 11.9C(7)–(9) are similar to three FS forestry CXs formally adopted in 2003 (68 FR 44598–44608, July 29, 2003). The FS instituted their forestry CXs (Forest Service Handbook (FSH) 1909.15, Ch. 31.2(12–14)) based on 154 completed FS projects that had sufficient NEPA analysis documentation. The FS data show that no individually or cumulatively significant effects resulted when the activities described in the three FS forestry CXs were used. Since no significant effects occurred at the current size limits, there is no logical reason to arbitrarily reduce the size limits. For additional information on the FS data collection and analysis process and the method used to determine reasonable project area limits, refer to 68 FR 44598–44608, July 29, 2003, and supporting documents and the BLM analysis at *http://www.blm.gov/planning/handouts/CX_Report-Forestry-FS_CXs.pdf*. The BLM also rejects the notion that allowing commercial use of the harvest material increases environmental risks. The effects on the ground of a project would be the same regardless of whether or not someone is likely to profit from the venture.

Comment: CXs 11.9C(7)–(9) provide for ''temporary road construction.'' Some comments ask the BLM to define ''temporary road'' and other comments ask the BLM to clearly define what constitutes temporary road construction to ''minimize impacts.'' Some comments state that limiting temporary road construction to ''no more than 0.5 mile[s]'' is too constraining, while others state that any road building causes significant environmental impacts.

Response: The BLM agrees that it needs a definition for temporary roads. For use of the specific forestry CXs 11.9C(7)–(9) the BLM has rewritten the CXs to define temporary roads based on the definitions in the FS regulations, which will meet the BLM needs and ensure compatibility between agencies for these specific CXs. The BLM rejects the notion that any road construction causes significant environmental impacts. The BLM reviewed the FS data where 35 of the 154 timber sales reviewed by the FS required temporary road construction. The FS found no significant effects in reviewing these projects. The average length of temporary road construction for the 35 sales was 0.5 mile. Based upon its analysis, the BLM determined that temporary road construction when the CX criteria are met will be non-significant. Therefore, it is appropriate to use the 0.5-mile maximum length limit for temporary road construction for these CXs, to maintain consistency between agencies.

Comment: Some comments state that the BLM should conduct an in-depth cost-benefit analysis of the proposed forestry CXs: 11.9C(6)–(9).

Response: A forestry cost-benefit analysis of each CX is not necessary because the BLM determined that the cumulative economic impact of the proposed changes to 516 DM 11, including adoption of CXs 11.9C(7)–(9) would not have an annual effect of $100 million or more on the economy or adversely affect productivity, competition, jobs, the environment, public health or safety, or state, tribal or local governments. This determination was reported in the 71 FR 4161, January 25, 2006. The expected economic result from instituting the new forestry CXs in 516 DM 11.9C is efficient reallocation of resources needed to complete NEPA review from actions, which do not have a significant effect to those, which may have a significant effect.

Comment: Some comments question the amount of money the BLM charges for permits and timber.

Response: This question is not relevant to the proposed revisions in 516 DM 11 regarding CXs for permits. Market values are a local issue, and values for resources are set by the BLM Districts based on local economies.

Comment: Some comments noted that three of the ''proposed new CXs 11.9(7)–(9) mirror new CXs developed by the Forest Service.'' They ''by reference'' reiterate their concerns about these FS-based Forestry activities published in the 68 FR 1026, January 8, 2003, in their comments on the BLM proposal to adopt CXs 11.9(7)–(9).

Response: The concerns expressed in the comment are addressed in this notice of final action where relevant, and in the case of other concerns, the relevant FS responses to comments received and published in 68 FR 44598–44608, July 29, 2003, are by reference included in this notice of final action. The FS **Federal Register** notice may be obtained electronically at *http://www.fs.fed.us/emc/lth/notice.pdf.*

C(6)—Comments.

Comment: Some comments ask the BLM to provide a ''sufficient explanation'' for why the proposed Sample Tree Felling (STF) CX 11.9C(6) is limited to certain areas within Oregon. Some comments suggest that the STF CX 11.9C(6) be expanded to all of Oregon, other Western States, or BLM-wide.

Response: While the STF survey method has been used elsewhere, the BLM reviewed NEPA analysis specifically to consider the environmental effects of the STF timber volume survey method within the western Oregon lands managed under the Oregon and California Lands Act (Pub. L. 75–405, August 28, 1937, as

amended by Pub. L. 426, June 24, 1954). The BLM's Lakeview District, Klamath Falls Resource Area has been added to the BLM management units that are eligible to use CX 11.9C(6), since it is part of the Oregon and California Lands Act area where the NEPA analysis and implementation and effects data are available. Omission of the Klamath Falls Resource Area in CX 11.9C(6) was unintentional. Therefore, Lakeview District, Klamath Falls Resource Area is added to the CX as finalized for these areas. The Prineville District is not located within the Oregon and California Lands Act area reviewed, and has not been included in the CX.

Comment: Some comments state that the STF CX 11.9C(6) violates the agreement that the BLM made in a federal court (*Umpqua Watersheds, et al.*, v. *BLM,* No. 00–1750–BR, U.S.D.C. Or., Stipulation for Dismissal and Order, 13 January 2003). These comments point out that the new CX will eliminate a court settlement requiring the BLM to restrict STF to trees under 20″ dbh.

Response: The CX 11.9C(6) was proposed to address the terms of the agreement which states that: ''Unless or until there is legislative, regulatory, or other authority adopting a NEPA procedure for sample tree felling or exempting such actions from NEPA procedures, sample tree felling for timber sale cruising will not occur prior to the BLM issuing any final decision document on any BLM District in western Oregon * * * of any trees over 80 years old * * * of any Douglas-fir trees 20.0 inches diameter at breast height (dbh) or greater.'' Thus, rather than constituting a violation of this agreement, this change in the NEPA procedures for STF was specifically provided for and anticipated in the stipulated order resulting from the settlement agreement. CEQ regulations at 40 CFR 1507.3 and 1508.4 give the BLM the authority for adopting a NEPA procedure to categorically exclude proposed actions, and based on the analysis referred to in previous responses and the analysis available at *http://www.blm.gov/planning/handouts/CX_Report-Sample_Tree_Falling.pdf,* the BLM determined that a CX was appropriate for STF. CEQ's testimony before the House Committee on Resources Task Force on Updating the NEPA Lessons Learned Oversight Hearing on November 17, 2005, reemphasized the responsibility of federal agencies to establish appropriate new CXs to promote efficient NEPA compliance.

Comment: Some comments state that the proposed STF activities in CX 11.9C(6) could have significant impacts on the environment. Other comments state that the STF CX 11.9C(6) analysis report (*http://www.doi.gov/oepc/cx_analysis.html* or *http://www.blm.gov/planning/news.html*) is flawed because none of the NEPA processing documents specifically identified STF as the proposed action category that could be tied to a finding of no individually or cumulatively significant impacts.

Response: Based on the comment received, the BLM revisited the 2001 through 2005 timber sale EA data used for the proposed STF CX, which came from five BLM Districts in western Oregon (Coos Bay, Eugene, Medford, Roseburg, and Salem) that have historically used STF extensively. In the timber sale EAs analyzed, four of the five Districts' data (Coos Bay, Eugene, Medford, and Salem) did not specifically address the impacts of STF. The Roseburg District EAs did specifically address cumulative effects of STF as the proposed action category in their 14 project EAs between October 1, 2001, and September 30, 2005. Based on the comments received, the BLM conducted a further review of six District-wide programmatic STF EAs (Coos Bay, Eugene, Medford, Roseburg, Salem, and Lakeview District—Klamath Falls Resource Area) completed prior to the 2003 Court Stipulation for Dismissal and Order (*Umpqua Watersheds, et al.*, v. *BLM,* No. 00–1750–BR, U.S.D.C. Or., Stipulation for Dismissal and Order, 13 January 2003). The six District-wide programmatic EAs were written specifically to analyze STF in the six western Oregon districts. Each programmatic EA analyzed STF effects, and none were found to be significant. Analysis from both data sets support the conclusion that performing STF activities will cause no individually or cumulatively significant impacts on the human environment when the STF activities are as described in CX 11.9C(6) and when no ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) apply. In all cases where STF was implemented on the ground, the actual impacts of STF were the same as the predicted impacts, and caused no individual or cumulative significant impacts.

Comment: Some comments state that STF is a connected action not subject to categorical exclusion. They posit that a proposed STF action is ''always connected to a commercial timber sale'' so categorically excluding an STF is a ''segmenting action'' which could prevent appropriate consideration of cumulative impacts.

Response: The BLM position is that STF and timber sales are not connected actions under the NEPA. There are numerous administrative and information gathering activities that occur on forested BLM lands that may or may not be within proposed timber sale areas. Many of these activities, e.g., stand exams, prescription inventory plots, wildlife surveys, property line and boundary surveys, are typically performed through a basic data collection CX. These activities are separate actions that are carried out in different time periods to provide the BLM with information to expand the knowledge of resource values. Collecting inventory data through stand exams, conducting wildlife surveys, or felling sample trees to ascertain volumes is not directly connected to proposed actions, and does not make a resource use allocation decision. If a subsequent timber sale project is proposed, the BLM is mandated by regulation (40 CFR 1507 and 1508.4) and the DOI (516 DM 2) to determine the scope of the proposed timber sale, consider alternative actions, and assess the affected environment through an EA or EIS, as warranted, including potential cumulative impacts.

Comment: Some comments state that the proposed STF CX 11.9C(6) violates a NEPA requirement that actions not be taken to implement a decision before a decision is made (e.g., cutting down sample trees in units that are or could potentially be allocated in a LUP for a timber sale). They state that the BLM is committing resources prejudicing the ultimate decision.

Response: The BLM disagrees. Sampling the potential timber yield of an area to obtain basic resource inventory data is not equivalent to making a decision regarding resource use allocation. There are instances where for various reasons proposed timber units or sales have not been offered, even though sample trees were cut to gather information on stand harvest potential. Cutting individual sample trees at an average density of less than one tree per acre does not constitute an irrevocable commitment to sell the timber stand measured by this method.

Comment: Some comments state the BLM should use the NWFP standards for exempting thinning projects in stands less than 80 years old from Regional Ecosystem Office (REO) review. They state that this action would help prevent the BLM ''abuse of discretion in thinning in young stands to restore old-growth conditions in Late Successional Reserves (LSR).'' The comments suggest that the REO exemption criteria are based on credible science that will help to build public trust/support.

Response: No changes to the NWFP are proposed with this CX, and the BLM will continue to follow the standards of the NWFP when implementing the CX. The BLM will continue to follow the guidance contained in the REO Memorandum of April 20, 1995, ''Criteria to Exempt Specific Silvicultural Activities in LSRs and MLSAs from REO Review.'' By following the NWFP standards and the REO guidance when using the CX, the BLM concludes that no additional constraints need be applied, no ''abuse in discretion in thinning'' will occur, and no significant impacts will result.

Comment: Some comments state that the number of trees to be sampled on average per acre is too small while others state the sample size is too large.

Response: The numbers of trees sampled is not a randomly chosen number that is easily or arbitrarily increased or decreased. The numbers of trees to be sampled are determined by a statistical equation (refer to the current the BLM Timber Cruising Handbook, H–5310–1) and reflect past and projected future BLM practices. The total number of sample trees required is less than one tree per acre on average as shown by the data and ongoing BLM forestry management activities.

Comment: Some comments state that using data from small tree STF to conclude that there are no impacts to old-growth STF is not logical. In addition, these data fail to reveal the real and cumulative environmental impacts of cutting old-growth STF. A related comment made is that if the tree is older it will be larger, and therefore, more likely to be included in the STF sample.

Response: Based on the comments received, the BLM conducted a further review, which included six pre-2001 District-wide programmatic EAs for STF in Coos Bay, Eugene, Medford, Roseburg, Salem, and Lakeview District, Klamath Falls Resource Area. These EAs analyzed the effects of STF on trees of all ages, including older stands with timber greater than 80 years of age. Even with a greater number of large trees sampled, the environmental impacts are not significant. Based on the additional review of the STF Programmatic EAs and the findings published in the 71 FR 4159–4167, January 25, 2006, the BLM concludes that when there are no ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2), the 11.9C(6) CX will not cause individually or cumulatively significant impacts, regardless of the age of the stand. The comment that a larger tree may be more likely to be included in the sample is not relevant to the use of a CX, since it does not change the conclusion that the sample size would average less than one tree per acre, and there would be no significant impacts from this level of action.

Comment: Some comments state the BLM should correct the date on the ''CX Project—Sample Tree Felling'' analysis report (dated January 3, 2005), when the actual date was January 3, 2006.

Response: The typographic error in the date of the analysis report has been corrected. The STF data analyzed were compiled in November 2005. The NEPA review process findings discussed in the analysis report came from STF projects performed between October 1, 2001, and September 30, 2005. The BLM subsequently examined pre-2001 programmatic EAs which resulted in the same finding—no individually or cumulatively significant effects occurred as a result of STF activities (see last comment and response).

Comment: Some comments state that the ''CX Project—Sample Tree Felling'' analysis report should have documented the high costs associated with preparation of EAs.

Response: The requested cost-benefit analysis is not required for this CX.

Comment: Some comments state that STF sampling should be limited to young timber stands.

Response: The BLM disagrees. The STF is used to obtain volume estimates based on generally accepted survey methods regardless of the age of the stand, which requires cutting representative trees, whether young or old. STF has been determined to be a more accurate method of determining tree volume in large trees because it is superior to other methods in detecting defect and measuring tree taper.

Comment: The number of data analysis ''flaws'' is a concern. For example, failure to consider impacts on old-growth and reserve land allocations, flawed data collection methods, and analyzing STF data for only young trees to justify STF in old-growth forests. The BLM's assumptions and conclusion that STF does not constitute a significant action as defined by NEPA, could be wrong.

Response: Based on the comments received, the BLM revisited the data used to prepare the ''CX Report—Sample Tree Felling'' posted at *http://www.doi.gov/oepc/cx_analysis.html* and *http://www.blm.gov/planning/news.html.* The BLM then conducted a further review of six pre-2001 District-wide programmatic EAs for STF (Coos Bay, Eugene, Medford, Roseburg, Salem, and Lakeview District, Klamath Falls Resource Area). These EAs included an analysis of the effects of STF on trees of all ages. The data analyzed by the BLM supports the conclusion that performing STF activities as described in the CX 11.9C(6), regardless of the timber age, and when there are no ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2), will cause no individually or cumulatively significant impacts on the human environment.

Comment: Some comments state that hundreds of old-growth trees will be removed if the STF CX 11.9C(6) is instituted.

Response: By its own terms, the STF CX 11.9C(6) limits felling, bucking, and scaling sample trees to an average of one tree per acre or fewer. The CX does not include yarding and removal (harvesting) of trees; therefore, generally, the trees felled will remain in situ.

Comment: Some comments state the BLM should clarify the language used in CX 11.9C(6). There was concern about: (a) Interpretation of the qualifier ''approximately one [tree] per acre;'' (b) the purpose of the reference to ''use of ground-based equipment;'' (c) whether ''temporary'' roads are considered roads in this context; and (d) what is meant by the timber yarding text. Some comments state that the CX language seems to ''be a bit open-ended.''

Response: The CX language for 11.9C(6) has been revised to clarify that the allowable action or activity is ''less than one tree per acre on average'' and the only tools permitted are ''gas-powered chainsaws and handtools.'' Road and trail construction (of any type) and ''timber yarding'' are expressly prohibited. The modifications tighten the language.

C(7)—Comments

Comment: Some comments state that the 70-acre size threshold is excessively large for a ''small'' timber sale. They state that a 10-acre limit would be more appropriate based on ''interim policy'' issued in the 52 FR 30935, August 10, 1987, and reissued in the 53 FR 29505, August 5, 1988, and again revised in the 57 FR 43180, September 18, 1992.

Response: The BLM disagrees. The FS updated its ''interim policies'' to set the 70-acre limit based on a relatively recent analysis of relevant data (68 FR 44598—44608, July 29, 2003). The BLM reviewed the FS changes in acreages over the 15-year period from 1987 to 2003, which resulted in a different position from past interim policies, and concluded that the data supported a FS size limit change from 10 acres in 1987 to 70 acres in 2003. The BLM determined that the 70-acre limit is appropriate to meet the BLM's needs, based on its review and comparability

analysis of the FS data, which was found to have no individually or cumulatively significant environmental effects. Using a 70-acre limit for both the BLM and the FS will help maintain consistency between the agencies when applying CXs. The BLM concluded from this review that there would be no significant effect, individually or cumulatively, from the 70-acre size limit for these actions on public lands.

Comment: Some comments support the ''even-aged regeneration'' limitation, while others ask that it be stricken from the 70-acre live tree harvest CX 11.9C(7) language.

Response: The BLM is not changing the even-aged regeneration harvest limitation. Even-aged regeneration harvests involve a different scope of environmental effects, which exceed the supporting data for the live tree harvesting CX. Uneven-aged harvest systems (individual tree selection and group selection) maintain the canopy of a forest stand; and therefore, have relatively little effect on the structural and aesthetic properties of stands. Even-aged regeneration harvests, such as clearcutting, seed tree, and shelterwoods, were excluded from use in CX 11.9C(7). The limitation was derived from the FS data that showed the action described in the CX to have no individually or cumulatively significant environmental effects, and which the BLM review and analysis concluded would cause no significant effects on the BLM lands. In addition, the BLM will apply the ''extraordinary circumstances'' test to individual actions covered by the CXs.

Comment: Some comments ask the BLM to be more ''inclusive of a greater range of possible live-tree cutting activities, whether to accomplish fuel reduction, forest health, wildlife, pre-commercial thinning, or commercial timber sale objectives.''

Response: The CX 11.9C(7) language includes several examples of when it may be employed correctly; however, this is not an exhaustive list of potentially suitable applications. The live tree harvest CX focuses on small timber harvests of 70 acres or less regardless of the reasons for the harvest and specifically states the examples ''may include'' and ''but are not limited to'' those examples given in the CX. Therefore, the activities listed above could be covered by this CX if they meet all the CX qualifying criteria and none of the ''extraordinary circumstances'' as defined in 516 DM 2.3A(3) and appendix 2, apply.

C(8)—Comments.

Comment: Some comments ask the BLM to define ''dying tree'' because ''most mature trees are in some state of decadence.''

Response: In the context of proposed CX 11.9C(8), a dying tree is a standing tree that has been severely damaged by forces such as fire, wind, ice, insects, or disease, and that in the judgment of an experienced forest professional or someone technically trained for the work, is likely to die within a few years.

Comment: Some comments reference scientific findings that salvage tree harvesting will increase soil erosion and sedimentation through multiple mechanisms. Other comments ask the BLM to consider the scientific evidence that salvage tree harvesting is harmful to the environment and increases wildfire risk.

Response: The BLM reviewed the FS data and practices, and determined that none of the sampled FS projects resulted in individually or cumulatively significant environmental effects. This indicates that agency practices and guidelines are effective at mitigating environmental impacts, including soil erosion, sedimentation, and fire risk. The BLM's salvage tree harvesting practices, guidelines and project effects are similar to the FS (*http://www.blm.gov/planning/handouts/CX_Report-Forestry-FS_CXs.pdf*). Therefore, the BLM concludes that by implementing similar salvage tree harvesting practices and guidelines, the BLM's salvage tree harvesting projects that use CX 11.9C(8), will have no significant impacts on environmental conditions including soil erosion, sedimentation, or increased fire risk. If one or more of the extraordinary circumstances listed in 516 DM 2, appendix 2 apply, the Responsible Official cannot use the new forestry CXs.

Comment: Some comments posit that there is sufficient scientific evidence available that contradicts the ''finding that no significant impacts'' occur when the salvage tree harvesting CX 11.9C(8) criteria are used. They reference several scientific publications that support a conclusion that salvage tree harvesting is damaging to the human environment.

Response: The BLM concludes that salvage tree harvesting will not have significant effects on the environment based on the review of the FS data where none of the FS sampled projects showed significant environmental impacts. As some scientific publications point out, salvage activities can have negative environmental impacts, depending on the condition of the site, the harvesting system, time of the year, and other factors. However, both the FS and the BLM practices and guidelines have been developed with regard to soil and water protection on appropriate sites that will lead to no significant effects. This indicates that agency practices and guidelines are effective at mitigating environmental impacts, including soil erosion, sedimentation, and fire risk. When designing salvage projects, the BLM uses an extensive array of guidelines and procedures to prevent and mitigate negative environmental impacts during these activities. The BLM's salvage tree harvesting practices and guidelines are similar to the FS (*http://www.blm.gov/planning/handouts/CX_Report-Forestry-FS_CXs.pdf*). Therefore, the BLM concludes that by implementing salvage tree harvesting practices and guidelines similar to those implemented by the FS; the BLM's salvage tree harvesting projects that use CX 11.9C(8), will have no significant impacts on environmental conditions including soil erosion, sedimentation, or increased fire risk. The Responsible Official must consider the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) before deciding if a proposed action qualifies for using the CX. If one or more of the ''extraordinary circumstances'' listed in 516 DM 2 appendix 2 apply, the Responsible Official cannot use the new forestry CXs.

Comment: Some comments ask the BLM to provide the scientific information necessary to justify an implied assumption that salvage tree harvesting has less environmental impacts than other types of tree harvesting.

Response: Implied assumptions have not been used, nor has the BLM stated whether salvage tree harvesting has more or less environmental impacts than other types of tree harvesting. The purpose of the CX is not to compare the environmental effects of different types of tree harvesting, but to determine whether a CX for salvage tree harvesting is appropriate. The salvage tree harvesting CX 11.9C(8) is proposed based on the BLM's review of the FS conclusion that implementing the CX criteria will ensure that no individually or cumulatively significant impacts on the human environment will occur (68 FR 44598–44608, July 29, 2003). Where significant effects may occur, the FS concluded that their consideration of the FS ''extraordinary circumstances'' (FSH 1909.15, Ch. 30, Sec. 30.3, para. 2) would not allow the use of the CX. The BLM has completed a comparison and finds the FS CX to easily compare with the BLM CX; and therefore, will consider using this CX only when the CX qualifiers apply in full and when none of the DOI ''extraordinary circumstances'' apply (516 DM 2.3A(3)

and appendix 2). The harvest activity acreage limits were established by the FS based on review and analysis of the data used to establish the CXs (*http://www.fs.fed.us/emc/lth/1998_details.pdf*). The BLM concurs with the conclusions drawn by the FS, based on similar management practices and resulting environmental effects. The BLM concludes that with the acreage limitation and other criteria in place, the actions covered under the salvage tree harvesting CX will have no significant effect on the environment, individually or cumulatively.

Comment: Some comments state that salvage tree harvesting harms species protected by the ESA, that the CX fails to acknowledge that large snags provide valuable habitat and contribute little to fire hazard, or that salvage tree harvesting has significant impacts on woodpeckers.

Response: The BLM must ensure that any action authorized, funded, or carried out by its Responsible Officials is not likely to jeopardize the continued existence of any endangered, threatened, or proposed species (such as the woodpecker mentioned in the comment above), or result in the destruction or adverse modification of designated critical habitat. The BLM is required to comply with Section 7 of the Endangered Species Act, regardless of the type of NEPA document completed. The Responsible Official cannot use the salvage tree harvesting CX 11.9C(8) if any of the ''extraordinary circumstances'' in 516 DM 2.3A(3) and appendix 2 apply. Extraordinary circumstance 2.8 (516 DM 2 appendix 2) specifically prohibits the application of a CX review process if there is the potential to have a significant impact on listed species or their critical habitat.

Comment: Some comments ask the BLM not to salvage log and gave the following reasons: Some forested areas are designated as ''Late Successional Reserves'' or ''Critical Habitat Units'' where the management goals are incompatible with salvage tree harvesting; salvage tree harvesting eliminates important stand history data, structure, variability, and complexity; large, decay resistant snags and logs are important ecologically; and the large pulse of dead wood created by disturbance (such as fire and disease) is significant for an ecosystem's recovery over the long-term.

Response: Management goals in LSRs and salvage tree harvesting are compatible. For example, the 1994 NWFP and the six 1995 Western Oregon RMPs provide guidance for management of federal forest lands in western Oregon. The NWFP ROD identified specific conditions in which salvage tree harvesting could take place without negatively affecting the attainment of LSR goals (NWFP ROD, *Standards and Guidelines for Management of Habitat for Late Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl,* Guidelines for Salvage pp. C13–C16). Salvage activities can have negative environmental impacts, depending on the condition of the site, the harvesting system, time of the year, and many other factors. However, both the FS and the BLM practices and guidelines have been developed with regard to soil and water protection on appropriate sites that will lead to no significant effects. For example, in the area covered by the NWFP, the ROD identified specific conditions in which salvage tree harvesting could take place without negatively affecting Late Successional habitat goals. All actions must conform to the LUP management guidelines regardless of the level of NEPA analysis completed (43 CFR 1610.5–3).

Comment: Some comments state, ''salvage tree harvesting is not compatible with contemporary ecosystem-based management.''

Response: Salvage tree harvesting is one of many methods used to achieve a goal on the landscape, and is compatible with ecosystem-based management. The BLM uses ecosystem management to look at the big picture, beyond federal agency boundaries, and to work closely with other land managers, both public and private. When analyzing effects, the BLM addresses the long-term consequences of today's decisions, analyzing effects to various resources as interrelating parts of systems rather than as individual components to be managed separately. When implementing decisions, the BLM uses many tools. Salvage tree harvesting is one of the tools used to achieve on-the-ground goals.

Comment: Some comments state that there is an increased risk that a ''commercial'' salvage tree harvesting project will ''escape'' sufficient environmental analysis to prevent significant environmental impacts.

Response: The BLM disagrees. The FS data were reviewed for this activity, and demonstrate that no individually and cumulatively significant environmental impacts are likely to occur if the salvage tree harvesting CX criteria apply and if a determination is made that none of the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) apply. The BLM determined that establishing the CX is appropriate. The analytical findings did not differentiate between commercial and non-commercial activities. The effects on the ground of a project would be the same regardless of whether someone is likely to profit from the venture.

Comment: Some comments state that there are increased fire risks associated with salvage tree harvesting which will be overlooked in the CX review process.

Response: Based on the BLM review and analysis of the data, the BLM concludes that actions qualifying for the CX will not cause a significant increase in fire risk or fire hazard.

Comment: Some comments ask the BLM to consider the effects of salvage tree harvesting by preparing a ''new programmatic EIS for young complex forests'' because the FS and the BLM ''have [not] fully disclosed and considered current scientific understandings about the role of fire in forest development.''

Response: The role of fire in forest development is beyond the scope of the proposed action.

C(9)—Comments.

Comment: Some comments state that the phrase ''and adjacent live uninfested/infected trees as determined necessary'' should either be eliminated or quantified to show that a state licensed, responsible FS or BLM consultant, employee, or expert in the field, has validated and documented the need to harvest adjacent trees.

Response: Federal agency specialists are qualified to make determinations necessary in order to carry out their work in support of the federal government, and are not required to have state licenses. A forester or trained person determines if a tree adjacent to an infected tree should be removed to reduce the chance of spreading insects or disease to the rest of the timber stand. Typically trees are harvested that are expected to die within a year and have indicators such as: No new growth, lack of leaves during the growing season, yellowing needles, loss of needles or leaves in the tree crown, or are immediately adjacent to dead trees recently killed by root rot. Sanitation tree harvesting would not remove all defective trees as many are left for wildlife and other resource values.

Comment: Some comments state that the BLM overestimates the negative effects of insects and disease and fails to consider beneficial effects.

Response: The BLM agrees that there are both negative and positive effects from insect-infested and diseased trees. However, the BLM is not placing value judgments on the positive or negative effects, but is premising this CX on its judgment that a FS analysis effort correctly found that the effects of sanitation harvesting up to 250 acres

when specific criteria are met will have no significant effect, individually or cumulatively. The harvest activity acreage limits were determined by the FS based on review and analysis of the data used to establish the CXs (*http://www.fs.fed.us/emc/lth/1998_details.pdf*). The BLM concurs with the conclusions drawn by the FS and concludes that for BLM actions, due to similar management practices in similar ecosystems, the resulting environmental effects on public lands will be not significant, individually or cumulatively. Further, the BLM will review each proposed action against the DOI ''extraordinary circumstances'' (516 DM 2.3A(3)). If any apply, the CX cannot be used.

Responses to Specific Comments on Section 11.9—Categorical Exclusions

D. Rangeland Management (sub-part (10)–(12))

D(10)—Comments.

Comment: Some comments ask the BLM to explain the relationship between the proposed vegetation management CX 11.9D(10) and the ''Draft Vegetation Treatments Using Herbicides on Bureau of Land Management Lands in 17 Western States Programmatic Environmental Impact Statement; Volumes 1 & 2'' (DVPEIS). Some comments are concerned that the proposed vegetation management CX will ''be abused'' to meet a threefold annual increase in treated acres proposed in the DVPEIS.

Response: The November 2005 DVPEIS (*http://www.blm.gov/weeds/VegEIS/index.htm*) analyzed the potential effects of one of the BLM's vegetation management tools (application of herbicides). The CX 11.9D(10) is established because the BLM has reviewed the environmental effects of site-specific routine vegetation management activities and determined that those activities, absent extraordinary circumstances, do not have individual or cumulative significant effects and the activities can proceed without being analyzed in an EA or EIS. By its own terms, this CX does not allow its use with respect to any proposed chemical herbicide action.

Comment: Some comments state that the justification for the proposed vegetation management CX 11.9D(10) is inadequately substantiated. They point to the fact that the BLM has based its justification on data from post-fire restoration efforts and ''no data specific to the myriad other vegetative manipulation projects.''

Response: Though the purpose of treating hazardous fuels and applying post-fire emergency rehabilitation is different from ''routine management of vegetation,'' the actions and resulting effects are judged to be the same by professionals in the BLM. Therefore, the BLM has determined that it is appropriate to establish this CX based on these on-the-ground similarities. Data on routine vegetation manipulation activities designed to reduce hazardous fuels and mitigate post-wildfire environmental impacts were collected in September 2002 and analyzed in June 2003 to determine whether two CXs proposed under the Healthy Forest Initiative (HFI) (68 FR 33813–33824, June 5, 2003), were appropriate on DOI and FS lands. These same types of routine vegetation manipulation activities, and their effects on the same lands and resources analyzed in that context, would be addressed by the CX under consideration here. In the HFI context, information on 30 variables for 2,558 projects representing a range of conditions across the United States was analyzed. These data included project-specific information on the location, size, vegetation type, NEPA review processes used, predicted environmental impacts of proposed treatments, treatments performed, actual environmental impacts after treatments, and whether the associated ROD was appealed. A total of 3,073 treatments, in various combinations, were applied to the 2,558 projects. The vegetation treatments for reducing hazardous fuels included burning, mechanical thinning, application of chemical herbicides and use of biological agents (such as grazing goats). Some projects had more than one treatment applied and multiple tactics such as seeding, planting, tree felling, and soil stabilizing erosion control devices were used. The existing HFI hazardous fuel reduction and emergency rehabilitation CXs do not provide for the application of chemical herbicides or biological agents. Therefore, for the purpose of the routine vegetation management CX considered here, the BLM has proposed the same activity limits. Further, the BLM clarified the final CX language to specifically identify a limitation that no biological agents may be considered under the CX.

Comment: Some comments state that implementing the new CX 11.9D(10) will not sufficiently address regional or seasonal environmental concerns.

Response: Regional and seasonal project design considerations take place prior to any environmental analyses based on the professional judgment and expertise of BLM specialists. The data set analyzed did not identify a need for regional or seasonal limitations. The vegetation types in the HFI data are representative of the range of vegetation structure and conditions across the United States (refer to the December 18, 2005, ''CX Project—Vegetation Management analysis report at *http://www.doi.gov/oepc/cx_analysis.html* or *http://www.blm.gov/planning/news.html* for details). None of the treatments that took place under a CX or an EA/FONSI resulted in individual or cumulatively significant effects. Further, the proposed action is reviewed against the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2), and if one applies, the CX cannot be used.

Comment: Some comments state that adoption and use of the new vegetation management CX 11.9D(10) will cause negative impacts on ecosystems by opening areas to invasive plants resulting from cross-country travel at the wrong place and time.

Response: According to analyzed data, significant impacts, including exacerbating the spread of invasive species and/or disruption of the soil surface as a result of cross-country travel, did not occur except for 12 of the 2,558 projects in the sample population. These 12 projects were evaluated through the EIS process because significant effects were anticipated prior to analysis. Similar projects proposed by the BLM would not be considered for a CX due to the likelihood that one or more of the extraordinary circumstances would apply. In addition, no unanticipated project-related treatment impacts were validated by personal observation by the field staff associated with the project, field data collection through a monitoring program, or systematic evaluation of information received. Higher level NEPA analysis was deemed necessary less than 0.5 percent of the time, and those 12 projects for which significant individual or cumulative impacts were anticipated were elevated to the appropriate level of NEPA review. Based on the factual evidence framed in the context of the NEPA, adoption of the proposed vegetation management CX is justified because 99.5 percent of the projects analyzed and completed did not have a significant effect, individually or cumulatively. Further, those projects that could possibly have significant effects would not pass the ''extraordinary circumstances'' test and an EA or EIS would be used instead of a CX.

Comment: Some comments state that the BLM should not allow projects in certain high value wildlife areas such as sage-grouse habitat and potential wilderness areas unless the proposed

vegetation management actions are analyzed by an EA or EIS.

Response: The Responsible Official must determine the level of NEPA review required. The potential effect of a proposed action on high value wildlife areas such as sage-grouse will be part of that determination, which will take place in addition to a review for ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2). The Vegetation Management CX, by its own terms, cannot be considered for use in designated Wilderness or Wilderness Study Areas.

Comment: Some comments state that allowing 4,500 acres of public lands to be treated by prescribed fire without an EA is irresponsible.

Response: The HFI data reviewed for the development of this CX revealed no unanticipated individually or cumulatively significant impacts from prescribed fire as long as the area treated remains at 4,500 acres or less and none of the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) apply.

Comment: Some comments suggested that road construction should only be carried out following a detailed analysis. Other road construction is discussed below.

Response: The vegetation management CX does not apply to vegetation management activities involving new permanent road construction. Projects involving new permanent road construction must be documented through an EA or an EIS.

Comment: The BLM should exclude prescribed fire from the proposed revision because prescribed fire causes significant environmental impacts and safety risks, and could be an excuse for building ''temporary roads.''

Response: The BLM's review of the projects considered in the establishment of the CX revealed that, in the absence of ''extraordinary circumstances,'' no significant effects result from these treatment actions when the 11.9D(10) CX criteria are met. Prescribed fire is an important vegetation management tool that can be the least environmentally damaging vegetation treatment option. Use of prescribed fire was analyzed in the projects reviewed and the BLM concluded that the action, if carried out consistently with the specific criteria set, did not result in a significant effect. In addition, while temporary roads included in the projects reviewed did not cause a significant effect, in response to the comment's request for clarification, the BLM has added a definition of temporary road to be used with respect to when this CX is considered for use. As an additional measure of protection, and to be consistent with the HFI CX, the BLM added a limitation to the CX so that no new permanent road can be constructed.

Comment: Some comments want the BLM to define the term ''contiguous'' both spatially and temporally, ''to prevent abuse and cumulative impacts to the area's flora and fauna.''

Response: The term ''contiguous'' has been eliminated to avoid possible misinterpretation. Each proposed action must describe the project and the impacted area in its entirety. Projects cannot be segmented for purposes of using this CX. The impacted area of the proposed action cannot cumulatively exceed the spatial limits established in the CX 11.9D(10): 1,000 acres for qualifying vegetation management activities, except for prescribed fire, which can affect up to 4,500 acres. Based on the spatial *and* temporal parameters of the proposed action, the Responsible Official must determine if any of the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) apply. If there is the potential for individually or cumulatively significant impacts on the area's flora or fauna, CX 11.9D(10) cannot be used.

Comment: Some comments ask the BLM not to spray ''untested chemicals'' under the proposed revisions to CX 11.9D(10).

Response: The BLM has not proposed that the application of ''untested chemicals'' be subject to approval for any purpose based on use of a CX. The proposed routine Vegetation Management CX specifically excludes the application of herbicides or pesticides because the data are not available by which to analyze whether such an activity should be included in the category of actions described in the CX.

D(11) & (12)—Comments.

Comment: Several comments were received related to proposed CX 11.9D(12) for authorization of non-renewable grazing use. Comments included topics such as expanding the CX to cover actions to improve land health; questioning the adequacy of the data analyzed to support the proposed CX; and requesting that the BLM give ''close scrutiny'' to the issuance of non-renewable grazing permits as proposed in the CX.

Response: Upon review of the analysis supporting the proposed CX 11.9D(12), and comments received, the BLM has decided not to finalize the proposed CX.

Comment: Some comments suggest that the proposed grazing permit CXs directly contradict the BLM's rationale for amendments to grazing regulations proposed on December 8, 2003, (See final rule 71 FR 39402, July 12, 2006). Comments express concern that ''[t]he combined effect of the proposed categorical exclusion[s 11.9D(11)&(12)] and the previously-proposed revisions to grazing regulations will be to eliminate all opportunities for up front public consultation regarding the terms and conditions of grazing permits. The only remaining opportunities for public involvement will be the provisions for after-the-fact protest and appeal under 43 CFR 4160, and even those opportunities will be eliminated with respect to temporary, non-renewable grazing permits.''

Response: The grazing permit CX 11.9D(11) does not contradict the rationale for changing grazing regulations with respect to consultation, cooperation, and coordination with the interested public, nor does it result in the elimination of all opportunities for up front public consultation. As explained in the ROD and in the preamble to the final rule, the final rule is intended to achieve an appropriate balance between efficient management of public lands, and the need for public involvement (See 71 FR 39414; Preamble, id at 39439–39441). The same goals are behind the new grazing CX. Moreover, ''interested publics'' will continue to have opportunities to participate (''to the extent practical'') in public lands grazing management. Those opportunities arise, during the development of LUPs and activity plans, during the development of reports that lead to a determination regarding status of land health, and following the issuance of proposed and final decisions (See 71 FR at 39432, 39470, and 39475). During the development or revision of a RMP, the BLM may decide what public lands will (or will not) be available for livestock grazing, change past LUP decisions, or develop guidance for making such decisions. In addition, the BLM may use the land use planning process to determine if any allotment management plans (AMPs) will be put in place. Either during or after the land use planning process, the BLM develops the terms and conditions of permits, leases, and AMPs, such as the authorized animal unit months (AUMs) and seasons of use. In this tier of decision-making, the BLM incorporates a variety of elements of rangeland management into a single document. For example, public scoping conducted during the revision of an RMP may prompt the BLM to coordinate the timing of land health assessments with

the duration of permits, leases, and AMPs within a Field Office so that data from recent land health assessments will be available at the time of renewal. The authorized officer (Responsible Official), using his or her knowledge and expertise, will identify the relevant factors, make findings, and integrate them into a single proposed decision. At that point, the interested public has an opportunity to protest, and thereby affect the decision before it is finalized. Public participation is a part of the BLM's land use planning process, and enables Responsible Officials to refine the details of their analysis before they finalize grazing decisions. However, a Responsible Official is in the best position to compile, and consider in the first instance, the factors that are relevant to a grazing allotment in a proposed decision. Thus, the final rule and the new grazing CX provide for public input, where most valuable, in deciding management direction for public lands. Comments with respect to temporary non-renewable grazing permits are moot in view of the BLM's decision to not finalize proposed CX 11.9D(12).

Comment: Some comments ask the BLM to expand the grazing permit CXs 11.9D(11) and (12) by ''adding a 'resource health activities' component'' addressing ''water developments, fences, etc.''

Response: The CX 11.9D(11) covers grazing permit activities where and when certain conditions are met, including achievement of land health standards, or documentation that the existing livestock grazing is not a causal factor if standards are not met. Expanding the CX to include ''resource health activities'' as described by the comment would exceed the scope of the administrative actions analyzed to support the CX 11.9D(11). An analysis of the effects of implementing these types of projects would need to occur before a CX could be developed for these activities. Proposed CX 11.9D(12) is not being finalized.

Comment: Some comments state that the fact that most grazing permit EAs have resulted in FONSIs is insufficient evidence to demonstrate that EAs are unnecessary or the impacts are not significant.

Response: The BLM disagrees. The BLM established the CX based upon a review of past environmental documents, including EAs and FONSIs. This review showed that in the overwhelming majority of cases, permit issuance did not result in significant impacts to the human environment, either individually or cumulatively. Based on comments received in response to the proposal of this CX (71 FR 4159–4167, January 25, 2006), as well as consultation with CEQ, the BLM collected and reviewed additional information regarding past actions and the effects of those actions. This additional review is intended to clarify the information previously presented in the Analysis Report on the issuance of grazing permits made available in conjunction with the January 25, 2006, proposal (see 71 FR 4159–4167, January 25, 2006, *http://www.blm.gov/planning/news.html*). The BLM determined a data refinement was needed that would facilitate gathering information on a random basis regarding permits issued during the period of 1999 through 2004. Taking this consideration into account, the BLM determined that the most valid and reliable method of review would be to conduct a stratified random sample of grazing permits issued, drawn from the BLM's national Rangeland Administration System (RAS) database. A Supplementary Analysis Report reflecting this refinement of information regarding NEPA compliance in the issuance of grazing permits, conducted based on information in the RAS database, in response to comments received, and in consultation with CEQ, is available at *http://www.blm.gov/planning/news.html.* Rather than the 12,724 records of grazing permits issued presented in the January 2006 Analysis Report, there are only 9,226 applicable records in the RAS database for the relevant time period, 1999 to 2004. These total figures are different due to the differing recordkeeping methods of the BLM Field Offices on the one hand, and the national RAS database on the other. Specifically, the BLM field offices, when queried for the review reported in January 2006, had returned total numbers representing all permits processed during the relevant time period. The RAS database includes only those permits processed and actually *issued*. Most importantly, the RAS database identifies by office and state each permit issued during that time-period. Thus, the RAS database provides an opportunity to conduct a state stratified random sample of the permits issued during the relevant time period. The BLM determined from review of the sampling of these 9,226 records that 80 percent of grazing permits issued were issued based on environmental assessments (EAs) resulting in Findings of No Significant Impact (FONSIs). The BLM determined, based on monitoring, personal observation, and/or the professional judgment of BLM rangeland specialists, that as predicted by these FONSIs, permitted grazing resulted in no significant effects, either individually or cumulatively. This methodology for supporting establishment of CXs is consistent with CEQ's proposed guidance for the establishment of CXs (See 71 FR 54816, September 19, 2006). For the remaining 20 percent of the sample of grazing permits issued, compliance with the NEPA was documented in a DNA, which is a BLM procedure for documenting whether adequate NEPA analysis has already taken place for a particular action. The DNAs documented that additional review was not required, as adequate analysis had been presented in previously completed EISs. The BLM then surveyed the field offices to review the EIS analysis to determine first, whether or not grazing permit issuance itself had been predicted in the EIS to result in significant effects and second, whether or not, in their professional judgment, significant effects had in fact occurred as a result of the permitted grazing. Ninety-four of the 458 permits in the sample, or approximately 20 percent of the sampled permits, had been issued under a DNA based on an EIS. The BLM found that of these ninety-four permits, for five, significant effects had been identified within the EIS, and for another one, significant effects had been documented (through the Land Health Assessment process) to have occurred. Therefore, on a weighted basis, because these numbers were based on a state-stratified random sample from the parent population in the RAS database, the BLM determined that no more than 3 percent of total permits issued would have resulted in significant impacts, either individually or cumulatively, on the quality of the human environment. For the remaining 17 percent of the total permits issued (which used a DNA based on an existing EIS), the field offices reported that the resulting effects were not significant. Based on this review, the BLM is confident in its projection, that only a small percentage (no more than 3 percent) of permits issued would result in significant effects on the environment. This small percentage would be screened out by ''extraordinary circumstance'' review. Therefore, based on the review of the data presented in January 2006, as well as review of the refined data, the BLM concludes that in the absence of ''extraordinary circumstances,'' the issuance of a grazing permit does not have a significant effect on the environment, individually or cumulatively. Further, the BLM in the establishment of CX 11.9D(11), has

instituted a limitation for the use of this CX. This limitation is that the Responsible Official must determine (and document the finding) either that land health standards are met, or that any failure to meet standards is not the result of existing livestock grazing.

Comment: ''The BLM has proposed to revise its NEPA manual to categorically exclude most term grazing permits (516 DM 11.9D(11)) and most temporary non-renewable grazing permits (516 DM 11.9D(12)) from analysis under NEPA. These proposed categorical exclusions are unlawful, unjustified, and ill-advised.''

Response: The CEQ regulations implementing the NEPA authorize the creation and use of CXs. The CEQ encourages federal agencies to assess and act upon opportunities to increase the NEPA efficiency by creating and using appropriate CXs (40 CFR 1507.3(b)(2)(ii) and 1508.4: See also ''NEPA Lessons Learned Oversight Hearing, CEQ'' testimony before the House Committee on Resources Task Force on Updating the NEPA Lessons Learned, 2005). Based on comments received, the BLM took two actions: (1) The BLM dropped the proposed non-renewable grazing permit CX from further consideration under this manual revision; and (2) The BLM refined its analysis of existing NEPA documents associated with the issuance of grazing permits (see above response), which had been reviewed for the establishment of the 11.9D(11) and has further limited the situations in which the CX can be used.

Comment: Some comments state that the BLM is attempting to substitute the NEPA environmental assessment process with the rangeland health assessment process, and by extension, that the BLM is assuming there will be no significant environmental impacts if rangeland health assessment standards and guidelines are met.

Response: While land health assessments are part of the process of determining the applicability of the grazing permit CX 11.9D(11), the BLM is not substituting land health assessments for NEPA compliance. The CX was established based on an initial review of the NEPA documents, for the processing of grazing permits, reported by the BLM state offices in January 2006. As described above, a further refinement and review of data on grazing permit issuance, conducted in October through December 2006, revealed that, on the whole, issuance of grazing permits does not result in significant effects, individually or cumulatively, on the quality of the human environment. See discussion of this data refinement above and the BLM conclusion that in the absence of ''extraordinary circumstances,'' the actions covered under CX 11.9D(11) do not have significant effects, individually or cumulatively. Rather, the land health assessment requirement is an additional limitation the BLM is incorporating into the CX 11.9D(11). This is in keeping with CEQ proposed guidance published at 71 FR 54816, September 19, 2006, which emphasizes that CXs must clearly describe a category of actions, and should include physical and/or environmental factors that would constrain its use. The purpose of a land health assessment is to determine the status or condition of the land or grazing allotment. The rangeland assessment process is not intended to serve as an analysis of impacts associated with a particular management action, although the condition of the land must be considered if the management action potentially involves issuing a grazing permit using the new grazing permit CX (43 CFR 4180). The land health assessment process comes into play as a limitation on use of the CX because application of the CX is limited to those permits where allotments are determined to be meeting land health standards, or if not meeting land health standards, this is due solely to factors other than existing livestock grazing. If existing livestock grazing management or level of use is determined to be a significant causal factor for failing to achieve standards, federal regulations mandate that the BLM take appropriate action to make significant progress toward achieving those standards (43 CFR 4180.2(c)). If the land health assessment finds that standards *are* being met, the Responsible Official may fulfill obligations under the NEPA by using the grazing permit CX, provided that, in accord with 40 CFR 1580.4, the Responsible Official determines and documents that none of the ''extraordinary circumstances'' (described in 516 DM 2.3A(3) and appendix 2) applies.

Comment: Some comments state that administratively allowing the names on a permit to change, but ''the terms of the permit to continue unchanged'' without further analysis is ''inconsistent'' under NEPA and negates an opportunity to look at ground conditions.

Response: The BLM deleted part (b) of CX 11.9D(11) to clarify the intent of the CX to require completion of a land health assessment before application of a CX could be considered. Therefore, administrative changes such as changes of names on grazing permits are subject to CX 11.9D(11) and its criteria involving the completion of land health assessments. ''Ground conditions'' are evaluated in the land health assessment process. Existing monitoring and inventory data and information gathered using the BLM approved techniques are used to evaluate conditions in relation to the standards developed by the BLM state directors in consultation with their respective Resource Advisory Councils as directed in 43 CFR 4180.2. Changing the name on a permit does not change on-the-ground management or the effects of implementing the other terms and conditions of the permit. The modification of CX 11.9D(11) will assure that land health assessment findings are considered when making an ''administrative'' change.

Comment: Some comments state that the federal courts have determined that grazing permits significantly affect the human environment.

Response: In 1974, a federal court stated that ''[t]he court is * * * persuaded that the grazing permit program produces significant impacts on individual locales. And when the cumulative impact of the entire program is considered, it is difficult to understand how defendants-intervenors can claim either that the impact of the program is not significant or that the Federal action involved is not major.'' *NRDC* v *Morton*, 388 F. Supp. 829, 835 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (DC cir 1976), *cert. denied*, 427 U.S. 913 (1976). As a result of this ruling, the BLM agreed to (and did) analyze the effects of the BLM grazing program in over 140 local EISs covering approximately 160 million acres. The Interior Board of Land Appeals (IBLA) subsequently held in *National Wildlife Federation* v. *BLM*, 140 IBLA 85 (1997) that, in the Comb Wash allotment, the general analysis for the LUP did not provide adequate site-specific analysis of the effects of livestock grazing. Consequently, the BLM issued guidance in Washington Office Instruction Memorandum 99–039 Attachment 3 explaining that existing NEPA documentation should be reviewed to determine if adequate analysis had already been completed, and where existing documents were not adequate, adequate NEPA documents should be developed. The BLM Responsible Officials have instituted these directives. Based on comments received in response to the January 2006 proposal to establish new CXs, as explained above, the BLM refined its review and analysis of NEPA documents associated with all grazing permits issued in 1999 through 2004 (9,226 projects). See the data refinement discussion above. Approximately 80 percent of the 9,226 grazing permits

issued from 1999 through 2004 were based on EA/FONSIs. The remaining 20 percent of permits sampled used a DNA, which indicated an existing EIS represented sufficient analysis to support issuance of the grazing permit. In addition to the review of the NEPA documents, BLM specialists used monitoring, personal observation and/or professional judgment to evaluate the permitted grazing. This evaluation of the NEPA documents and any actual impacts not anticipated in the NEPA documents revealed that significant impacts were estimated to be (weighted, on the basis of a state-stratified random sample), at most, 3 percent of the permits issued between 1999 and 2004, with a high degree of certainty. The BLM believes the ''extraordinary circumstances'' review would preclude use of CX 11.9D(11) in similar circumstances. Establishment and appropriate use of the grazing permit CX 11.9D(11) is warranted based on the analysis described above and in the Supplementary Analysis Report. Establishment and appropriate use of the CX is also warranted in the context of the BLM administrative procedures such as the BLM Qualifications and Preference Handbook (H–4110–1), the state-specific standards and guidelines, and the specific terms and conditions identified within local LUPs. The extraordinary circumstances review provides additional protections to prevent the issuance of permits through a CX when significant individual or cumulative impacts are likely to occur.

Comment: Some comments state that the statistics presented in the ''CX Project—Grazing Permit'' analysis report posted at *http://www.doi.gov/oepc/cx_analysis.html* and *http://www.blm.gov/planning/news.html* are ''extraordinarily misleading'' because they fail to reveal the multiple instances in which the federal courts or DOI administrative law judges have found that the BLM violated NEPA by failing to prepare an EIS. The example cited was *Western Watersheds Project* v. *Bennett*, 392 F. Supp. 2d 1217 (D. Idaho 2005).

Response: These comments highlight a case in which the court found that the BLM had erred in preparing four EAs associated with four grazing permits for 28 grazing allotments in the Jarbidge Resource Area in Idaho. The BLM should instead have prepared a single NEPA document covering all four permits. It is speculative to suggest that this finding undermines the BLM's analysis of thousands of permits. Moreover, a careful reading of the court's opinion reveals that none of the grazing decisions at issue in that case would have been eligible for use of the new CX, because land health assessments had shown that land health standards were not being met in any of the allotments—generally because of grazing. Further, the BLM believes that existing NEPA compliance procedures would have rendered the proposed actions involved in the *Western Watersheds Project* v. *Bennett* case ineligible for the new grazing permit CX 11.9D(11) based upon review of the ''extraordinary circumstances.'' Specifically, ''extraordinary circumstance'' 516 DM 2 appendix 2.8 would have applied. This extraordinary circumstance applies when a proposed action may have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species.

Comment: The same comments state that ''[I]t is likely that many of the EAs and FONSIs tabulated in [the ''CX Project—Grazing Permit'' Analysis Report] were not subject to challenge by environmental, conservation, or wildlife interests. Experience has shown that, when subject to administrative or judicial challenge, a high percentage of the BLM's FONSIs for grazing permits are found to be unlawful. If more had been challenged, it is likely that many more of the FONSIs would have been overturned and environmental impact statements (EISs) would have been required.''

Response: These comments are speculative in nature. An administrative or judicial challenge to a particular EA and FONSI may result in a ruling that, for example, an agency failed to take a hard look in a particular instance. However, it is unreasonable to assume that EAs and FONSIs that were never protested or appealed were unlawful.

Comment: The same comments ask the BLM to ''survey the EAs that have been prepared for grazing permits to determine the nature and scope of the information and analysis that they have contained and the public comment that they have engendered.''

Response: The BLM reviewed data relating to the NEPA documents for grazing permits that were completed in 1999 through 2004. CX 11.9D(11) has been established based on the finding that the overwhelming majority of these NEPA documents (EAs prepared in accordance with CEQ regulations and agency guidance) resulted in FONSIs and subsequent BLM review of the actual effects of grazing confirmed this prediction. For those proposed permits for which a DNA reflected the prior completion of adequate NEPA, at most (weighted, based on a state-stratified random sample), only 3 percent were found to have resulted in a significant effect, either individually or cumulatively. The CX would not have been considered for use with those actions found to have significant effects, as one or more of the ''extraordinary circumstances'' would have applied. The BLM concluded, based on this evidence, that the issuance of grazing permits is an action that does not have a significant impact on the human environment, either individually or cumulatively. This is in accord with the CEQ proposed guidance on the establishment of CXs (See 71 FR 54,816, September 19, 2006). Use of this CX in light of an ''extraordinary circumstances'' review provides a further safeguard that significant impacts will be avoided. The BLM believes additional analysis of the type requested is not required.

Comment: Some comments state that the proposed revisions to the grazing permit process remove environmental safeguards by reducing the amount of information needed.

Response: In order to establish the grazing permit CX, the BLM reviewed NEPA analyses completed in the process of issuing 12,724 permits over a five-year period and then, as explained above, further refined this analysis by sampling 9,226 permits identified in the RAS database. These permits were processed regardless of whether or not land health assessments had been completed for the relevant allotments. The results of that review show that impacts to the human environment from the issuance of grazing permits are not significant, either individually or cumulatively. The CEQ regulations support the establishment of a CX in circumstances where the review of data shows that impacts of a particular action have not been significant, either individually or cumulatively. Not only does the required review of the ''extraordinary circumstances'' provide a safeguard when using the CX, but also the specific criterion that a land health assessment must have been completed, and result in a certain finding, provides an additional safeguard at the outset. This is in keeping with CEQ proposed guidance published at 71 FR 54816, September 19, 2006, which emphasizes that CXs must clearly describe a category of actions, and should include physical and/or environmental factors that would constrain its use. As part of the CX criteria, land health assessment and evaluation information and status are considered. The evaluations are based on existing inventory and monitoring information, data collected

using BLM-approved methods, and, if appropriate, information provided by other sources, such as other agencies, permittees, or the interested public. The grazing CX cannot be used unless the specific CX criteria are met and none of the ''extraordinary circumstances'' applies.

Comment: Some comments correctly assume that rangeland health ''Land Health'' assessments only look at a limited set of environmental concerns covered by the NEPA. These same comments express concern that impacts on certain resources covered by the NEPA (*e.g.*, archeological sites) are not specifically evaluated and use of CXs (11.9D(11)&(12)) will preclude appropriate consideration of resources not included in land health assessments.

Response: Use of the grazing CX 11.9D(11) requires review against the list of ''extraordinary circumstances.'' Two of the ''extraordinary circumstances,'' 516 DM Ch appendix 2.2 and 2.7, ensure that ''cultural resources'' will not be affected by the proposed action; therefore, impacts to cultural resources are not overlooked when a grazing permit is processed through CX 11.9D(11). In addition, use of the CX (or any CX) does not eliminate the need to comply with statutes such as Section 106 of the National Historical Preservation Act and the Archeological Resource Protection Act (1979).

Comment: Some comments question some of the key terms and concepts in the grazing permit CXs 11.9D(11)&(12): (1) ''Assessed and evaluated,'' (2) ''meeting land health standards,'' and (3) ''not meeting standards solely due to factors other than existing livestock grazing'' are arbitrary, and '' [N]ot meeting standards solely due to factors other than existing livestock grazing'' is an admission that ''the land is in poor condition.'' The comments go on to say, ''[I]f the land is already degraded, the approval of a lease, absent any NEPA review, will only further devastate the land and result in substantial environmental impacts.''

Response: In keeping with CEQ proposed guidance published at 71 FR 54816, September 19, 2006, which emphasizes that CXs must clearly describe a category of actions, and should include physical and/or environmental factors that would constrain its use, the land health standards serve as a screen to ensure that the grazing CX is considered for use only where land health standards are being met or if not being met, the cause is not existing livestock grazing use. The concept of ''meeting land health standards'' is derived from grazing regulations in 43 CFR 4180.2. These regulations require action to change existing grazing if the Responsible Official finds that current livestock grazing is a significant cause for ''failing to achieve the standards.'' The reference to ''not meeting land health standards solely due to factors other than existing livestock grazing'' follows from the same regulatory requirement, but is somewhat more restrictive than the language in the regulations, in that the CX may only be used when existing livestock grazing is not at all a contributing factor for failure to achieve standards. Assessments and evaluations are not arbitrary concepts; they are the means for determining whether standards are achieved and identifying the causal factors for ''failure to achieve.'' If standards are not achieved because of another activity, then that activity needs to be addressed (BLM Rangeland Health Standards Manual 4180). For example, during the course of a land health assessment the BLM could determine that the amount of dead and down woody material in an area of forested lands is causing an unnatural build-up of fuels and that the resulting potential for a severe wildfire is an indication that the land is failing to meet one or more of the land health standards. In this example, the inter-disciplinary team determines that livestock grazing is not a contributing factor to the unnatural build-up of woody fuels that resulted in non-achievement of the standard. This is one example of a situation where changes in, or denial of a grazing permit/lease would not influence attainment of the land health standard(s).

Comment: Some comments state that the BLM's ''land health standards are not sufficiently demanding'' to prevent significant environmental impacts or to restore degraded lands. The ''bar for compliance is pretty low and * * * most * * * [allotments] routinely pass * * * regardless of condition.'' Allotments can ''meet land health standards'' and still ''have important and unresolved resource issues which are more likely to be ignored in a CX than an EA.''

Response: Based on the data analyzed for establishment of the grazing CX 11.9D(11), as explained above, 80 percent of the NEPA documents prepared in support of issuing grazing permits predicted no significant effect on the quality of the human environment, and subsequent BLM review of the actual effects of grazing confirmed this prediction, regardless of whether the allotment for which the permit was issued had undergone a land health assessment. For the (at most 3 percent) grazing permits issued, that did or may have (projecting on the basis of the sample reviewed) result(ed) in significant effects, the BLM's NEPA review procedures that are in place to review proposed actions against the DOI's ''extraordinary circumstances'' would have rendered the actions that did result in a significant effect as ineligible for CX consideration. The BLM believes that for issuing grazing permits in the future, the review of the ''extraordinary circumstances'' will identify significant unresolved issues related to grazing use. When any of the ''extraordinary circumstances'' apply, a CX cannot be used even if land health standards are met. The BLM has placed a limitation on the use of the CX 11.9D(11), which only allows consideration of the grazing permit CX when an allotment is meeting land health standards or is not meeting land health standards for reasons other than livestock grazing. As explained above, the inclusion of this limitation is in accord with CEQ proposed guidance published at 71 FR 54816, September 19, 2006.

Comment: Some comments state that, '' 'and health standards' evaluations are not conducted often enough and get outdated quickly when drought, fire, and other circumstances occur. This is particularly problematic when a [non-renewable permit] is to be issued.''

Response: The grazing permit CX 11.9D(11) cannot be used if land health standards have not been assessed or evaluated, and the evaluation team is responsible for the adequacy of the information. As discussed above, the non-renewable grazing CX 11.9D(12) is not being finalized. No grazing permit can be issued under CX 11.9D(11) unless CX criteria are satisfied and none of the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) applies.

Comment: Some comments state that the new grazing permit CXs ''would permit inappropriate grazing * * * to pollute streams and watersheds * * *.''

Response: The CXs, EAs, FONSIs, and EISs do not ''permit'' grazing or any other activity on public lands, they document fulfillment of procedural requirements under the NEPA. When the proposed action consists of a permit, lease, or other grazing authorization, the NEPA compliance for these actions cannot end with a CX unless an authorized officer (Responsible Official) has completed a land health assessment for the relevant allotment, and has concluded that the 43 CFR 4180 standards for grazing administration are being achieved. Since all state and regional standards address water quality

and other ecological criteria, the BLM is confident that the use of CXs will not result in the pollution of streams and watersheds.

Comment: Some comments say that rangeland health ''land health'' assessments do not address the cumulative impacts of grazing on multiple allotments.

Response: The land health assessments are not meant to replace the NEPA analysis and do not directly address cumulative impacts. As explained above, in accordance with CEQ proposed guidance (71 FR 54816, September 19, 2006), which recommends that categorical exclusions should clearly define a category of actions, as well as any physical or environmental factors that would constrain its use, the BLM has incorporated this limitation as criteria for the use of the CX in relation to issuance of a grazing permit. The land health assessment would serve as a ''screen'' to determine if a CX might be considered for issuing a grazing permit. The land health assessment process identifies whether or not the land health standards are being achieved, and if they are not achieved, the causal factors are identified. Therefore, they do provide useful information about whether grazing is contributing to non-achievement of one or more of those standards. Cumulative impacts of grazing on multiple allotments are often analyzed at the LUP allocation level under an EIS or EA, but that analysis may also occur within a more program specific NEPA document. Individual grazing permits can be issued within the scope of such LUP NEPA analysis and/or appropriate program specific NEPA analysis. Issuance of the grazing permit would be based on the resource allocation of the LUP or other program-specific plan. Any additional mitigation measures or other restrictions in grazing use, prescribed in the NEPA analysis that addressed cumulative impacts associated with grazing, would be incorporated in the grazing permits issued within the scope of that NEPA analysis. As explained above, based on the data analyzed for establishment of the grazing CX 11.9D(11), 80 percent of the NEPA documents associated with issuing grazing permits resulted in a FONSI. That is, the evidence showed that the action of issuing grazing permits was predicted not to result in significant impact to the human environment, either individually or cumulatively and BLM specialists through monitoring, personal observation and/or professional judgment confirmed these predictions. As an added safeguard, when considering issuance of individual grazing permits, the Responsible Official must consider the DOI ''extraordinary circumstances.'' If ''extraordinary circumstance'' 516 DM 2.3A(3) and appendix 2.6, regarding significant cumulative impacts applies, the grazing CX cannot be used, and an EA or EIS would be prepared.

Comment: Some comments viewed the revisions as enabling ''unsustainable grazing permits.''

Response: It is unclear what is meant by ''unsustainable grazing permits.'' In the context of the Federal Land Policy and Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA), the BLM is required to administer public lands for multiple use and sustained yield. The BLM grazing permits are managed in accordance with FLPMA, the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, and the Public Rangelands Improvement Act, 43 U.S.C. 1901 *et seq.* An element of this management is a requirement to authorize grazing permits that do not preclude achievement of land health standards, consistent with these statutory mandates. The grazing CX 11.9D(11) is being established based on evidence that grazing decisions do not result in significant impacts to the environment, either individually or cumulatively. The BLM data show that the predictions represented by the EAs that resulted in FONSIs were confirmed by BLM professionals through monitoring, personal observation and/or professional judgment. The grazing CX 11.9D(11) can be used only for those permits being issued for livestock grazing on allotments where land health standards are achieved under existing grazing management, or where a Responsible Official finds that standards are not achieved due to factors that do not include existing livestock grazing. If standards are not met and current livestock management is one of several activities contributing to the non-achievement of the standards, a grazing permit cannot be issued using the new grazing permit CX, and an EA or EIS must be prepared unless the permit is withdrawn. Further, any use of a grazing CX would require review against the ''extraordinary circumstances,'' and if one applies, a CX cannot be used, and an EA or EIS would be prepared.

Comment: Some comments state that the analysis methods were not sufficiently disclosed which means the data set and the data interpretation could be flawed.

Response: As stated in the analysis report, available at *http://www.blm.gov/planning/news.html*, the data analyzed included a review of 12,724 NEPA documents associated with grazing permits issued between October 1, 1999, and September 30, 2004. Based on this comment, as well as consultations with CEQ, the BLM further refined its analysis, reviewing data from the RAS database, the official source of grazing administration data for the BLM, instead of from individual state reports, as were used in the January 2006 analysis report. Use of the information in the RAS database provided the BLM with an appropriate set of data from which to draw a stratified random sample for analysis. See the refined analysis report at *http://www.blm.gov/planning/news.html*. This refinement of the data on grazing permits resulted in 9,226 records, rather than the 12,724 presented in the January 2006 Analysis Report. This review based on the information in the RAS database ensured that only records of permits actually issued, not just processed, were being reviewed and eliminated the possibility of inappropriate inclusion of those permits issued pursuant to specific congressional authorization, regardless of completion of the NEPA process (see Pub. L. 108–108, Section 325, 117 Stat. 1307–1308 (2003)). The BLM determined from review of these 9,226 records that 80 percent of grazing permits issued were issued based on EAs resulting in FONSIs. Further, the BLM determined, based on monitoring, personal observation, and/or professional judgment by BLM rangeland specialists, that, as predicted by these FONSIs, permitted grazing resulted in no significant effects, either individually or cumulatively. This methodology for supporting establishment of CXs is consistent with the CEQ's proposed guidance for the establishment of CXs (See 71 FR 54,816, September 19, 2006). For the remaining 20 percent of grazing permits issued, in the majority of cases, the DNA review documented that additional NEPA review was not necessary. The issuance of the permits had been adequately analyzed in an existing EIS prepared in the course of the land use planning process or specifically prepared to address grazing issues. The BLM concludes from this review that, in general, the issuance of grazing permits results in no significant impacts and establishment of a CX is warranted. The BLM believes that ''extraordinary circumstances'' review will capture those instances for which additional NEPA review will be necessary, such as the 3 percent (weighted, on the basis of a state-stratified random sample analysis) of permits issued in conjunction with a DNA prepared on the basis of an existing EIS, for which

significant impacts were either predicted to occur, or though not predicted, were observed (during the land health assessment process) to have occurred. In this regard, the results of the additional data calls conducted in October 2006, as reflected in the Supplemental Analysis Report, are consistent with the results originally presented in the Analysis Report published in January 2006, which showed that in only a few cases (0.2%) did issuance of grazing permits/leases require preparation of a new EIS because of specific resource reasons.

Comment: Some comments ask whether any land health assessments are based on ''observations'' alone (ocular estimates). Other comments express an opinion that ''[o]cular monitoring to determine the range condition and trend makes management [of grazing permit decisions based on observations alone] arbitrary and capricious.''

Response: The BLM does not use exclusively qualitative (*i.e.* ''ocular'' or ''observational'') methodology to determine trend. The BLM's Rangeland Health Standards Handbook (H–4180–1) provides guidance on using qualitative (''observational'') and quantitative information to determine the status of land health. In addition, the BLM's Technical Reference, Interpreting Indicators of Rangeland Health, Version 4 (TR1734–6) describes land health assessment protocols, developed through an interagency process, which have received interdisciplinary review. TR 1734–6 identifies limitations for using the results derived from the qualitative (''ocular''/''observational'') process. For example, TR 1734–6 states that the qualitative process described in the document is not suited to detecting land health condition trends. Qualitative methods are appropriate for certain purposes, but quantitative data are needed to detect and statistically validate trends. When an assessment is done, existing monitoring data are evaluated. This data can be the result of either quantitative or qualitative methods. Where these data do not address all of the standards, the BLM employs the processes described in TR 1734–6 to assess conditions. Within the limits described in this TR 1734–6, qualitative approaches, such as ocular or observational methods, are important tools for assessing conditions, but not trends.

Comment: Some comments ask that management alternatives that could improve land health conditions not be excluded from the new grazing permit CXs 11.9D(11)–(12). These comments recommend modifying the new grazing permit CXs to allow changes to the authorized grazing activities that might improve ground cover, soil stability, and other conditions to reduce conflicts with other resource uses.

Response: The BLM's purpose in establishing CX 11.9 D(11) is to expedite the permit issuance process where the environmental impacts have been shown not to be significant, either individually or cumulatively. In appropriate circumstances, it may be possible to apply the CX to modifications (*e.g.* reduced level of grazing) that might improve ground cover, soil stability, and other conditions to reduce conflicts with other resources so long as the terms of the CX are met and the overall effects of the livestock grazing permit do not result in an inability to meet land health standards. Further, a CX may only be used when none of the ''extraordinary circumstances'' applies. If any of the ''extraordinary circumstances'' applies, then the proposed action (including the actions listed in the comment) may require preparation of an EA or EIS. Because the proposed CX 11.9D(12) is not being finalized through this action, the potential applicability of proposed CX 11.9D(12) will not be addressed here.

Comment: Some comments state that the grazing permit CXs 11.9D(11)–(12) will ''allow the BLM to issue a permit for any number or type of livestock, for any season, [for any given time period], with (or without) any terms and conditions, without performing any analysis pursuant to NEPA.''

Response: The CEQ regulations provide that NEPA obligations can be fulfilled using categorical exclusions (43 CFR 1507.3 and 1508.4). The CX 11.9D(11) has been established based on review of analyses of NEPA documents completed in the process of issuing grazing permits. This review showed that in the vast majority of cases, this action of issuing a grazing permit resulted in a FONSI and that as described above, only a very small percentage (3 percent, weighted, as based on a state-stratified random sample) resulted in significant effects. The BLM believes that ''extraordinary circumstances'' review would have precluded use of the CX in the circumstances represented by this small percentage of instances. The BLM concluded based on its review of the resulting effects of the grazing permit issuance action that, in the absence of ''extraordinary circumstances,'' there are no significant effects, individually or cumulatively. Use of this CX is specifically limited in two ways. First, the permitted use must be basically the same as that previously authorized (same kind of livestock, the active use is not exceeded, and the grazing season is not more than 14 days earlier or later than the use authorized on the previous permit/lease). Second, the land health standards must be met or if the standard(s) are not met, this can only be due to factors that do not include existing livestock grazing. If the permit action is ineligible under these criteria, then grazing permit CX 11.9D(11) cannot be used. As mentioned above, CX 11.9(D)(12) is not being finalized through this action.

Comment: Some comments identify ''six resources categories'' that are adversely affected by livestock grazing and its associated infrastructure (facilities), which they state are not addressed by land health standards. The six categories they identified are archeological sites, wilderness, scenery, recreational opportunities, wildlife other than listed and ''sensitive'' species, and natural surface water sources. They contended that, if the grazing permit CXs 11.9D(11)–(12) are adopted, analysis and consideration of the impacts on these resources would never occur on any allotment that meets minimal standards for land health.

Response: Water quality and wildlife habitat standards are addressed in all the sets of state or regional land health standards. Two of the six resources mentioned in the comment (archeology and wilderness) are specifically addressed in the ''extraordinary circumstances'' found in 516 DM 2, appendix 2.2. In addition, appendix 2.2 refers to recreation, wild and scenic rivers, national natural landmarks, sole or principle drinking water aquifers, wetlands, floodplains, migratory birds, and other ecologically significant or critical areas. ''Infrastructure'' that facilitates management of livestock grazing is not addressed in the CX. Such infrastructure (also known as ''range improvements'') would be addressed in AMPs and project proposals and would, in accordance with 43 CFR 4120.3–1(f), receive appropriate NEPA review separate from CX 11.9D(11).

Comment: Some comments state that rangeland health ''land health'' assessments fail to address many significant impacts of grazing.

Response: Land health assessments are not intended to analyze the impacts of grazing, but to determine the existing condition of the public land in comparison to the land health standard. If the Responsible Official determines that land health standards are not being achieved, a determination is made regarding the significant causal factor(s). If the Responsible Official finds that

current livestock grazing management or levels of use are significant causal factors for failure to achieve land health standards, they are directed by regulation (43 CFR 4180.2) to take appropriate action to make significant progress toward achieving the standard(s) not achieved. The issue of whether there are any significant impacts from the BLM-permitted grazing is addressed pursuant to compliance with the NEPA at the time permits are issued. Use of a CX, like the grazing CX 11.9D(11) is a method of complying with the NEPA (see 40 CFR 1500.4(p); 40 CFR 1500.5(k); 40 CFR 1507.3; and 40 CFR 1508.4). As explained above, the grazing CX 11.9D(11) has been established based on the results of a review of NEPA documents associated with the issuance of grazing permits over a five-year period and the subsequent BLM review of the actual effects of grazing confirmed this prediction. The review shows that this category of actions (issuing permits) has no significant impact on the human environment, either individually or cumulatively and would not normally warrant preparation of an EIS or EA. Land health assessments are not the only screen for determining whether the grazing CX 11.9D(11) may be used. The ''extraordinary circumstances'' also provide screening for application of the CX.

Comment: Some comments ask these questions: ''What is the required time period and nature of the assessment?'' ''Is it a detailed FRH [Fundamentals of Rangeland Health] assessment or a cursory review by a BLM team?''

Response: An assessment consists of a review of existing monitoring and inventory data, and a review of the status of selected indicators using BLM TR 1734–6. The assessment may include a collection of new monitoring data when there is inadequate information to make a determination of status or causal factors for non-achievement. In 1998, the BLM directed State Offices to develop a strategy to complete an assessment of current conditions in relation to land health standards and to strive to assess about 10 percent of their land each year. Washington Office Instruction Memorandum No. 98–91 provided direction to assess high priority areas first. The Responsible Official usually determines the level of intensity of the assessment based on issues, availability and currency of existing inventory and monitoring data, and amount of information needed to make a determination of status and, if necessary, to determine causal factors where land health standards are not achieved. The land health assessment process is described in the BLM's Rangeland Health Standards Handbook (H–4180–1) available at the BLM's Web site *http://www.blm.gov/nhp/efoia/wo/fy01/im2001-079.html*.

Comment: Some comments ask the BLM to include a ''requirement as to the [currency and] quality of the data involved'' to ensure that the BLM is ''employing the Best Available Science.''

Response: CEQ regulations at 40 CFR 1502.22 and 1502.24 include requirements that an EIS include ''credible scientific evidence'' (1502.22), and that ''agencies shall ensure the professional integrity, including scientific integrity of discussions and analyses in environmental impact statements.'' (1502.24). The BLM conducts its environmental reviews and analyses in accordance with guidance contained in programmatic handbooks and technical references to ensure the professional integrity of the information, discussions, and analyses. For example, the BLM's Rangeland Health Standards Handbook (H–4180–1) provides direction for collecting and evaluating information used in determining the status of land health. The BLM's Rangeland Health Standards Handbook (H–4180–1) contains a lengthy discussion of the availability and adequacy of existing data including factors such as the age, scale, and appropriateness of the data to be used. Professional judgment may be used to draw conclusions where quantitative data does not lead to definitive conclusions; but the reasoning behind the use of professional judgment should be documented. The interdisciplinary team evaluating the land health standards is also responsible for the adequacy of the available information. If the interdisciplinary team concludes that there is inadequate information available to evaluate the land in light of the standards, then they are directed to begin gathering the information needed. Various BLM technical references, such as TR 1730–1 ''Measuring and Monitoring Plant Populations,'' TR 1730–2 ''Biological Soil Crusts: Ecology and Management,'' and TR 1734–4 ''Sampling Vegetation Attributes'' provide descriptions of the approved techniques for collecting data. These technical references are available at the BLM's National Science and Technology Center at *http://www.blm.gov/nstc/library/techref.htm*. As new information becomes available, it may be considered for incorporation into public land management policies and technical references. When determining in what circumstances to use a CX or an environmental document, the Responsible Official has discretion to determine, consistent with BLM guidance, what data is sufficient to support a finding.

Comment: Some comments state, ''* * * there is significant variation in land health standards and how they are applied between [f]ield [o]ffices. Only in an EA or EIS can the public be ensured that the BLM is using current and adequate science.''

Response: Federal Regulations (43 CFR part 4180) and policy in the BLM's Rangeland Health Standards Handbook (H–4180–1) provide for variation in land health standards and how they are evaluated because of inherent variability among the ecosystems in the states where the BLM manages public land. For example, the Sonoran Desert is significantly different than the Snake River Plain. Responsible Officials have discretion to determine, consistent with BLM guidance, how to determine land health status and causal factors where standards are not achieved. Further information regarding the methodologies employed may be found at the BLM's National Science and Technology Center at *http://www.blm.gov/nstc/library/techref.htm*. The public has opportunities outside the NEPA process to review information used as the basis for grazing decisions, including scientific information. For example, the Grazing regulations at 43 CFR 4130.3–3(b) direct: ''To the extent practical, during the preparation of monitoring reports that evaluate monitoring and other data that the Responsible Official uses as a basis for making decisions to increase or decrease grazing use, or otherwise to change the terms and conditions of a permit or lease, the Responsible Official will provide [the interested public] an opportunity to review and offer input.''

Comment: Some comments pointed out ''there is still a backlog of permits that have not received an original NEPA, as well as a growing number of permits that are being renewed without an updated NEPA.''

Response: At present, Congress has authorized the BLM, under Appropriations legislation (Pub. L. 108–108, Section 325, 117 Stat. 1307–1308 (2003)), to issue grazing permits with the same terms and conditions as expiring permits for which NEPA review has not been completed. Section 325 provides: ''the terms and conditions shall continue in effect under the renewed permit or lease until such time as the Secretary of the Interior * * * complete[s] processing of such permit or lease in compliance with all applicable laws and regulations, at which time such permit or lease may be canceled,

suspended or modified, in whole or in part, to meet the requirements of such applicable laws and regulations.'' The BLM refers to permits issued in accordance with this law as ''backlog'' permits until they are processed as required. Between the beginning of Fiscal Year 1999 and end of Fiscal Year 2005, almost 15,000 permits and leases had expired. The BLM has processed all of these, except for 2610, which are in ''backlog'' status. For purposes of this action, when the BLM is completing NEPA review and documentation, the Responsible Official will consider application of CX 11.9 D(11) for issuance of grazing permits when the specific CX criteria are met and none of the DOI ''extraordinary circumstances'' applies. Consideration of whether or not to use the CX will facilitate reduction of the ''backlog.''

Comment: Some comments state that the ''BLM does not have the institutional resources to properly [collect current ecological site data, or] manage and employ a monitoring program that can correctly assess what is actually occurring.''

Response: The ''correctness'' of the BLM's assessments is a matter that can be questioned on a case-by-case basis under 43 CFR 4130.3–3(b) (''To the extent practical, during the preparation of reports that evaluate monitoring and other data * * * the authorized officer will provide [the interested public] an opportunity to review and offer input.'') Development and implementation of a monitoring program is an issue that is separate from the establishment of a CX. See responses above for responses to questions specifically regarding the establishment of CX 11.9D(11). That said, regardless of whether a proposed activity is reviewed under an EA, EIS or CX, the BLM monitors the effects of the activities to the extent its budget allows. Monitoring data is used in land health assessments when it is available, but is not required. The BLM's program management and associated staffing decisions regarding the monitoring of effects of actions taken are subject to the appropriations process.

Comment: Some comments state that the BLM did not begin site-specific NEPA for grazing management until the 1990s. They cite the IBLA decision in *Oregon Natural Resources Council* v. *BLM,* 129 IBLA 269 (1994) where extending a permit's termination date or changing the name of the permit holder constitutes an action requiring notice and opportunity to protest. The decision applies to whether or not an ''interested public'' or ''affected interest'' has the opportunity to protest and appeal a decision. The implied concern is that, by adopting the CXs 11.9D(11)–(12), the public will be unable to protest or appeal administrative decisions made by the BLM.

Response: The BLM was conducting site-specific NEPA analyses in the early 1970s to facilitate informed decisions on the development and implementation of grazing AMPs. Implementation of the proposed revisions to the NEPA management process will not affect ''interested public'' or ''affected interests'' right to protest and appeal BLM grazing decisions, including decisions made following the CX review process (43 CFR part 4160).

Comment: The same comments express concern that, if the new grazing permit CXs 11.9D(11)–(12) cover administrative actions, such as changing the termination date of the permit, site-specific environmental analyses will not be conducted for grazing allotments that have yet to be given the benefit of a site-specific review.

Response: The BLM deleted part (b) of CX 11.9D(11) to clarify the intent of the CX to require completion of a land health assessment before application of a CX to a specific allotment described in the permit could be considered. Therefore, the CX 11.9D(11) may only be used for administrative changes such as changes of names on grazing permits, if the specific criteria for use of the CX 11.9D(11) are met. Use of the CX in issuing such permits would be subject to the reviews included in the CX limitation involving the completion of land health assessments as well as the consideration of whether any ''extraordinary circumstances'' apply. The BLM has decided not to finalize CX 11.9D(12).

Comment: Some comments state that ''administrative action'' is inadequately defined, and therefore, could be construed ''to include all BLM actions.''

Response: This comment refers to proposed CX 11.9D(12), which the BLM has decided not to finalize.

Comment: Some comments state that the BLM is issuing grazing permits for less than market value.

Response: The comment has no bearing on the adoption of CXs.

Comment: Some comments state that the BLM should revise the CXs to be more specific relative to the stipulation relating to livestock being ''solely'' responsible for the failure to meet land health standards.

Response: The language for CX 11.9D(11) has been revised to clarify the limitation. It now reads, ''Not meeting land health standards due to factors that do not include existing livestock grazing.''

Responses to Specific Comments on Section 11.9—Categorical Exclusions

G. Transportation (Sub-Parts G(1)–(4))

G(1)–(3)—Comments.

Comment: Some comments state that the modified transportation CXs 11.9G(1)–(3) make no distinction among motorized, mechanized, and foot/horse trails, or between authorized and unauthorized roads and trails.

Response: The comments are correct. These CXs do not address the type of use authorized on a road or trail. Trail use is authorized through the land use planning process. These CXs address actions, which take place following this planning process, and are primarily concerned with identification within a transportation plan, routine maintenance or temporary closures. Further, the Responsible Official reviews each proposed action as to whether any of the ''extraordinary circumstances'' in 516 DM 2.3A(3) and appendix 2 apply. If any ''extraordinary circumstance'' applies, the revised transportation CXs 11.9G(1)–(3) may not be used.

Comment: Some comments state that the BLM fails to account for important differences between roads and trails.

Response: The BLM guidance (Washington Office Instruction Memorandum No. 2006–173) defines similar routine management and maintenance requirements for roads and trails. Engineering, design and signing requirements are consistent between roads and trails, and should be consistently addressed in the NEPA context. Trails, like roads, require maintenance (*e.g.*, erosion control, stabilization, and signs) and are periodically closed for safety or resource protection purposes. The major difference between roads and trails is their spatial footprint and degree of infrastructure design, which is less for trails than for roads. With respect to trail location and design, as with respect to roads, the BLM considers resource conditions in design and placement decisions. The BLM's State Trails and Travel Management Leads confirmed that, based upon their past observations and professional experience, implementation of past actions covered under the existing CX did not result in significant effects, individually or cumulatively. In addition, the BLM's Trails and Travel Management Leads agreed that based on their experiences, the environmental effects of these actions along trails as proposed and finalized in the establishment of CXs 11.G(1)–(3) will not result in a significant effect, individually or cumulatively. Further, regardless of

whether the transportation feature is a road or a trail, all proposed actions possible under the CXs would be reviewed against the DOI ''extraordinary circumstances'' (516 DM 2 and appendix 2). If any apply, the CXs could not be used; rather, an EA or EIS would be prepared.

Comment: Some comments ask that the BLM not add ''trails'' to the existing transportation CXs 11.9G(1)–(3).

Response: See response above. Further, it is appropriate to consider roads and trails together in transportation management and maintenance, which are the activities addressed by CXs 11.9G(1)–(3). Collectively roads and trails form the travel network in a management area. Both roads and trails require signs, markers, culverts, and other similar structures covered by CX 11.9G(2). Trails, like roads, occasionally need to be closed or barricaded, which is the subject of CX 11.9G(3). The addition of trails to CXs 11.9(G)(1)–(3) is consistent with the BLM's management practices and comprehensive planning for roads and trails-related activities. These management practices and planning considerations are guided by regulation (43 CFR 8342.2 ''Designation Procedures''—including ''identification of designated areas and trails''), BLM directives and guidelines (BLM Manual 9130 (June 7, 1985)), BLM Land Use Planning Handbook (H–1601–1), and current BLM Sign Manual 9130. Coverage of minor management activities by these three CXs will enable more timely day-to-day management responses, which directly benefit the environment and/or assist in visitor safety and result in no significant impact.

Comment: Some comments ask that the BLM clarify the meaning of the modifier ''existing'' in the transportation CXs 11.9(G)(1) and 11.9(G)(2).

Response: The term ''existing'' has been replaced by ''eligible'' to clarify that any roads and trails to be addressed by the CXs 11.9(G)(1) and (2) must meet certain requirements established in the land use and transportation planning processes. The requirement criteria for defining a road or trail as open are developed as part of the land use planning process to meet resource management objectives. The word ''existing'' was replaced with the word ''eligible'' to avoid confusion with the BLM's OHV designation of ''Limited.''

Comment: Some comments state that it is inappropriate to treat routine installation of signs, markers, culverts, ditches, waterbars, gates, or cattleguards as equally benign when analyzing potential environmental effects which the BLM has done in proposing the 11.9G(2) CX.

Response: Based upon field experience, implementing the category of actions, as defined in the CX, has not resulted in individually or cumulatively significant effects for or along roads. The BLM State Trail and Travel Management Leads have concluded based upon years of professional experience that the addition of ''trails'' to these categories will not result in individually or cumulatively significant environmental effects. The BLM did not propose changes to the overall category of activities covered by the existing CX 11.9G(2) for management actions for and along roads, rather it added to the ability of the BLM to implement the activities along the smaller linear trail features. The BLM is adding trails to the CX to more accurately reflect the similarities in the management actions and maintenance requirements under these categories for roads and trails and due to their similar non-significant environmental effect.

Comment: Some comments state that by including existing trails, the BLM could be permitting approval and signing of illegally created motorized trails or providing access or use rights to third parties, and the BLM will encourage additional use of unauthorized trails.

Response: The term ''existing'' has been replaced by ''eligible'' to clarify that all roads and trails that can be addressed by the CXs must meet certain requirements under the land use and transportation planning processes. Decisions regarding the designation of roads and trails, determinations of OHV open, closed or limited areas, or ''formal'' recognition of the roads and trails contained within any transportation system are determined through the appropriate land use planning or activity planning that is accompanied by a NEPA review process (see the BLM Land Use Planning Handbook H–1601–1, appendix C, Section D). These decisions are not determined through application of the CX.

Responses to Specific Comments on Section 11.9—Categorical Exclusions

H. Recreation Management (Sub-Part H(1))

H(1)—Comments.

Comment: Some comments state that the analysis used to justify the special recreation permit (Recreation Management) CX 11.9H(1) is flawed because it ''assumes that [the] BLM review process will ensure categorical exclusions will not be used where significant consequences may ensue, a rationale that the courts have rejected.''

Response: The comment is not clear about which court has ''rejected'' the ''rationale'' that CXs ''will not be used where significant consequences may ensue.'' The CEQ regulations (40 CFR 1508.4 and 1507.3) authorize federal agencies to establish and apply CXs and specify that CXs will not be applicable when there are extraordinary circumstances. The BLM followed CEQ regulations in proposing additional CXs to reduce paperwork and delays (40 CFR 1500.4 and 1500.5) and enable the BLM to concentrate on environmental issues that are associated with proposed actions that require further analysis in an EA or an EIS. Supporting documentation for the revised Recreation Management CX 11.9H(1) was reviewed to determine whether there is sufficient evidence based on past NEPA analyses and subsequent review of environmental effects to support the finding that the activity included in the proposed CX would not cause individually or cumulatively significant environmental impacts. The establishment of CXs has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd* 230 F.3d 947, 954–55 (7th Cir. 2000). The BLM administrative review concluded that special recreation permits (SRP) that meet the criteria of the CX, will not result in individually or cumulatively significant effects. In addition, activities conducted through the CX review process must address the ''extraordinary circumstances'' (516 DM 2.3(A) and appendix 2) and be consistent with all applicable laws and requirements imposed for protection of the environment.

Comment: The same comments state, ''although CEQ regulations require that CXs incorporate an 'extraordinary circumstances' exception, 40 CFR 1508.4, the presence of the exception is not an excuse for the authorization of otherwise improper or inadequately justified CXs. *See Heartwood, Inc.* v. *United States Forest Service*, 73 F. Supp. 2d 962, 976 (rejecting as ''circular'' the Forest Service's argument that exceptional circumstances exception adequately compensates for failure to consider cumulative effects of an action proposed for categorical exclusion).''

Response: See previous response relative to the court case cited. In addition, the facts in the *Heartwood* decision are distinguishable from those underlying the proposed actions here; therefore, they do not apply in this context. The BLM has established the

Recreation Management CX 11.9H(1), based on data gathered and reviewed using generally accepted analytic procedures. Furthermore, the BLM's analysis included a review of NEPA documents which themselves included analyses of cumulative effects and the subsequent BLM review of the actual effects. A statistically valid random sample of the BLM's total population of SRP records indicates that 84 percent of the BLM's SRPs have had no unanticipated individual or cumulatively significant impacts. Upon further review, the BLM clarified the CX language to include the limitation that the CX cannot be applied to commercial boating activities proposed along designated Wild and Scenic Rivers. This limitation was added in accordance with CEQ proposed guidance on the establishment and use of categorical exclusions (71 FR 54816, September 19, 2006), which encourages agencies to clearly define the category of actions covered, as well as any physical or environmental factors that would constrain its use. These constraints ensure that the SRPs likely to have significant effects would not be eligible for CX use. Therefore, the SRP activities that could be covered under the CX by meeting all CX criteria, would not result in a significant effect on the environment either individually or cumulatively. The BLM mandates that proposed actions or activities be, at a minimum, consistent with the DOI and the BLM regulations, manuals, handbooks, policies, and applicable LUPs regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations. The BLM requires that all SRP permittees must agree to comply with the specific SRPs terms and conditions identified on the BLM Form 2930–1, which the BLM uses nationwide. Additional examples of standard stipulations, terms, conditions of approval and specific limitations to apply to SRPs can be found in the BLM's Recreation Permit Handbook (H–2930–1 appendix C). An example of one state-specific guidance is the Wyoming Statewide Recreation Permit Handbook (2932–WY–050–SRP–03–05). The BLM must review all proposed actions against the DOI list of ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2). If one or more of the ''extraordinary circumstances'' apply, the CX could not be used; rather, an EA or EIS would be prepared.

Comment: Some comments state that the analysis used to justify Recreation Management CX 11.9H(1) is ''flawed'' because it ''fails to distinguish between significantly different categories of activities, such as motorized versus non-motorized recreation events.'' In other words, it exempts a ''category of actions'' without any analysis of the actions, which belong to that category.

Response: The BLM disagrees. The CEQ regulations (40 CFR 1508.4 and 1507.3) authorize Federal agencies to establish and apply CXs to categories of actions that do not have significant effects, either individually or cumulatively, on the quality of the human environment, and specify that CXs will not be applicable when there are extraordinary circumstances. The BLM examined, collectively SRP activities authorized in LUPs, and found that for this category of action, with the added limitation respecting commercial boating along Wild and Scenic Rivers, there were no significant impacts, individually or cumulatively. This category of actions, the authorizing of SRPs, includes permitting commercial recreation operations, competitive events and organized group activities, as stated on page 2 of the SRP analysis report available at *http://www.blm.gov/planning/news.html*. As such, the category includes all types of recreational activities engaged in by the public. The report lists, for instance, an organized group of bird watchers and an endurance horse racing event, but as stated in the report the recreational activities covered by SRPs are not limited to the examples given. The SRPs are also granted for mechanized and motorized recreational activities. The SRP data analyzed incorporated all types of recreational activities authorized under SRPs, including those issued for motorized recreational activities. For additional information regarding the definition of these activities, see 43 CFR 2932. Further, with respect to the grant of each SRP, the Responsible Official must require the standard terms and conditions found on Form 2930–1 and must address whether any ''extraordinary circumstances'' (516 DM 2 and appendix 2) apply. If any of the ''extraordinary circumstances'' apply, the CX cannot be used.

Comment: Some comments state that the analysis used to justify the SRP CX 11.9H(1) is ''flawed'' because using a history of EA process review data to justify the CX fails entirely to take into consideration the extent to which adverse environmental consequences are identified and avoided through the EA process and accompanying public involvement.

Response: The BLM disagrees. The CEQ regulations (40 CFR 1508.4 and 1507.3) authorize Federal agencies to establish and apply CXs. The BLM followed CEQ regulations in proposing additional CXs to reduce paperwork and delays (40 CFR 1500.4 and 1500.5) and enable the BLM to concentrate on environmental issues associated with proposed actions that require further analysis in an EA or EIS. The Recreation Management CX 11.9H(1) was subjected to administrative review to determine whether there is supporting evidence based on past NEPA analyses, as well as evaluation of environmental effects of the action as implemented, sufficient to support the conclusion that this category of action does not cause individually or cumulatively significant environmental impacts. The BLM found no significant effect for all cases except commercial boating activities along Wild and Scenic Rivers. Based upon further review, and in accordance with CEQ proposed guidance on the establishment and use of categorical exclusions (71 FR 54816, September 19, 2006), which encourages agencies to clearly define the category of actions covered, as well as any physical or environmental factors that would constrain its use, the final SRP CX includes a limitation on this type of SRP so that the CX cannot be used for consideration of commercial boating SRPs along Wild and Scenic Rivers. Further, the BLM must review proposed actions considered for use of a CX against the DOI ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2). If one or more of the ''extraordinary circumstances'' apply, the CX cannot be used. In authorizing an action, regardless of the type of NEPA compliance completed, the BLM may not violate any applicable Federal, State, local, and tribal laws and requirements imposed for protection of the environment. The establishment of CXs have been upheld in *Heartwood, Inc.* v. *U.S. Forest Service*, 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd* 230 F.3d 947, 954–55 (7th Cir. 2000). In addition, public involvement has been, and remains, critical to the BLM decision-making process. The public will continue to have opportunities for involvement during the development of LUPs and activity plans. Furthermore, in instances where there is a high public interest in an individual proposed SRP, the Responsible Official retains the discretion to involve the public throughout the decision-making process regardless of the kind of NEPA review conducted.

Comment: Some comments state that the ''best outcome'' would be to retain the SRP CX 11.9H(5) and modify and adopt the new CX 11.9H(1) by ''adding

a ceiling or maximum number of people and/or vehicles that may participate in the recreational activity or event, in addition to any time an[d]/or acreage limits.''

Response: The Recreation Program determined that the existing CX needed to be revised to clarify the language to ensure consistent application of its use Bureau-wide. The new language approved for the CX 11.9H(1) was developed following generally accepted analytical procedures. The proposed language did not include ceilings or maximum numbers of people and/or vehicles that may participate in activities addressed by the CX because, for the overwhelming number of SRPs issued and otherwise meeting the proposed criteria, the NEPA analyses conducted resulted in FONSIs regardless of the number of people or vehicles involved in the permitted activity and the subsequent BLM review of the actual effects confirmed there were no significant impacts. In addition, the BLM has added limits to the final CX language to clarify that it cannot be applied for the permitting of commercial boating along Wild and Scenic Rivers, the only type of SRP sampled that was found to have or potentially have significant environmental effects, rendering it unacceptable for CX consideration. Further, if needed, establishment of visitor use limitations or vehicle number limitations are determined during the land use planning process. Based on BLM data, when the new Recreation Management CX 11.9H(1) criteria are met, individual and cumulatively significant impacts will not occur. The staging area acre limitation was determined during the analytical process, based on the professional judgment of the BLM recreation specialists and their review of past SRP activities, to be an appropriate threshold to set to ensure that significant effects do not occur for future actions addressed by the CX.

Comment: Some comments ask the BLM to retain the existing CX ''in lieu of this new H(1)CX,'' because they prefer the concluding phrase ''similar minor events'' which is an important and ''reasonable'' limitation.

Response: See response above. The new language is based on a completed NEPA review process that included data collected through a stratified random sample of all SRPs issued by the BLM from October 1, 2000, through September 30, 2005. The analysis of this sample supports the new Recreation Management CX 11.9H(1).

Comment: Some comments wanted the CX 11.9H(1) to apply ''to the relatively low-impact examples provided'' and not allow ''other activities, with extremely serious adverse environmental consequences, such as motorized vehicle races and events and activities on Wild and Scenic Rivers.''

Response: Upon further review, the BLM has added a limitation to the terms of the CX. The CX may not be used in the permitting of commercial boating activities on Wild and Scenic Rivers as this was the one type of SRP activity sampled that resulted in a significant effect. None of the other SRP activities sampled during the establishment of this CX resulted in environmentally significant effects, individually or cumulatively. As to the commenter's other concern, while the list of examples provided in the December 12, 2005, CX Project—Recreation analysis report (available at *http://www.doi.gov/oepc/cx_analysis.html* and *http://www.blm.gov/planning/news.html*) did not include motorized vehicle activity examples, it was not an exhaustive list. In fact, SRPs authorizing motorized activities were included in the sampled data, which reflected all types of SRPs authorized. Recreational activities of any type with ''extremely serious adverse environmental consequences'' as mentioned in the comment, would not be reviewed using a CX as one or more of the ''extraordinary circumstance'' would apply (516 DM 2.3A(3) and appendix 2). If any of the ''extraordinary circumstances'' apply, the CX will not be used, and an EA or EIS would be prepared.

Comment: Some comments ask if CX 11.9H(1) covers ''organized and/or commercial events.''

Response: Yes, CX 11.9H(1) covers all types of SRPs, including organized and/or commercial events, that meet the CX-specific criteria and where none of the ''extraordinary circumstances'' apply (516 DM 2.3A(3) and appendix 2).

Comment: Some comments state that CX 11.9H(1) ''time and space limitations'' are not enough to ''negate the environmental impacts'' and ''concentrating [any] such activities to a confined space can further and substantially increase the impacts.''

Response: The BLM disagrees. The ''time and space'' limitations set in establishment of the proposed CX were derived based on the administrative review described in the analysis report for the SRP CX found at *http://www.blm.gov/planning/news.html*. Upon further review, the BLM has decided to change the limitation for the Recreation Management CX 11.9H(1) length of overnight stay from 7 to 14 consecutive nights to provide consistency with the typical length of stay for any casual visitor using public lands (43 CFR 8364; 8365.1–2 ''Occupancy and Use,'' and 8365.1–6 ''Supplementary Rules''). Additional review of the data analyzed during the establishment of the CX confirmed that there was no difference in results of the NEPA review with respect to SRPs with overnights stays of up to 7 nights, as compared to stays of up to 14 nights. Significant environmental effects did not result from SRPs with lengths of stays of up to 14 nights. The acre limit was set during the establishment of the proposed CX based on the professional judgment of the BLM recreation planners and their review of SRP activities. This acreage was refined for the final CX based on the data reviewed. The BLM professional judgment, supported by the data analysis ensures that no significant impact will occur based on implementation of this limitation for this CX.

Comment: Some comments state that the analysis used to justify the CX is ''flawed'' because it ''fails entirely to address the question of cumulative impacts on the environment.''

Response: See above responses regarding establishment of the Recreation Management CX. None of the projects reviewed that meet the final CX language criteria, resulted in cumulatively significant environmental effects. Further, all proposed SRPs considered for application of the CX would be reviewed against the ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2), and extraordinary circumstance 2.6 specifically addresses cumulative impacts on the environment.

Comment: Some comments state that CX 11.9H(1) ''should not be adopted as written'' and that the CX should ''exclude activities that utilize motorized equipment, which intrinsically have the potential to cause significant environmental impacts.'' Some comments ask the BLM to exclude ''off-highway vehicles and motorized recreation'' because they cause significant impacts, such as increased noise levels, air pollution from dust and fumes, and incidental off-road use.

Response: See above responses. The data analyzed during the establishment of the CX included ''off-highway vehicle and motorized recreation'' activities. The BLM concluded based on the data analyzed, that the SRPs covered under the CX did not result in significant environmental effects, individually or cumulatively. Further, CX 11.9H(1) can only be used to permit recreational activities that meet the CX criteria when none of the ''extraordinary

circumstances'' (516 DM 2.3A(3) and appendix 2) apply. If any ''extraordinary circumstances'' apply, the CX cannot be used.

Comment: Some comments state that not all types of recreation use/activity should be eligible for the Recreation Management CX 11.9H(1), even if the use/activity meets the area and number of consecutive nights criteria. For example, certain recreational uses, such as cattle drives, rodeos, and motorcross and motorcycle hill climbing events, may have significant effects. Federal court cases and the ''IBLA have specifically found [these kinds of events] to have significant (and adverse) effects * * * .''

Response: The BLM used analytical procedures to examine the NEPA process results used to issue 8,063 SRPs from October 1, 2000, through September 30, 2005. The BLM currently issues an estimated 3,500 SRPs annually, of which approximately 1,500 permits are re-issued each year. The permits granted include SRPs for the types of recreation actions identified by the comments. The BLM examined, collectively, SRP activities authorized in LUPs, and found that for this category of action, with the added limitation pertaining to commercial boating on Wild and Scenic Rivers, there are no significant environmental effects, either individually or cumulatively. This category of actions, the authorizing of SRPs, includes permitting commercial recreation operations (excepting boating along Wild and Scenic Rivers), competitive events and organized group activities, as stated on page 2 of the SRP analysis report available at *http://www.blm.gov/planning/news.html.* As such, the category includes all types of recreational activities engaged in by the public. The report lists, for instance, an organized group of bird watchers and an endurance horse racing event, but as stated in the report the recreational activities covered by SRPs are not limited to the examples given. These SRPs are also granted for mechanized and motorized recreational activities. The SRP data and activities analyzed included all types of recreational activities authorized under SRPs. For additional information regarding the definition of these activities, see 43 CFR 2932. Based on a statistically valid sample of SRPs issued, the BLM has determined that establishment of the new SRP CX is warranted; all types of recreation activities that meet the CX criteria are eligible for authorization under the new SRP CX. However, if any of the DOI ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2) apply, the CX cannot be used.

Comment: Some comments wanted to know if ''the 3% of SRPs with significant impacts'' involved motor vehicle events and whether the SRP data can be used to differentiate between significant impacts associated with different types of SRP activities.

Response: The BLM data reviewed revealed that the 3% of the SRPs with significant impacts were for SPR commercial boating activities along Wild and Scenic Rivers. Therefore, the BLM added a specific limitation to the CX so that it cannot be used for commercial boating along Wild and Scenic Rivers. None of the remaining SRPs activities sampled resulted in significant environmental effects, individually or cumulatively.

Comment: Some comments wanted the BLM to limit the number of motorized vehicles used, duration, speed, or type of event and/or to specifically address the different impacts from the volume of users, intensity of use, and equipment involved.

Response: None of the SRP activities that meet the final CX criteria resulted in significant environmental effects, individually or cumulatively. Therefore, the BLM did not add additional limitations to the CX as suggested in the comment.

Comment: Some comments asked the BLM to describe how the size of the ''3 contiguous acres'' and the seven consecutive day and overnight stay limits were derived.

Response: Data analyses revealed no statistical relationship between the size of the staging area, number of consecutive overnights permitted, and the incidence of significant individual or cumulative impacts. Therefore, the BLM selected the three contiguous acre area limit based upon a review of the SRPs issued. Of 548 informative responses to a questionnaire about the actual size of the staging area and number of nights involved in the SRPs issued, 90 percent of the SRPs with staging area information reported that the area involved was equal to or less than 3 acres. The 7-day stay limit was derived by analyzing the entire population of SRPs in the BLM's Recreation Management Information System and taking the average length of stay permitted. Based on comments received and the fact that the data revealed no relationship between length of overnight stay and significant impacts, the BLM has decided to change the Recreation Management CX 11.9H(1) length of overnight stay from 7 to 14 consecutive nights to provide consistency with the allowable length of stay for any casual visitor using public lands (43 CFR 8364, 8365.1–2 ''Occupancy and Use,'' and 8365.1–6 ''Supplementary Rules''). This is to ensure equality regarding ''length of stay'' limitations between permitted use activities and the casual use activities on public lands.

Comment: Some comments express a concern that the three contiguous acres language could be variously interpreted because it is not clear whether the activity area includes a linear route, such as a race. They suggested adding the words ''staging area'' to clarify the CX language.

Response: The BLM agrees. The word ''contiguous'' has been deleted and the term ''staging area'' has been added to the CX to clarify the intent of the limiting condition. See staging area definition below.

Comment: Some comments ask that the BLM define ''staging area.''

Response: A staging area is defined in this context as an area where use is concentrated, usually to enable access to a recreational activity that involves traveling across public lands along roads, trails or in areas authorized in a LUP. Examples include trailheads, gathering points, base or hunting camps, boat launching or parking areas, and the like. Other examples of staging areas include a congregation point (e.g., for parking) where a group activity begins and/or ends, a viewing area for an event, a training course or play area not involving existing roads or trails. The staging area acreage amount does not include the use of authorized roads, trails or access to adjacent areas open for recreational use in the LUP.

Comment: Some comments ask that the BLM define ''travel management area'' and ''travel networks.''

Response: ''Travel management areas'' and ''networks'' are defined in the BLM's Land Use Planning Handbook (H–1601–1 appendix C and Glossary page 8). ''Travel Management Areas'' are defined as polygons or delineated areas where a land use planning process has classified areas as open, closed, or limited to off-highway vehicle use or other modes of travel. The terms ''travel management area'' and ''networks'' were replaced in the final CX language with ''recreational travel along roads, trails or in areas authorized in a LUP'' to clarify the intent of the final CX.

Comment: Some comments ask for more information on how the BLM: (a) Differentiates organized/commercial groups relative to private/individual use in the travel management and transportation network planning context; (b) deals with permitted

dispersed recreational activities impacts; and (c) manages events with large staging areas on private lands supporting permitted recreational use of public lands.

Response: (a) The BLM differentiates SRP authorized activities from private/individual use (i.e. casual use) based on definitions found in 43 CFR 2930 and the BLM guidance in the BLM Recreation Permit Handbook (H–2930–1, pages 10–12). (b) The BLM does not differentiate between dispersed or non-dispersed recreational activity impacts when considering a proposed SRP action. The BLM considers whether the proposed activity meets the criteria set forth in the CX and if not, a different type of NEPA review would be conducted to determine the environmental effects of the proposed SRP. In addition, general dispersed recreational activity impacts would be analyzed during the land use planning process. (c) The BLM SRPs are use authorizations for activities on the BLM-administered public lands and related waters. The issuing of SRPs for events involving ''staging areas'' on private lands are coordinated by the BLM with stipulations requiring the permittee collaborate with appropriate private landowners and/or public agencies (law enforcement, highway, fish and game, etc., BLM Form 2930–1, Special Recreation Application and Permit). If significant impacts, as revealed in the course of ''extraordinary circumstances'' review, may occur from issuance of an SRP, this CX could not be used.

Responses to Specific Comments on Section 11.9—Categorical Exclusions

I. Emergency Stabilization (sub-part I(1))

I(1)—Comments.

Comment: Some comments state that the Emergency Stabilization CX is (1) too broad, (2) based on subjective criteria, and (3) includes far too many acres of land disturbance.

Response: (1) The new Emergency Stabilization CX builds on the existing DOI CX that addresses post-fire rehabilitation responses to wildfires (516 DM 2 appendix 1, section 1.13, Finalized at 68 FR 33814, June 5, 2003). Post-fire rehabilitation activities as defined in the DOI CX refer to response activities taken within 1 to 3 years following a wildfire. For the purposes of this BLM-specific CX, emergency stabilization response activities are the same on-the-ground treatments as the post-fire rehabilitation treatments but they must occur within one year of the natural land disturbance event. The events may include destabilizing natural events, such as wildfire, floods, strong weather, earthquakes, and landslips. The emergency stabilization response activities include management treatments, which are prescribed to minimize threats to life or property and to stabilize and prevent unacceptable degradation of natural and cultural resources as a result of a natural land disturbance event. The emergency stabilization responses under this CX are the same as the DOI CX post-fire rehabilitation activities and may include: Seeding to prevent erosion or the spread of noxious weeds; installation of structures, such as log erosion barriers or straw wattles; felling hazard trees along roads or in campgrounds; and similar treatments to prevent or minimize negative impacts caused by a natural land disturbance event. While the natural events responded to by activities covered under this CX may be different from a wildland fire, because the response actions taken under this CX are generally the same as those taken under the DOI CX for post-fire rehabilitation, the BLM has concluded that, similarly, they do not result in significant effects, individually or cumulatively. The BLM reached this conclusion on the basis both of conducting a review of the wildfire data, and based on the professional judgment of BLM specialists experienced with these types of events and response activities and their effects. Appropriate use of the Emergency Stabilization CX 11.9I(1) is warranted on the basis of this review and judgment, as well as because such use will be in accord with current administrative procedures such as the following: BLM Burned Area Emergency Stabilization and Rehabilitation Handbook (H–1742–1); specific standards and guidelines expressed in policy documents such as Instruction Memorandum 2006–162; and the specific terms and conditions identified within local LUPs. Further, the BLM must review all proposed emergency stabilization treatment against the DOI's ''extraordinary circumstances'' (516 DM 2.3A(3) and appendix 2). The CX cannot be used if any of the ''extraordinary circumstances'' apply.

(2) The category of actions covered by the new Emergency Stabilization CX, as well as its specific criteria, were derived from a review of approximately 300 post-fire emergency stabilization/rehabilitation projects analyzed during the establishment of the DOI post-fire rehabilitation CX 620 DM Ch 3.3E, June 5, 2003. Information on 30 variables was collected and analyzed. These data included project-specific information on the location, project size, vegetation type, emergency stabilization/rehabilitation treatments performed, the type of NEPA review performed, predicted environmental impacts of proposed treatments and the actual environmental impacts after treatments. The criteria applied were not subjectively derived. In the judgment of the BLM professionals experienced in implementing these activities, the activities and their effects for which the BLM Emergency Stabilization CX is proposed, are of the same nature as the activities and their effects analyzed as the basis for establishment of the DOI post-fire rehabilitation CX.

(3) The 4,200-acre limit was derived through analysis of the DOI CX data set, which represents a range of environments in which wildfire events routinely occur on public lands. This CX adopts the 4,200-acre limit to maintain consistency with the DOI CX limitation as the effects of the actions taken in response to wildfires. These response actions are the same as those taken in response to other natural land disturbance events. Based on review of the DOI CX data by professionals in the area of post-disturbance stabilization, the BLM concludes that this CX will not have individual or cumulative significant impacts when all conditions of the CX were met. Further, as an additional safeguard, the BLM must review all proposed actions against the DOI ''extraordinary circumstances'' (516 DM 2.3A(3)). If any of the ''extraordinary circumstances'' apply, the CX cannot be used.

Comment: Some comments state that post-emergency treatments ''merit thorough analysis regarding potential significant impacts.'' Affected areas are ''often extremely vulnerable to further environmental damage'' and ''the activities included do not necessarily work successfully to mitigate damages from natural events and often cause adverse impacts on their own.''

Response: The DOI post-fire rehabilitation CX data review concluded that no significant individual or cumulative impacts are likely to occur as a result of the types of stabilizing response activities that are taken within 1 to 3 years of the natural disturbance event. The BLM's Emergency Stabilization CX includes an additional limitation that actions can only be taken within one year following the natural disturbance event. In addition, the Emergency Stabilization CX cannot be used if one or more of the DOI ''extraordinary circumstance'' (516 DM 2.3A(3) and appendix 2) applies.

Comment: Some comments ask that the BLM ''consider alternatives [to repair or replacement of roads and

culverts] that would permit improvement of wildlife habitat or watershed condition.''

Response: The CX 11.9I(1) may be used only for Emergency Stabilization treatments when the CX specific criteria are met in full. Further, each proposed action must be reviewed against the DOI ''extraordinary circumstances,'' if any apply, the CX cannot be used. Emergency stabilization activities are those treatments that are prescribed to minimize threats to life or property and to stabilize and prevent unacceptable degradation of natural and cultural resources as a result of a natural land disturbance event. The emergency stabilization actions must be taken within one year following the disturbance event. The emergency stabilization activities may include: seeding to prevent erosion or the spread of noxious weeds; installation of structures, such as log erosion barriers or weed-free straw wattles and fish friendly culverts; felling hazardous trees along roads or in campgrounds; and similar treatments to prevent or minimize negative impacts caused by certain inevitable natural events. These activities are covered under CX 11.9I(1) because they are commonly accepted minimum impact responses to the effects of floods, weather events, earthquakes, and landslips in addition to wildfires. Improvements to natural resource conditions may be a derived or incidental benefit, but cannot be a driving purpose for the proposed action for use of this CX.

Comment: Some comments ask that the BLM clearly define what constitutes ''temporary road'' construction to ''minimize * * * impacts,'' and to include language in each CX that provides a requirement that temporary roads be obliterated when a project is completed. Some comments suggested that road construction should only be carried out following a detailed analysis.

Response: The need for temporary roads is determined during the project proposal process. The Responsible Official is required to review the project proposal against the DOI's extraordinary circumstance (516 DM 2.3A(3) and appendix 2). Project proposals include descriptions of when vehicle and equipment access is necessary, how it will be done, and, if temporary roads are included, how they are to be reclaimed. Based on the DOI CX data analyzed for the proposed Emergency Stabilization CX (11.9I(1)), there are no individual or cumulatively significant environmental effects when temporary roads are part of activities identified in the CX. The BLM added a definition to the CX language to clarify what a temporary road is for use under this CX. Further, if one or more of the ''extraordinary circumstances'' apply the CX cannot be used.

Comment: Some comments recommend that culvert repair and replacement not be included in the list of exempted treatments and that the CX language be changed to limit treatments to ''less invasive treatments'' that can only be applied when the affected area is verifiably destabilized.

Response: Repair and replacement of existing culverts damaged or lost due to a natural disaster is necessary to prevent excessive soil erosion and damage to resources and property in unstable environments. According to the DOI CX data analyzed, no unanticipated individual or cumulatively significant impacts occur when culverts are repaired or replaced in accordance with the criteria established in the new Emergency Stabilization CX 11.9I(1). The activities and the effects of those activities covered under this Emergency Stabilization CX are the same as the DOI CX and will result in no individually or cumulatively significant impacts.

Comment: Some comments recommend that the Emergency Stabilization CX 11.9I(1) be expanded to include ''minor herbicide applications.''

Response: The data analyzed in the development of the Emergency Stabilization CX 11.9I(1) excluded the use of herbicides as a variable in the analysis. Therefore, the CX 11.9I(1) explicitly precludes its use with respect to the application of herbicides.

Responses to Specific Comments on Section 11.9—Categorical Exclusions

J. Other (sub-part J(12))

J(12)—Comments.

Comment: Some comments ask why the existing CX 11.9H(12) is being deleted.

Response: The proposed 516 DM 11 mistakenly left the existing 11.9H(12) out of the **Federal Register** (71 FR 4159–4167, January 25, 2006). This existing CX is added back into the text of this **Federal Register** notice with no changes to its language, however the citation number is changed to J(12) for continued inclusion in the ''Other'' Category. The language reads, ''Rendering formal classification of lands as to their mineral character and waterpower and water storage values.''

Procedural Requirements

The following list of procedural requirements has been assembled and addressed to contribute to this open review process. Today's publication is a notice of an internal Departmental action and not a rulemaking. However, we have addressed the various procedural requirements that are generally applicable to proposed and final rulemaking to show how they would affect this notice if it were a rulemaking.

Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), it has been determined that this action is the implementation of policy and procedures applicable only to the DOI and not a significant regulatory action. These policies and procedures would not impose a compliance burden on the general economy.

Administrative Procedure Act

This document is not subject to prior notice and opportunity to comment because it is a general statement of policy and procedure (5 U.S.C. 553(b)(A)). However, notice and opportunity to comment is required by the CEQ regulations (40 CFR 1507.3(a)).

Regulatory Flexibility Act

This document is not subject to notice and comment under the Administrative Procedure Act, and, therefore, is not subject to the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This document provides the DOI with policy and procedures under NEPA and does not compel any other party to conduct any action.

Small Business Regulatory Enforcement Fairness Act

These policies and procedures do not comprise a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The document will not have an annual effect on the economy of $100 million or more and is expected to have no significant economic impacts. Further, it will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions and will (Page 52596) impose no additional regulatory restraints in addition to those already in operation. Finally, the document does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), this document will not significantly or uniquely affect small governments. A Small Government

Agency Plan is not required. The document does not require any additional management responsibilities. Further, this document will not produce a federal mandate of $100 million or greater in any year, that is, it is not a significant regulatory action under the Unfunded Mandates Reform Act. These policies and procedures are not expected to have significant economic impacts nor will they impose any unfunded mandates on other Federal, State, or local government agencies to carry out specific activities.

Federalism

In accordance with Executive Order 13132, this document does not have significant federalism effects; therefore, a federalism assessment is not required. The policies and procedures will not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government. No intrusion on state policy or administration is expected, roles or responsibilities of federal or state governments will not change, and fiscal capacity will not be substantially, directly affected. Therefore, the document does not have significant effects on or implications for federalism.

Paperwork Reduction Act

This document does not require information collection, as defined under the Paperwork Reduction Act. Therefore, this document does not constitute a new information collection system requiring Office of Management and Budget approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

National Environmental Policy Act

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, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The determination that establishing NEPA procedures does not require NEPA analysis and documentation has been upheld in *Heartwood, Inc.* v. *U.S. Forest Service,* 73 F. Supp. 2d 962, 972–73 (S.D. Ill. 1999), *aff'd* 230 F.3d 947, 954–55 (7th Cir. 2000).

Essential Fish Habitat

We have analyzed this document in accordance with Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act and determined that issuance of this document will not affect the essential fish habitat of federally-managed species; therefore, an essential fish habitat consultation on this document is not required.

Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175 of November 6, 2000, and 512 DM Ch 2, we have assessed this document's impact on tribal trust resources and have determined that it does not directly affect tribal resources since it describes the DOI's procedures for its compliance with NEPA.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Executive Order 13211 of May 18, 2001, requires a Statement of Energy Effects for significant energy actions. Significant energy actions are actions normally published in the **Federal Register** that lead to the promulgation of a final rule or regulation and may have any adverse effects on energy supply, distribution, or use. We have explained above that this document is an internal DM part, which only affects how the DOI conducts its business under the NEPA. Revising this manual part does not constitute rulemaking; therefore, it is not subject to Executive Order 13211.

Actions to Expedite Energy-Related Projects

Executive Order 13212 of May 18, 2001, requires agencies to expedite energy-related projects by streamlining internal processes while maintaining safety, public health, and environmental protections. Today's publication is in conformance with this requirement as it promotes existing process streamlining requirements and revises the text to emphasize this concept (see Chapter 4, subpart 4.16).

Government Actions and Interference With Constitutionally Protected Property Rights

In accordance with Executive Order 12630 (March 15, 1988), and Part 318 of the DM, the DOI has reviewed today's notice to determine whether it would interfere with constitutionally protected property rights. As internal instructions to bureaus on the implementation of the NEPA, this publication will not cause such interference.

Authority: The NEPA, the National Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*); Executive Order 11514, March 5, 1970, as amended by Executive Order 11991, May 24, 1977; and CEQ regulations 40 CFR 1507.3.

Willie R. Taylor,

Director, Office of Environmental Policy and Compliance.

An electronic copy may be obtained from the Department of the Interior Web site *http://elips.doi.gov.*

Department of the Interior

Departmental Manual

Effective Date: _____
Series: Environmental Quality.
Part 516: National Environmental Policy Act of 1969.
Chapter 11: Managing the NEPA Process—Bureau of Land Management.
Originating Office: Office of Environmental Policy and Compliance.

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516 DM 11

11.1 Purpose

This chapter provides supplementary requirements for implementing provisions of 516 DM Chapters 1 through 6 for the Department of the Interior's Bureau of Land Management (BLM). The BLM's National Environmental Policy Act (NEPA) Handbook (H–1790–1) provides additional guidance.

11.2 NEPA Responsibilities

A. The Director and Deputy Director(s) are responsible for the BLM NEPA compliance activities.

B. The Assistant Director, Renewable Resources and Planning, is responsible for national NEPA compliance leadership and coordination, program direction, policy, and protocols development, and implementation of the same at the line management level. The Division of Planning and Science Policy, within the Assistant Directorate, Renewable Resources and Planning, has the BLM lead for the NEPA compliance program direction and oversight.

C. The BLM Office Directors and other Assistant Directors are responsible for cooperating with the Assistant Director, Renewable Resources and Planning, to ensure that the BLM NEPA compliance procedures operate as prescribed within their areas of responsibility.

D. The BLM Center Directors are responsible for cooperating with the

Assistant Director, Renewable Resources and Planning, to ensure that the BLM NEPA compliance procedures operate as prescribed within their areas of responsibility.

E. The State Directors are responsible to the Director/Deputy Director(s) for overall direction, integration and implementation of the BLM NEPA compliance procedures in their states. This includes managing for the appropriate level of public notification and participation, and ensuring production of quality environmental review and decision documents. Deputy State Directors serve as focal points for NEPA compliance matters at the state level.

F. The District and Field Managers are responsible for NEPA compliance at the local level.

11.3 External Applicants' Guidance

A. General

(1) For all external proposals, applicants should make initial contact with the Responsible Official (District Manager, Field Manager, or State Director) responsible for the affected public lands as soon as possible after determining the BLM's involvement. This early contact is necessary to allow the BLM to consult early with appropriate state and local agencies and tribes and with interested private persons and organizations, and to commence its NEPA process at the earliest possible time.

(2) When a proposed action has the potential to affect public lands in more than one administrative unit, the applicant may initially contact any Responsible Official whose jurisdiction is involved. The BLM may then designate a lead office to coordinate between BLM jurisdictions.

(3) Potential applicants may secure from the Responsible Official a list of NEPA and other relevant regulations and requirements for environmental review related to each applicant's proposed action. The purpose of making these regulations and requirements known in advance is to assist the applicant in the development of an adequate and accurate description of the proposed action when the applicant submits their project application. The list provided to the applicant may not fully disclose all relevant regulations and requirements because additional requirements could be identified after review of the applicant's proposal document(s) and as a result of the ''scoping'' process.

(4) The applicant is encouraged to advise the BLM of their intentions early on in their planning process. Early communication is necessary so that the BLM can efficiently advise the applicant on the anticipated type of NEPA review required, information needed, and potential data gaps that may or may not need to be filled, so that the BLM can describe the relevant regulations and requirements likely to affect the proposed action(s), and to discuss scheduling expectations.

B. *Regulations:* The following list of potentially relevant regulations should be considered at a minimum. Many other regulations affect public lands—some of which are specific to the BLM, while others are applicable across a broad range of federal programs (e.g., Protection of Historic and Cultural Programs—36 Code of Federal Regulations (CFR) Part 800).

(1) Resource Management Planning—43 CFR 1610;

(2) Withdrawals—43 CFR 2300;

(3) Land Classification—43 CFR 2400;

(4) Disposition: Occupancy and Use—43 CFR 2500;

(5) Disposition: Grants—43 CFR 2600;

(6) Disposition: Sales—43 CFR 2700;

(7) Use: Rights-of-Way—43 CFR 2800;

(8) Use: Leases and Permits—43 CFR 2900;

(9) Oil and Gas Leasing—43 CFR 3100;

(10) Geothermal Resources Leasing—43 CFR 3200;

(11) Coal Management—43 CFR 3400;

(12) Leasing of Solid Minerals Other than Coal/Oil Shale—43 CFR 3500;

(13) Mineral Materials Disposal—43 CFR 3600;

(14) Mining Claims Under the General Mining Laws—43 CFR 3800;

(15) Grazing Administration—43 CFR 4100;

(16) Wild Free-Roaming Horse and Burro Management—43 CFR 4700;

(17) Forest Management—43 CFR 5000;

(18) Wildlife Management—43 CFR 6000;

(19) Recreation Management—43 CFR 8300; and

(20) Wilderness Management—43 CFR 6300.

11.4 General Requirements

The Council on Environmental Quality (CEQ) regulations state that federal agencies shall reduce paperwork and delay (40 CFR 1500.4 and 1500.5) to the fullest extent possible. The information used in any NEPA analysis must be of high quality. Accurate scientific analysis, agency expert comments, and public scrutiny are essential to implementing the NEPA (40 CFR 1500.1(b)). Environmental documents should be concise and written in plain language (40 CFR 1502.8), so they can be understood and should concentrate on the issues that are truly significant to the action in question rather than amassing needless detail (40 CFR 1500.1(b)).

A. *Reduce paperwork and delays:* The Responsible Official will avoid unnecessary duplication of effort and promote cooperation with other federal agencies that have permitting, funding, approving, or other consulting or coordinating requirements associated with the proposed action. The Responsible Official shall, as appropriate, integrate NEPA requirements with other environmental review and consultation requirements (40 CFR 1500.4(k)); tier to broader environmental review documents (40 CFR 1502.20); incorporate by reference relevant studies and analyses (40 CFR 1502.21); adopt other agency environmental analyses (40 CFR 1506.3); and supplement analyses with new information (40 CFR 1502.9).

B. *Eliminate duplicate tribal, state, and local governmental procedures (40 CFR 1506.2):* The Responsible Official will cooperate with other governmental entities to the fullest extent possible to reduce duplication between federal, state, local and tribal requirements in addition to, but not in conflict with, those in the NEPA. Cooperation may include the following: common databases; joint planning processes; joint science investigations; joint public meetings and hearings; and joint environmental assessment (EA) level and joint environmental impact statement (EIS) level analyses using joint lead or cooperating agency status.

C. *Consult and coordinate:* The Responsible Official will determine early in the process the appropriate type and level of consultation and coordination required with other federal agencies and with state, local and tribal governments. After the NEPA review is completed, coordination will often continue throughout project implementation, monitoring, and evaluation.

D. *Involve the public:* The public must be involved early and continuously, as appropriate, throughout the NEPA process. The Responsible Official shall ensure that:

(1) The type and level of public involvement shall be commensurate with the NEPA analysis needed to make the decision.

(2) When feasible, communities can be involved through consensus-based management activities. Consensus-based management includes direct community involvement in the BLM activities subject to NEPA analyses, from initial scoping to implementation and

monitoring of the impacts of the decision. Consensus-based management seeks to achieve agreement from diverse interests on the goals, purposes, and needs of the BLM plans and activities and the methods needed to achieve those ends. The BLM retains exclusive decision-making responsibility and shall exercise that responsibility in a timely manner.

E. *Implement Adaptive Management:* The Responsible Official is encouraged to build ''Adaptive Management'' practice in to their proposed actions and NEPA compliance activities and train personnel in this important environmental concept.

Adaptive Management in the DOI is a system of management practices based on clearly identified outcomes, monitoring to determine if management actions are meeting outcomes, and the facilitation of management changes to ensure that outcomes are met, or reevaluated as necessary. Such reevaluation may require new or supplemental NEPA compliance. Adaptive Management recognizes that knowledge about natural resource systems is sometimes uncertain and is the preferred method for addressing these cases. The preferred alternative should include sufficient flexibility to allow for adjustments in implementation in response to monitoring results.

F. *Train for public and community involvement:* The BLM employee(s) that facilitate(s) public and community involvement in the NEPA process should have training in public involvement, alternative dispute resolution, negotiation, meeting facilitation, collaboration, and/or partnering.

G. *Limitations on Actions during the NEPA process:* The following guidance may aid in fulfilling the requirements of 40 CFR 1506.1. During the preparation of a program or plan NEPA document, the Responsible Official may undertake any major Federal action within the scope and analyzed in the existing NEPA document supporting the current plan or program, so long as there is adequate NEPA documentation to support the individual action.

11.5 Plan Conformance

Where a BLM land use plan (LUP) exists, a proposed action must be in conformance with the plan. This means that the proposed action must be specifically provided for in the plan, or if not specifically mentioned, the proposal must be clearly consistent with the terms, conditions, and decisions of the plan or plan as amended. If it is determined that the proposed action does not conform to the plan, the Responsible Official may:

(A) Reject the proposal,

(B) Modify the proposal to conform to the land use plan, or

(C) Complete appropriate plan amendments and associated NEPA compliance requirements prior to proceeding with the proposed action.

11.6 Existing Documentation (Determination of NEPA Adequacy)

The Responsible Official may consider using existing NEPA analysis for a proposed action when the record documents show that the following conditions are met.

(A) The proposed action is adequately covered by (i.e., is within the scope of and analyzed in) relevant existing analyses, data, and records; and

(B) There are no new circumstances, new information, or unanticipated or unanalyzed environmental impacts that warrant new or supplemental analysis.

If the Responsible Official determines that existing NEPA documents adequately analyzed the effects of the proposed action, this determination, usually prepared in a Determination of NEPA Adequacy (DNA) worksheet to provide the administrative record support, serves as an interim step in the BLM's internal decision-making process. The DNA is intended to evaluate the coverage of existing documents and the significance of new information, but does not itself provide NEPA analysis. If the Responsible Official concludes that the proposed action(s) warrant additional review, information from the DNA worksheet may be used to facilitate the preparation of the appropriate level of NEPA analysis.

The BLM's NEPA Handbook and program specific regulations and guidance describe additional steps needed to make and document the agency's final determination regarding a proposed action.

11.7 Actions Requiring an Environmental Assessment (EA)

A. An EA is a concise public document that serves to:

(1) Provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a Finding of No Significant Impact (FONSI);

(2) Aid the BLM's compliance with NEPA when an EIS is not necessary; and

(3) Facilitate preparation of an EIS when one is necessary.

B. Unlike an EIS that requires much more, an EA must include the following four items identified in 40 CFR 1508.9(b):

(1) The need for the proposal.

(2) Alternatives as described in Section 102(2)(E) of NEPA.

(3) The environmental impacts of the proposed action and alternatives.

(4) A listing of agencies and persons consulted.

C. An EA is usually the appropriate NEPA document for:

(1) Land Use Plan Amendments;

(2) Land use plan implementation decisions, including but not limited to analysis for implementation plans such as watershed plans or coordinated resource activity plans, resource use permits (except for those that are categorically excludable), and site-specific project plans, such as construction of a trail.

D. An EA should be completed when the Responsible Official is uncertain of the potential for significant impacts and needs further analysis to make the determination.

E. If, for any of these actions, it is anticipated or determined that an EA is not appropriate because of potential significant impacts, an EIS will be prepared.

11.8 Major Actions Requiring an EIS

A. An EIS level analysis should be completed when an action meets either of the two following criteria.

(1) If the impacts of a proposed action are expected to be significant; or

(2) In circumstances where a proposed action is directly related to another action(s), and cumulatively the effects of the actions taken together would be significant, even if the effects of the actions taken separately would not be significant,

B. The following types of BLM actions will normally require the preparation of an EIS:

(1) Approval of Resource Management Plans.

(2) Proposals for Wild and Scenic Rivers and National Scenic and Historic Trails.

(3) Approval of regional coal lease sales in a coal production region.

(4) Decisions to issue a coal preference right lease.

(5) Approval of applications to the BLM for major actions in the following categories:

(a) Sites for steam-electric powerplants, petroleum refineries, synfuel plants, and industrial facilities; and

(b) Rights-of-way for major reservoirs, canals, pipelines, transmission lines, highways, and railroads.

(6) Approval of operations that would result in liberation of radioactive tracer materials or nuclear stimulation.

(7) Approval of any mining operations where the area to be mined, including

any area of disturbance, over the life of the mining plan, is 640 acres or larger in size.

C. If potentially significant impacts are not anticipated for these actions, an EA will be prepared.

11.9 Actions Eligible for a Categorical Exclusion (CX)

The Departmental Manual (516 DM 2.3A(3) and appendix 2) requires that before any action described in the following list of CXs is used, the list of ''extraordinary circumstances'' must be reviewed for applicability. If a CX does not pass the ''extraordinary circumstances'' test, the proposed action analysis defaults to either an EA or an EIS. When no ''extraordinary circumstances'' apply, the following activities do not require the preparation of an EA or EIS. In addition, see 516 DM 2, appendix 1 for a list of DOI-wide categorical exclusions. As proposed actions are designed and then reviewed against the CX list, proposed actions or activities must be, at a minimum, consistent with the DOI and the BLM regulations, manuals, handbooks, policies, and applicable land use plans regarding design features, best management practices, terms and conditions, conditions of approval, and stipulations.

A. Fish and Wildlife

(1) Modification of existing fences to provide improved wildlife ingress and egress.

(2) Minor modification of water developments to improve or facilitate wildlife use (e.g., modify enclosure fence, install flood valve, or reduce ramp access angle).

(3) Construction of perches, nesting platforms, islands, and similar structures for wildlife use.

(4) Temporary emergency feeding of wildlife during periods of extreme adverse weather conditions.

(5) Routine augmentations, such as fish stocking, providing no new species are introduced.

(6) Relocation of nuisance or depredating wildlife, providing the relocation does not introduce new species into the ecosystem.

(7) Installation of devices on existing facilities to protect animal life, such as raptor electrocution prevention devices.

B. Oil, Gas, and Geothermal Energy

(1) Issuance of future interest leases under the Mineral Leasing Act for Acquired Lands, where the subject lands are already in production.

(2) Approval of mineral lease adjustments and transfers, including assignments and subleases.

(3) Approval of unitization agreements, communitization agreements, drainage agreements, underground storage agreements, development contracts, or geothermal unit or participating area agreements.

(4) Approval of suspensions of operations, *force majeure* suspensions, and suspensions of operations and production.

(5) Approval of royalty determinations, such as royalty rate reductions.

(6) Approval of Notices of Intent to conduct geophysical exploration of oil, gas, or geothermal, pursuant to 43 CFR 3150 or 3250, when no temporary or new road construction is proposed.

C. Forestry

(1) Land cultivation and silvicultural activities (excluding herbicide application) in forest tree nurseries, seed orchards, and progeny test sites.

(2) Sale and removal of individual trees or small groups of trees which are dead, diseased, injured, or which constitute a safety hazard, and where access for the removal requires no more than maintenance to existing roads.

(3) Seeding or reforestation of timber sales or burn areas where no chaining is done, no pesticides are used, and there is no conversion of timber type or conversion of non-forest to forest land. Specific reforestation activities covered include: seeding and seedling plantings, shading, tubing (browse protection), paper mulching, bud caps, ravel protection, application of non-toxic big game repellant, spot scalping, rodent trapping, fertilization of seed trees, fence construction around out-planting sites, and collection of pollen, scions and cones.

(4) Pre-commercial thinning and brush control using small mechanical devices.

(5) Disposal of small amounts of miscellaneous vegetation products outside established harvest areas, such as Christmas trees, wildings, floral products (ferns, boughs, etc.), cones, seeds, and personal use firewood.

(6) Felling, bucking, and scaling sample trees to ensure accuracy of timber cruises. Such activities:

(a) Shall be limited to an average of one tree per acre or less,

(b) Shall be limited to gas-powered chainsaws or hand tools,

(c) Shall not involve any road or trail construction,

(d) Shall not include the use of ground based equipment or other manner of timber yarding, and

(e) Shall be limited to the Coos Bay, Eugene, Medford, Roseburg, and Salem Districts and Lakeview District—Klamath Falls Resource Area in Oregon.

(7) Harvesting live trees not to exceed 70 acres, requiring no more than 0.5 mile of temporary road construction. Such activities:

(a) Shall not include even-aged regeneration harvests or vegetation type conversions.

(b) May include incidental removal of trees for landings, skid trails, and road clearing.

(c) May include temporary roads which are defined as roads authorized by contract, permit, lease, other written authorization, or emergency operation not intended to be part of the BLM transportation system and not necessary for long-term resource management. Temporary roads shall be designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources; and

(d) Shall require the treatment of temporary roads constructed or used so as to permit the reestablishment by artificial or natural means, or vegetative cover on the roadway and areas where the vegetative cover was disturbed by the construction or use of the road, as necessary to minimize erosion from the disturbed area. Such treatment shall be designed to reestablish vegetative cover as soon as practicable, but at least within 10 years after the termination of the contract.

Examples include, but are not limited to:

(a) Removing individual trees for sawlogs, specialty products, or fuelwood.

(b) Commercial thinning of overstocked stands to achieve the desired stocking level to increase health and vigor.

(8) Salvaging dead or dying trees not to exceed 250 acres, requiring no more than 0.5 mile of temporary road construction. Such activities:

(a) May include incidental removal of live or dead trees for landings, skid trails, and road clearing.

(b) May include temporary roads which are defined as roads authorized by contract, permit, lease, other written authorization, or emergency operation not intended to be part of the BLM transportation system and not necessary for long-term resource management. Temporary roads shall be designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources; and

(c) Shall require the treatment of temporary roads constructed or used so as to permit the reestablishment, by artificial or natural means, of vegetative

cover on the roadway and areas where the vegetative cover was disturbed by the construction or use of the road, as necessary to minimize erosion from the disturbed area. Such treatment shall be designed to reestablish vegetative cover as soon as practicable, but at least within 10 years after the termination of the contract.

(d) For this CX, a dying tree is defined as a standing tree that has been severely damaged by forces such as fire, wind, ice, insects, or disease, and that in the judgment of an experienced forest professional or someone technically trained for the work, is likely to die within a few years.

Examples include, but are not limited to:

(a) Harvesting a portion of a stand damaged by a wind or ice event.

(b) Harvesting fire damaged trees.

(9) Commercial and non-commercial sanitation harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than 0.5 miles of temporary road construction. Such activities:

(a) May include removal of infested/infected trees and adjacent live uninfested/uninfected trees as determined necessary to control the spread of insects or disease; and

(b) May include incidental removal of live or dead trees for landings, skid trails, and road clearing.

(c) May include temporary roads which are defined as roads authorized by contract, permit, lease, other written authorization, or emergency operation not intended to be part of the BLM transportation system and not necessary for long-term resource management. Temporary roads shall be designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources; and

(d) Shall require the treatment of temporary roads constructed or used so as to permit the reestablishment, by artificial or natural means, of vegetative cover on the roadway and areas where the vegetative cover was disturbed by the construction or use of the road, as necessary to minimize erosion from the disturbed area. Such treatment shall be designed to reestablish vegetative cover as soon as practicable, but at least within 10 years after the termination of the contract.

Examples include, but are not limited to:

(a) Felling and harvesting trees infested with mountain pine beetles and immediately adjacent uninfested trees to control expanding spot infestations; and

(b) Removing or destroying trees infested or infected with a new exotic insect or disease, such as emerald ash borer, Asian longhorned beetle, or sudden oak death pathogen.

D. Rangeland Management

(1) Approval of transfers of grazing preference.

(2) Placement and use of temporary (not to exceed one month) portable corrals and water troughs, providing no new road construction is needed.

(3) Temporary emergency feeding of livestock or wild horses and burros during periods of extreme adverse weather conditions.

(4) Removal of wild horses or burros from private lands at the request of the landowner.

(5) Processing (transporting, sorting, providing veterinary care, vaccinating, testing for communicable diseases, training, gelding, marketing, maintaining, feeding, and trimming of hooves of) excess wild horses and burros.

(6) Approval of the adoption of healthy, excess wild horses and burros.

(7) Actions required to ensure compliance with the terms of Private Maintenance and Care agreements.

(8) Issuance of title to adopted wild horses and burros.

(9) Destroying old, sick, and lame wild horses and burros as an act of mercy.

(10) Vegetation management activities, such as seeding, planting, invasive plant removal, installation of erosion control devices (e.g., mats/straw/chips), and mechanical treatments, such as crushing, piling, thinning, pruning, cutting, chipping, mulching, mowing, and prescribed fire when the activity is necessary for the management of vegetation on public lands. Such activities:

(a) Shall not exceed 4,500 acres per prescribed fire project and 1,000 acres for other vegetation management projects;

(b) Shall not be conducted in Wilderness areas or Wilderness Study Areas;

(c) Shall not include the use of herbicides, pesticides, biological treatments or the construction of new permanent roads or other new permanent infrastructure;

(d) May include temporary roads which are defined as roads authorized by contract, permit, lease, other written authorization, or emergency operation not intended to be part of the BLM transportation system and not necessary for long-term resource management. Temporary roads shall be designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources; and

(e) Shall require the treatment of temporary roads constructed or used so as to permit the reestablishment, by artificial or natural means, of vegetative cover on the roadway and areas where the vegetative cover was disturbed by the construction or use of the road, as necessary to minimize erosion from the disturbed area. Such treatment shall be designed to reestablish vegetative cover as soon as practicable, but at least within 10 years after the termination of the contract.

(11) Issuance of livestock grazing permits/leases where

(a) The new grazing permit/lease is consistent with the use specified on the previous permit/lease, such that

(1) the same kind of livestock is grazed,

(2) the active use previously authorized is not exceeded, and

(3) grazing does not occur more than 14 days earlier or later than as specified on the previous permit/lease, and

(b) The grazing allotment(s) has been assessed and evaluated and the Responsible Official has documented in a determination that the allotment(s) is

(1) meeting land health standards, or

(2) not meeting land health standards due to factors that do not include existing livestock grazing.

E. Realty

(1) Withdrawal extensions or modifications, which only establish a new time period and entail no changes in segregative effect or use.

(2) Withdrawal revocations, terminations, extensions, or modifications; and classification terminations or modifications which do not result in lands being opened or closed to the general land laws or to the mining or mineral leasing laws.

(3) Withdrawal revocations, terminations, extensions, or modifications; classification terminations or modifications; or opening actions where the land would be opened only to discretionary land laws and where subsequent discretionary actions (prior to implementation) are in conformance with and are covered by a Resource Management Plan/EIS (or plan amendment and EA or EIS).

(4) Administrative conveyances from the Federal Aviation Administration (FAA) to the State of Alaska to accommodate airports on lands appropriated by the FAA prior to the enactment of the Alaska Statehood Act.

(5) Actions taken in conveying mineral interest where there are no known mineral values in the land under

Section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA).

(6) Resolution of class one color-of-title cases.

(7) Issuance of recordable disclaimers of interest under Section 315 of FLPMA.

(8) Corrections of patents and other conveyance documents under Section 316 of FLPMA and other applicable statutes.

(9) Renewals and assignments of leases, permits, or rights-of-way where no additional rights are conveyed beyond those granted by the original authorizations.

(10) Transfer or conversion of leases, permits, or rights-of-way from one agency to another (e.g., conversion of Forest Service permits to a BLM Title V Right-of-way).

(11) Conversion of existing right-of-way grants to Title V grants or existing leases to FLPMA Section 302(b) leases where no new facilities or other changes are needed.

(12) Grants of right-of-way wholly within the boundaries of other compatibly developed rights-of-way.

(13) Amendments to existing rights-of-way, such as the upgrading of existing facilities, which entail no additional disturbances outside the right-of-way boundary.

(14) Grants of rights-of-way for an overhead line (no pole or tower on BLM land) crossing over a corner of public land.

(15) Transfers of land or interest in land to or from other bureaus or federal agencies where current management will continue and future changes in management will be subject to the NEPA process.

(16) Acquisition of easements for an existing road or issuance of leases, permits, or rights-of-way for the use of existing facilities, improvements, or sites for the same or similar purposes.

(17) Grant of a short rights-of-way for utility service or terminal access roads to an individual residence, outbuilding, or water well.

(18) Temporary placement of a pipeline above ground.

(19) Issuance of short-term (3 years or less) rights-of-way or land use authorizations for such uses as storage sites, apiary sites, and construction sites where the proposal includes rehabilitation to restore the land to its natural or original condition.

(20) One-time issuance of short-term (3 years or less) rights-of-way or land use authorizations which authorize trespass action where no new use or construction is allowed, and where the proposal includes rehabilitation to restore the land to its natural or original condition.

F. Solid Minerals

(1) Issuance of future interest leases under the Mineral Leasing Act for Acquired Lands where the subject lands are already in production.

(2) Approval of mineral lease readjustments, renewals, and transfers including assignments and subleases.

(3) Approval of suspensions of operations, *force majeure* suspensions, and suspensions of operations and production.

(4) Approval of royalty determinations, such as royalty rate reductions and operations reporting procedures.

(5) Determination and designation of logical mining units.

(6) Findings of completeness furnished to the Office of Surface Mining Reclamation and Enforcement for Resource Recovery and Protection Plans.

(7) Approval of minor modifications to or minor variances from activities described in an approved exploration plan for leasable, salable, and locatable minerals (e.g., the approved plan identifies no new surface disturbance outside the areas already identified to be disturbed).

(8) Approval of minor modifications to or minor variances from activities described in an approved underground or surface mine plan for leasable minerals (e.g., change in mining sequence or timing).

(9) Digging of exploratory trenches for mineral materials, except in riparian areas.

(10) Disposal of mineral materials, such as sand, stone, gravel, pumice, pumicite, cinders, and clay, in amounts not exceeding 50,000 cubic yards or disturbing more than 5 acres, except in riparian areas.

G. Transportation

(1) Incorporation of eligible roads and trails in any transportation plan when no new construction or upgrading is needed.

(2) Installation of routine signs, markers, culverts, ditches, waterbars, gates, or cattleguards on/or adjacent to roads and trails identified in any land use or transportation plan, or eligible for incorporation in such plan.

(3) Temporary closure of roads and trails.

(4) Placement of recreational, special designation, or information signs, visitor registers, kiosks, and portable sanitation devices.

H. Recreation Management

(1) Issuance of Special Recreation Permits for day use or overnight use up to 14 consecutive nights; that impacts no more than 3 staging area acres; and/or for recreational travel along roads, trails, or in areas authorized in a land use plan. This CX cannot be used for commercial boating permits along Wild and Scenic Rivers. This CX cannot be used for the establishment or issuance of Special Recreation Permits for ''Special Area'' management (43 CFR 2932.5).

I. Emergency Stabilization

(1) Planned actions in response to wildfires, floods, weather events, earthquakes, or landslips that threaten public health or safety, property, and/or natural and cultural resources, and that are necessary to repair or improve lands unlikely to recover to a management-approved condition as a result of the event. Such activities shall be limited to: repair and installation of essential erosion control structures; replacement or repair of existing culverts, roads, trails, fences, and minor facilities; construction of protection fences; planting, seeding, and mulching; and removal of hazard trees, rocks, soil, and other mobile debris from, on, or along roads, trails, campgrounds, and watercourses. These activities:

(a) Shall be completed within one year following the event;

(b) Shall not include the use of herbicides or pesticides;

(c) Shall not include the construction of new roads or other new permanent infrastructure;

(d) Shall not exceed 4,200 acres; and

(e) May include temporary roads which are defined as roads authorized by contract, permit, lease, other written authorization, or emergency operation not intended to be part of the BLM transportation system and not necessary for long-term resource management. Temporary roads shall be designed to standards appropriate for the intended uses, considering safety, cost of transportation, and impacts on land and resources; and

(f) Shall require the treatment of temporary roads constructed or used so as to permit the reestablishment by artificial or natural means, or vegetative cover on the roadway and areas where the vegetative cover was disturbed by the construction or use of the road, as necessary to minimize erosion from the disturbed area. Such treatment shall be designed to reestablish vegetative cover as soon as practicable, but at least within 10 years after the termination of the contract.

J. Other

(1) Maintaining land use plans in accordance with 43 CFR 1610.5–4.

(2) Acquisition of existing water developments (e.g., wells and springs) on public land.

(3) Conducting preliminary hazardous materials assessments and site investigations, site characterization studies and environmental monitoring. Included are siting, construction, installation and/or operation of small monitoring devices such as wells, particulate dust counters and automatic air or water samples.

(4) Use of small sites for temporary field work camps where the sites will be restored to their natural or original condition within the same work season.

(5) Reserved.

(6) A single trip in a one month period for data collection or observation sites.

(7) Construction of snow fences for safety purposes or to accumulate snow for small water facilities.

(8) Installation of minor devices to protect human life (e.g., grates across mines).

(9) Construction of small protective enclosures, including those to protect reservoirs and springs and those to protect small study areas.

(10) Removal of structures and materials of no historical value, such as abandoned automobiles, fences, and buildings, including those built in trespass and reclamation of the site when little or no surface disturbance is involved.

(11) Actions where the BLM has concurrence or co-approval with another DOI agency and the action is categorically excluded for that DOI agency.

(12) Rendering formal classification of lands as to their mineral character, waterpower, and water storage values.

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August 14, 2007

Part III

Securities and Exchange Commission

17 CFR Part 242
Amendments to Regulation SHO; Final Rule and Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–56212; File No. S7–12–06]

RIN 3235–AJ57

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting amendments to Regulation SHO under the Securities Exchange Act of 1934 (''Exchange Act''). The amendments are intended to further reduce the number of persistent fails to deliver in certain equity securities by eliminating the grandfather provision of Regulation SHO. In addition, we are amending the close-out requirement of Regulation SHO for certain securities that a seller is ''deemed to own.'' The amendments also update the market decline limitation referenced in Regulation SHO.

DATES: *Effective Date:* October 15, 2007.

FOR FURTHER INFORMATION CONTACT: James A. Brigagliano, Associate Director, Josephine J. Tao, Assistant Director, Victoria L. Crane, Branch Chief, Elizabeth A. Sandoe, Branch Chief, Joan M. Collopy, Special Counsel, and Lillian S. Hagen, Special Counsel, Office of Trading Practices and Processing, Division of Market Regulation, at (202) 551–5720, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: We are amending Rules 200 and 203 of Regulation SHO [17 CFR 242.200 and 242.203] under the Exchange Act.

I. Introduction

Regulation SHO, which became fully effective on January 3, 2005, sets forth the regulatory framework governing short sales.[1] Among other things, Regulation SHO imposes a close-out requirement to address persistent failures to deliver stock on trade settlement date[2] and to target potentially abusive ''naked'' short selling[3] in certain equity securities.[4] While the majority of trades settle on time,[5] Regulation SHO is intended to address those situations where the level of fails to deliver for the particular stock is so substantial that it might impact the market for that security.[6] Although high fails levels exist only for a small percentage of issuers,[7] we are concerned that large and persistent fails to deliver may have a negative effect on the market in these securities. For example, large and persistent fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending. In addition, where a seller of securities fails to deliver securities on trade settlement date, in effect the seller unilaterally converts a securities contract (which should settle within the standard 3-day settlement period) into an undated futures-type contract, to which the buyer may not have agreed, or that may have been priced differently. Moreover, sellers that fail to deliver securities on trade settlement date may enjoy fewer restrictions than if they were required to deliver the securities within a reasonable period of time, and such sellers may attempt to use this additional freedom to engage in trading activities that deliberately and improperly depress the price of a security.

In addition, many issuers and investors continue to express concerns about extended fails to deliver in connection with ''naked'' short selling.[8]

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[1] 17 CFR 242.200. *See also* Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (''Adopting Release''), *available at http://www.sec.gov/rules/final/34-50103.htm.* For more information on Regulation SHO, *see* ''Frequently Asked Questions'' and ''Key Points about Regulation SHO,'' *available at http://www.sec.gov/spotlight/shortsales.htm.*

A short sale is the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. In order to deliver the security to the purchaser, the short seller may borrow the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owns, and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or in a related security.

[2] Generally, investors must complete or settle their security transactions within three business days. This settlement cycle is known as T+3 (or ''trade date plus three days''). T+3 means that when the investor purchases a security, the purchaser's payment must be received by its brokerage firm no later than three business days after the trade is executed. When the investor sells a security, the seller must deliver its securities, in certificated or electronic form, to its brokerage firm no later than three business days after the sale. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options settle on the next business day following the trade. Because the Commission recognized that there are many legitimate reasons why broker-dealers may not be able to deliver securities on settlement date, it adopted Rule 15c6–1, which prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1. However, failure to deliver securities on T+3 does not violate the rule.

[3] We have previously noted that abusive ''naked'' short selling, while not defined in the federal securities laws, generally refers to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three day settlement cycle. *See* Exchange Act Release No. 54154 (July 14, 2006), 71 FR 41710 (July 21, 2006) (''Proposing Release'').

[4] In 2003, the Commission settled a case against certain parties relating to allegations of manipulative short selling in the stock of Sedona Corporation. The Commission alleged that the defendants profited from engaging in massive naked short selling that flooded the market with Sedona stock, and depressed its price. *See Rhino Advisors, Inc. & Thomas Badian*, Lit. Rel. No. 18003 (Feb. 27, 2003); *see also, SEC* v. *Rhino Advisors, Inc. & Thomas Badian*, Civ. Action No. 03 civ 1310 (RO) (S.D.N.Y.). *See also*, Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 (Nov. 6, 2003) (''2003 Proposing Release'') (describing the alleged activity in the case involving stock of Sedona Corporation); Adopting Release, 69 FR at 48016, n.76.

[5] According to the National Securities Clearing Corporation (''NSCC''), 99% (by dollar value) of all trades settle on time. Thus, on an average day, approximately 1% (by dollar value) of all trades, including equity, debt, and municipal securities fail to settle. The vast majority of these fails are closed out within five days after T+3.

[6] These fails to deliver may result from either short or long sales of stock. There may be many reasons for a fail to deliver. For example, human or mechanical errors or processing delays can result from transferring securities in physical certificate rather than book-entry form, thus causing a failure to deliver on a long sale within the normal three-day settlement period. Also, broker-dealers that make a market in a security (''market makers'') and who sell short thinly-traded, illiquid stock in response to customer demand may encounter difficulty in obtaining securities when the time for delivery arrives.

[7] The average daily number of securities on the threshold list in March 2007 was approximately 311 securities, which comprised 0.39% of all equity securities, including those that are not covered by Regulation SHO. Regulation SHO's current close-out requirement applies to any equity security of an issuer that is registered under Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d) of the Exchange Act. NASD Rule 3210, which became effective on July 3, 2006, applies the Regulation SHO close-out framework to non-reporting equity securities with aggregate fails to deliver equal to, or greater than, 10,000 shares and that have a last reported sale price during normal trading hours that would value the aggregate fail to deliver position at $50,000 or greater for five consecutive settlement days. *See* Exchange Act Release No. 53596 (April 4, 2006), 71 FR 18392 (April 11, 2006) (SR–NASD–2004–044). Consistent with the amendment to eliminate the grandfather provision of Regulation SHO, we anticipate the NASD would propose similar amendments to NASD Rule 3210.

[8] *See, e.g.*, comment letter from Patrick M. Byrne, Chairman and Chief Executive Officer, Overstock.com, Inc., dated Sept. 11, 2006 (''Overstock''); comment letter from Daniel Behrendt, Chief Financial Officer, and Douglas Klint, General Counsel, Taser International, dated Sept. 18, 2006 (''Taser''); comment letter from John Royce, dated April 30, 2007; comment letter from Michael Read, dated April 29, 2007; comment letter from Robert DeVivo, dated April 26, 2007; comment letter from Ahmed Akhtar, dated April 26, 2007.

To the extent that large and persistent fails to deliver might be indicative of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price, fails to deliver may undermine the confidence of investors.[9] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[10] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding large and persistent fails to deliver.[11] Any unwarranted reputational damage caused by large and persistent fails to deliver might have an adverse impact on the security's price.[12]

The close-out requirement, which is contained in Rule 203(b)(3) of Regulation SHO, applies only to securities in which a substantial amount of fails to deliver have occurred (also known as ''threshold securities'').[13] As adopted in August 2004, Rule 203(b)(3) of Regulation SHO included two exceptions to the mandatory close-out requirement. The first was the ''grandfather'' provision, which excepted fails to deliver established prior to a security becoming a threshold security;[14] and the second was the ''options market maker exception,'' which excepted fails to deliver in threshold securities resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security.[15]

At the time of Regulation SHO's adoption, the Commission stated that it would monitor the operation of Regulation SHO, particularly whether grandfathered fail to deliver positions were being cleared up under the existing delivery and settlement requirements or whether any further regulatory action with respect to the close-out provisions of Regulation SHO was warranted.[16] In addition, with respect to the options market maker exception, the Commission noted that it would take into consideration any indications that this provision was operating significantly differently from the Commission's original expectations.[17]

Since Regulation SHO's effective date in January 2005, the Commission's staff (''Staff'') and the SROs have been examining firms for compliance with Regulation SHO, including the close-out provisions. We have received preliminary data that indicates that Regulation SHO appears to be significantly reducing fails to deliver without disruption to the market.[18] However, despite this positive impact, we continue to observe a small number of threshold securities with substantial and persistent fail to deliver positions that are not being closed out under existing delivery and settlement requirements. Allowing these persistent fails to deliver to continue indefinitely may lead to greater uncertainty about the fulfillment of the settlement obligation.[19] While some delays in closing out may be understandable and necessary, a seller should deliver shares to close out its sale within a reasonable time period.

Based, in part, on the results of examinations conducted by the Staff and SROs, as well as our desire to reduce large and persistent fails to deliver, on July 14, 2006, we proposed revisions to Regulation SHO that would modify Rule 203(b)(3) by eliminating the grandfather provision and narrowing the options market maker exception.[20] The proposed amendments were intended to reduce the number of persistent fails to deliver attributable primarily to the grandfather provision and, secondarily, to reliance on the options market maker exception.

The proposals were based, in part, on data collected by the National Association of Securities Dealers, Inc. (''NASD''), as well as concerns about the persistence of certain securities on the threshold securities lists.[21] However, in response to commenters' concerns regarding the public availability of data relied on by the Commission, on March 26, 2007 we re-opened the comment period to the Proposing Release for thirty days to provide the public with an opportunity to comment on a summary of the NASD's findings that the NASD had submitted to the public file on March 12, 2007. In addition, the notice regarding the re-opening of the

[9] *See, e.g.*, comment letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 30, 2006 (''NCANS''); comment letter from Richard Blumenthal, Attorney General, State of Connecticut, dated Sept. 19, 2006 (''State of Connecticut'') (discussing the impact of fails to deliver on investor confidence).

[10] *See, e.g.*, comment letter from Congressman Tom Feeney, Florida, U.S. House of Representatives, dated Sept. 25, 2006 (''Feeney'') (expressing concern about potential ''naked'' short selling on capital formation, claiming that ''naked'' short selling causes a drop in an issuer's stock price and may limit the issuer's ability to access the capital markets); comment letter from Zix Corporation, dated Sept. 19, 2006 (''Zix'') (stating that ''[m]any investors attribute the Company's frequent re-appearances on the Regulation SHO list to manipulative short selling and frequently demand that the Company ''do something'' about the perceived manipulative short selling. This perception that manipulative short selling of the Company's securities is continually occurring has undermined the confidence of many of the Company's investors in the integrity of the market for the Company's securities'').

[11] Due, in part, to such concerns, issuers have taken actions to attempt to make transfer of their securities ''custody only,'' thus preventing transfer of their stock to or from securities intermediaries such as the Depository Trust Company (''DTC'') or broker-dealers. A number of issuers have attempted to withdraw their issued securities on deposit at DTC, which makes the securities ineligible for book-entry transfer at a securities depository. We note, however, that in 2003 the Commission approved a DTC rule change clarifying that its rules provide that only its participants may withdraw securities from their accounts at DTC, and establishing a procedure to process issuer withdrawal requests. *See* Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003).

[12] *See also*, Proposing Release, 71 FR at 41712 (discussing the potential impact of large and persistent fails to deliver on the market). *See also*, 2003 Proposing Release, 68 FR at 62975 (discussing the potential impact of ''naked'' short selling on the market).

[13] A threshold security is defined in Rule 203(c)(6) of Regulation SHO as any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*) or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) for which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more, and that is equal to at least 0.5% of the issue's total shares outstanding; and is included on a list (''threshold securities list'') disseminated to its members by a self-regulatory organization (''SRO''). *See* 17 CFR 242.203(c)(6). Each SRO is responsible for providing the threshold securities list for those securities for which the SRO is the primary market.

[14] The ''grandfathered'' status applied in two situations: (1) to fail positions occurring before January 3, 2005, Regulation SHO's effective date; and (2) to fail positions that were established on or after January 3, 2005 but prior to the security appearing on a threshold securities list. *See* 17 CFR 242.203(b)(3)(i).

[15] 17 CFR 242.203(b)(3)(ii).

[16] *See* Adopting Release, 69 FR at 48018.

[17] *See id.* at 48019.

[18] For example, in comparing a period prior to the effective date of the current rule (April 1, 2004 to December 31, 2004) to a period following the effective date of the current rule (January 1, 2005 to March 31, 2007) for all stocks with aggregate fails to deliver of 10,000 shares or more as reported by NSCC:

- The average daily aggregate fails to deliver declined by 29.5%;
- The average daily number of securities with aggregate fails to deliver of at least 10,000 shares declined by 5.8%;
- The average daily number of fails to deliver declined by 15.1%;
- The average age of a fail to deliver position declined by 25.5%;
- The average daily number of threshold securities declined by 39.0%; and
- The average daily fails to deliver of threshold securities declined by 52.9%.

See also, supra n. 7.

[19] *See* Adopting Release, 69 FR at 48016–48017; *see also*, 2003 Proposing Release, 68 FR at 62977–62978 (discussing the Commission's belief that the delivery requirements of proposed Regulation SHO would protect and enhance the operation, integrity and stability of the markets and the clearance and settlement system, and protect buyers of securities by curtailing ''naked'' short selling).

[20] *See* Proposing Release, 71 FR 41710.

[21] *See* Proposing Release, 71 FR at 41712.

comment period directed the public's attention to brief summaries of data collected by the Commission's Office of Compliance Inspections and Examinations and the New York Stock Exchange LLC (''NYSE'').[22]

The proposals included a 35 settlement day phase-in period following the effective date of the amendment intended to provide additional time to begin closing out certain previously-excepted fails to deliver. In addition, the proposals included an amendment to update the market decline limitation referenced in Rule 200(e)(3) of Regulation SHO.[23] The Commission also included in the Proposing Release a number of requests for comment, including whether the Commission should amend Regulation SHO to extend the close-out requirement to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act of 1933 (the ''Securities Act'').[24]

We received over 1,000 comment letters in response to the Proposing Release.[25] As discussed below, after considering the comments received and the purposes underlying Regulation SHO, we are adopting the amendments to the grandfather provision and the market decline limitation, with some modifications to refine provisions and address commenters' concerns. However, in a separate companion release, we are re-proposing amendments to the options market maker exception.[26] In addition, we are adopting amendments to the close-out requirement of Regulation SHO for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act.

[22] *See* Exchange Act Release No. 55520 (March 26, 2007), 72 FR 15079 (March 30, 2007) (''Regulation SHO Re-Opening Release''). We received a number of comment letters in response to the Regulation SHO Re-Opening Release, most of which urged the Commission to take action on the proposed amendments to eliminate the grandfather provision and narrow the options market maker exception. Comment letters, including the comments of the NASD, are available on the Commission's Internet Web Site at *http://www.sec.gov/comments/s7-12-06/s71206.shtml*. *See also*, Memorandum from the Commission's Office of Economic Analysis regarding Fails to Deliver Pre- and Post-Regulation SHO (dated August 21, 2006), which is available on the Commission's Internet Web Site at *http://www.sec.gov/spotlight/failstodeliver082106.pdf*.

[23] 17 CFR 242.200(e)(3).

[24] 17 CFR 230.144.

[25] The comment letters are available on the Commission's Internet Web Site at *http://www.sec.gov/comments/s7-12-06/s71206.shtml*.

[26] *See* Exchange Act Release No. 56213 (Aug. 7, 2007)

II. Overview of Regulation SHO

A. Rule 203(b)(3)'s Close-out Requirement

One of Regulation SHO's primary goals is to reduce fails to deliver in those securities with a substantial amount of fails to deliver by imposing additional delivery requirements on those securities.[27] We believe that additional delivery requirements help protect and enhance the operation, integrity and stability of the markets, as well as reduce short selling abuses.

Regulation SHO requires certain persistent fail to deliver positions to be closed out. Specifically, Rule 203(b)(3)'s close-out requirement provides that a participant of a clearing agency registered with the Commission [28] must take immediate action to close out a fail to deliver position in a threshold security in the Continuous Net Settlement (''CNS'') [29] system that has persisted for 13 consecutive settlement days by purchasing securities of like kind and quantity.[30] In addition, if the failure to deliver has persisted for 13 consecutive settlement days, Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, prohibits the participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.[31]

B. Grandfathering Under Regulation SHO

As originally adopted, Rule 203(b)(3)'s close-out requirement did not apply to positions that were established prior to the security becoming a threshold security.[32] This is known as grandfathering. Grandfathered positions included those that existed prior to the January 3, 2005 effective date of Regulation SHO, and to positions established prior to a security becoming a threshold security.[33] Regulation SHO's grandfathering provision was adopted because the Commission was concerned about creating volatility through short squeezes [34] if large pre-existing fail to deliver positions had to be closed out

[27] *See* Adopting Release, 69 FR at 48009.

[28] For purposes of Regulation SHO, the term ''participant'' has the same meaning as in section 3(a)(24) of the Exchange Act. *See* 15 U.S.C. 78c(a)(24). The term ''registered clearing agency'' means a clearing agency, as defined in section 3(a)(23) of the Exchange Act, that is registered as such pursuant to section 17A of the Exchange Act. *See* 15 U.S.C. 78c(a)(23)(A), 78q–1 and 15 U.S.C. 78q–1(b), respectively. *See also*, Adopting Release, 69 FR at 48031. As of May 2007, approximately 90% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Those participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually closed out within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

[29] The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. The NSCC clears and settles the majority of equity securities trades conducted on the exchanges and over the counter. NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. NSCC notifies its members of their securities delivery and payment obligations daily. In addition, NSCC guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction. While NSCC's rules do not authorize it to require member firms to close out or otherwise resolve fails to deliver, NSCC reports to the SROs those securities with fails to deliver of 10,000 shares or more. The SROs use NSCC fails data to determine which securities are threshold securities for purposes of Regulation SHO.

[30] 17 CFR 242.203(b)(3).

[31] 17 CFR 242.203(b)(3)(iii). It is possible under Regulation SHO that the close out by the participant of a registered clearing agency may result in a failure to deliver position at another participant if the counterparty from which the participant purchases securities fails to deliver. However, Regulation SHO prohibits a participant of a registered clearing agency from engaging in ''sham close outs'' by entering into an arrangement with a counterparty to purchase securities for purposes of closing out a failure to deliver position and the purchaser knows or has reason to know that the counterparty will not deliver the securities, which thus creates another fail to deliver position. 17 CFR 242.203(b)(3)(v); *see also*, Adopting Release, 69 FR at 48018 n.96. In addition, we note that borrowing securities, or otherwise entering into an agreement with another person to create the appearance of a purchase would not satisfy the close-out requirement of Regulation SHO. For example, the purchase of paired positions of stock and options that are designed to create the appearance of a bona fide purchase of securities but that are nothing more than a temporary stock lending arrangement would not satisfy Regulation SHO's close-out requirement.

[32] 17 CFR 242.203(b)(3)(i).

[33] *See* Adopting Release, 69 FR at 48018. However, any new fails to deliver in a security on a threshold securities list are subject to the mandatory close-out provisions of Rule 203(b)(3) of Regulation SHO.

[34] The term short squeeze refers to the pressure on short sellers to cover their positions as a result of sharp price increases or difficulty in borrowing the security the sellers are short. The rush by short sellers to cover produces additional upward pressure on the price of the stock, which then can cause an even greater squeeze. Although some short squeezes may occur naturally in the market, a scheme to manipulate the price or availability of stock in order to cause a short squeeze is illegal.

quickly after a security became a threshold security.

C. Regulation SHO's Options Market Maker Exception

In addition, Regulation SHO's options market maker exception excepts from the close-out requirement of Rule 203(b)(3) any fail to deliver position in a threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security.[35] The options market maker exception was created to address concerns regarding liquidity and the pricing of options. The exception does not require that such fails be closed out.

III. Discussion of Amendments to Regulation SHO

A. Grandfather Provision

1. Proposal

To further Regulation SHO's goal of reducing persistent fails to deliver, the Commission proposed to eliminate the grandfather provision in Rule 203(b)(3)(i) of Regulation SHO.[36] In particular, the proposed amendment would require that any previously-grandfathered fails to deliver in a security that is on a threshold list on the effective date of the amendment be closed out within 35 consecutive settlement days [37] of the effective date of the amendment. In addition, similar to the pre-borrow requirement in Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, if the fail to deliver position has persisted for 35 consecutive settlement days from the effective date of the amendment, the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

However, if a security becomes a threshold security after the effective date of the amendment, any fails to deliver in that security that occurred prior to the security becoming a threshold security would be subject to Rule 203(b)(3)'s mandatory 13 consecutive settlement day close-out requirement, similar to any other fail to deliver position in a threshold security.

2. Comments

We received a large number of comment letters regarding the proposal to eliminate the grandfather provision. The comments were from numerous entities, including issuers, retail investors, broker-dealers, SROs, associations, members of Congress, and other elected officials. Commenters expressed both support [38] and opposition [39] to the proposal to eliminate the grandfather provision.

Some of the commenters that supported eliminating the grandfather provision stated that the proposal would restore investor confidence and that it would not cause excessive volatility.[40] For example, one commenter stated that elimination of the grandfather provision should not cause excessive volatility because, according to the commenter, the Depository Trust & Clearing Corporation (''DTCC'') and market participants have said that fails to deliver are a small problem.[41] Another commenter stated that the Commission's concern over potential short squeezes is ''misplaced,'' as this is a risk short sellers assume when they sell short.[42] Many commenters supported the proposed 35-day phase-in period for certain previously-grandfathered fails to deliver;[43] although some commenters stated their belief that a phase-in period was unnecessary.[44]

Commenters opposing the elimination of the grandfather provision did so for various reasons. For example, one commenter stated that elimination of the grandfather provision could adversely impact stock liquidity and borrowing, increasing costs to investors.[45] Another commenter stated its belief that eliminating the grandfather provision would lead to increased volatility and short squeezes as individuals attempt to close out positions.[46] This commenter also stated that eliminating the grandfather provision would negatively impact bona fide market making and the ability of market makers to provide liquidity, which would lead to less liquidity, greater volatility, and widening of spreads.[47] According to this commenter, the proposal could also lead to upward price manipulation, causing investors to purchase shares at inflated prices.[48] Another commenter maintained that eliminating the grandfather provision

[35] 17 CFR 242.203(b)(3)(ii).

[36] *See* Proposing Release, 71 FR 41710.

[37] The Commission chose 35 settlement days because 35 days is used in the current rule (although for a different purpose) and to allow participants additional time to close out their previously-grandfathered fails to deliver, given that some participants may have large previously-excepted fails to deliver with respect to a number of securities.

[38] *See, e.g.*, comment letter from Overstock, *supra* note 8; comment letter from Taser, *supra* note 8; comment letter from Barry McCarthy, Chief Financial Officer, Netflix, Inc., dated Sept. 19, 2006; comment letter from Glenn W. Rollins, President, Orkin, Inc., dated Aug. 29, 2006; comment letter from Zix, *supra* note 10; comment letter from Joseph P. Borg, Esq., President, North American Securities Administrators Association, Inc., dated Oct. 4, 2006 (''NASAA''); comment letter from Paul Rivett, Vice President, Fairfax Financial Holdings, Ltd., Sept. 19, 2006; comment letter from State of Connecticut, *supra* note 9; comment letter from John G. Gaine, President, MFA, dated Sept. 19, 2006 (''MFA''); comment letter from James J. Angel, PhD., Associate Professor of Finance, McDonough School of Business, Georgetown University, dated July 18, 2006 (''Angel''); comment letter from NCANS, *supra* note 9; comment letter from Simon Lorne, Chief Legal Officer, and Martin Schwartz, Chief Compliance Officer, Millennium Partners, LP, dated Oct. 10, 2006; comment letter from David C. Chavern, Capital Markets Program, U.S. Chamber of Commerce, dated Sept. 13, 2006; comment letter from Jeffrey D. Stacey, Managing Director, Jeffrey D. Stacey Associates, Ltd., dated Sept. 19, 2006; comment letter from Congressman Rodney Alexander—Louisiana, U.S. House of Representatives, dated July 28, 2006; comment letter from Senator Orin Hatch—Utah, U.S. Senate, dated Sept. 19, 2006; comment letter from Feeney, *supra* note 10; comment letter from Congressman Virgil Goode, Jr.—Virginia, U.S. House of Representatives, dated Sept. 13, 2006; comment letter from Congresswoman Sue Kelly—New York, U.S. House of Representatives, dated Sept. 19, 2006; letter from Congressman Jim Ryun—Kansas, U.S. House of Representatives, dated Sept. 18, 2006; comment letter from Congressman Jim Matheson—Utah, U.S. House of Representatives, dated Sept. 19, 2006; comment letter from Governor Jon M. Huntsman, Governor of Utah, dated Sept. 8, 2006; comment letter from Mark L. Shurtleff, Attorney General for the State of Utah, dated Sept. 18, 2006; and comment letter from Wayne Klein, Director, Division of Securities, State of Utah, dated Sept. 13, 2006 (''Utah Division of Securities'').

[39] *See, e.g.*, comment letter from Ira D. Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated Sept. 19, 2006 (''SIA''); comment letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association Section of Business Law, dated Sept. 27, 2006 (''ABA''); comment letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, dated Oct. 11, 2006 (''CBOE''); comment letter from Gerard S. Citera, Executive Director, U.S. Equities, UBS Securities LLC, dated Sept. 22, 2006 (''UBS''); comment letter from Leonard J. Amoruso, Senior Managing Director and Chief Compliance Officer, Knight Capital Group, Inc., dated Sept. 20, 2006 (''Knight'').

[40] *See* comment letters from MFA, *supra* note 38; NCANS, *supra* note 9; State of Connecticut, *supra* note 9.

[41] *See* comment letter from NCANS, *supra* note 9.

[42] *See* comment letter from H. Glenn Bagwell, Jr., Esq., Sept. 19, 2006.

[43] *See, e.g.*, comment letters from NCANS, *supra* note 9; Taser, *supra* note 8; Overstock, *supra* note 8.

[44] *See, e.g.*, comment letters from NASAA, *supra* note 38; Utah Division of Securities, *supra* note 38; Zix, *supra* note 10.

[45] *See* comment letter from CBOE, *supra* note 39.

[46] *See* comment letter from Knight, *supra* note 39.

[47] *See id.*

[48] *See id.*

would cause substantial market disruption by increasing significantly the number of buy-ins in the market without sufficiently targeting the abusive ''naked'' short sellers.[49]

Some commenters stated that the proposal is an overly broad means of addressing the issue of substantial, persistent fails to deliver that may occur in only a small subset of threshold securities and that, in fact, the available data shows that the proposal is not necessary.[50] These commenters also stated their belief that a more targeted approach, such as tracking actual ''naked'' short sales, would be a more appropriate method of addressing the issue of fails to deliver. Another commenter stated that the Commission had not explained the need for the proposal and had not provided substantial evidence showing that persistent fails to deliver are primarily attributable to the grandfather provision.[51] However, as discussed in more detail below, even those commenters opposing the elimination of the grandfather provision suggested alternative proposals to elimination for the Commission to consider. For example, one commenter suggested allowing for a period longer than 13 consecutive settlement days within which to close out all fails to deliver currently excepted from the close-out requirement due to the grandfather provision.[52]

3. Adoption

After careful consideration of the comments, we are adopting the amendment to eliminate the grandfather provision as proposed. As adopted, the amendment eliminates the grandfather provision from Regulation SHO and amends Rule 203 to require that all fails to deliver in threshold securities be closed out within either 13 consecutive settlement days or, in the case of a previously-grandfathered fail to deliver position in a security that is a threshold security on the effective date of the amendment, 35 consecutive settlement days from the effective date of the amendment.[53]

For the reasons discussed above and in the Proposing Release, we believe that no fail to deliver position should be left open indefinitely. While some delays in closing out may be understandable and necessary, a seller should deliver shares to close out a sale within a reasonable time period. Thus, we believe the adoption of the amendment as proposed is warranted and strikes the appropriate balance between reducing large and persistent fails to deliver in threshold securities and still providing participants flexibility and advance notice to close out the originally grandfathered fails to deliver. While the amendments may have some potential impact on liquidity, we believe the advance notice and flexibility provided by the amendments will limit any impact on liquidity of requiring market participants to close out such previously-grandfathered fails to deliver.

Commenters opposing the elimination of the grandfather provision contended that elimination of the grandfather provision could lead to increased volatility, a reduction in liquidity, and short squeezes in these securities as individuals attempt to close out positions. Although we recognize that elimination of the grandfather provision could have these potential effects, we believe the benefits of requiring that fails to deliver not be allowed to continue indefinitely justify these potential effects. In addition, we believe that such effects, if any, would be minimal.

First, we believe that the potential effects, if any, of eliminating the grandfather provision will be minimal because the number of securities that will be impacted by elimination of the grandfather provision will be relatively small. Regulation SHO's close-out requirement is narrowly tailored in that it targets only those securities where the level of fails to deliver is high (0.5% of total shares outstanding and 10,000 shares or more) for a continuous period (five consecutive settlement days).[54] Requiring close out only for securities with large and persistent fails to deliver limits the overall market impact. Moreover, the amendment only impacts those fails to deliver in threshold securities that were created before the security became a threshold security. Because the current grandfather provision has a limited application, the overall impact of its removal on liquidity, volatility, and short squeezes, is expected to be minimal, if any.

Second, to the extent that the amendment could result in a decrease in liquidity, increased volatility, or short squeezes, we believe that any such potential effects will likely be mitigated by the fact that even though fails to deliver that were previously-grandfathered from the close-out requirement of Regulation SHO will no longer be permitted to continue indefinitely, such fails to deliver will not have to be closed out immediately, or even within the standard 3-day settlement period. Instead, under Rule 203(b)(3)'s mandatory close-out requirement, both new and previously-grandfathered fails to deliver in threshold securities will have 13 consecutive settlement days within which to be closed out.

Third, as noted above, the grandfather provision excepts from Rule 203(b)(3)'s mandatory 13 consecutive settlement day close-out requirement only those fails to deliver created before the security became a threshold security. Thus, it does not apply to fails to deliver created after the security became a threshold security. In examining the application of the current mandatory close-out requirement of Regulation SHO for all non-grandfathered fail to deliver positions, we have not become aware of any evidence that the current close-out requirement for non-grandfathered fails to deliver in threshold securities has negatively impacted liquidity or volatility in these securities, or resulted in short squeezes.

Fourth, to the extent that elimination of the grandfather provision results in decreased liquidity, or increased volatility in certain securities, or results in short squeezes, we believe that these potential effects are justified by the benefits of requiring that fails to deliver in all threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely. As discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is

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[49] *See* comment letter from UBS, *supra* note 39.

[50] *See, e.g.*, comment letter from Knight, *supra* note 39.

[51] *See* comment letter from ABA, *supra* note 39; *see also*, *supra* note 22 (discussing the Regulation SHO Re-Opening Release).

[52] *See, e.g.*, comment letters from CBOE, *supra* note 39; SIA, *supra* note 39; Knight, *supra* note 39; UBS, *supra* note 39. *See also*, Section III.A.3., discussing these alternative proposals.

[53] In addition, similar to the proposed amendment and Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, if the fail to deliver position persists for 35 consecutive settlement days from the effective date of the amendment, the amendment will prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity. For those fails to deliver not subject to the 35 consecutive settlement day phase-in period, Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, will apply to fail to deliver positions in threshold securities that persist beyond the 13 consecutive settlement day mandatory close-out requirement.

[54] *See supra* note 7 (discussing the number of threshold securities as of March 31, 2007).

occurring in certain securities can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to manipulative conduct.

In the Proposing Release, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Some commenters expressed concern about ''naked'' short selling causing a drop in an issuer's stock price, which may limit an issuer's ability to access the capital markets.[55] We believe that by requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing some to continue indefinitely, there will likely be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the amendments are expected to improve investor confidence about the security. We also believe that the amendments will lead to greater certainty in the settlement of securities which should strengthen investor confidence in the settlement process.

Alternative Proposals

Some commenters suggested alternative close-out requirements to the proposed amendment to eliminate the grandfather provision of Regulation SHO. For example, one commenter suggested that all fails to deliver in threshold securities, whether or not grandfathered, be closed out within 20 consecutive settlement days.[56] Although 20 consecutive settlement days would provide a uniform close-out requirement, we believe that it would be unwise to extend the close-out requirement to 20 consecutive settlement days because the current industry practice is to close out non-grandfathered fails to deliver in threshold securities within 13 consecutive settlement days and, for the most part, firms appear to be complying with this requirement. Also, it would extend the time in which a fail to deliver position would be permitted to persist, which is contrary to our goal of further reducing fails to deliver in threshold securities within a reasonable period of time. In addition, the current close-out requirement has led to a significant reduction in fails to deliver in threshold securities and, therefore, we do not believe it is appropriate to extend the close-out requirement beyond 13 consecutive settlement days.[57]

As another alternative to the proposed amendment, this commenter also recommended that the Commission require that all fails to deliver that exist prior to the security becoming a threshold security be closed out within 35 consecutive settlement days.[58] Under this alternative, all new fail to deliver positions in threshold securities would be subject to the current 13 consecutive settlement day close out requirement; however, it would allow all fails to deliver that occur prior to the security becoming a threshold security to be closed out within 35 consecutive settlement days. We believe that this two-track approach to the close out requirement of Regulation SHO would be difficult to apply and monitor for compliance.

Another option suggested by commenters was to modify the proposal to have it address only threshold securities that have a high level of persistent fails to deliver, rather than all threshold securities. Under this alternative, a previously-grandfathered fail to deliver position in a threshold security would only become subject to the mandatory close-out requirement if the threshold security has a substantial number of fails to deliver and consistently remains on the threshold list for an extended period of time. The number of securities that are threshold securities is already a small number of securities. For example, in March 2007, the average daily number of securities on the threshold list was approximately 311 securities, which comprised 0.39% of all equity securities, and 2.33% of those securities subject to Regulation SHO. The number of threshold securities with a high level of persistent fails to deliver would be an even smaller number. Thus, we do not believe that this alternative would effectively achieve the Commission's goal of further reducing fails to deliver in all threshold securities.

B. Options Market Maker Exception

The Commission proposed amendments to the options market maker exception contained in Regulation SHO to limit the duration of the exception.[59] Based on comments to the proposed amendments, we have determined at this time to re-propose amendments to the options market maker exception that would eliminate the exception.[60] In addition, in the re-proposal we request comment regarding specific alternatives to eliminating the options market maker exception that would require fails to deliver in threshold securities underlying options to be closed out within specific time-frames. We look forward to receiving comments regarding these proposed amendments to the options market maker exception.

C. Amendments to Rule 200(e)

1. Proposal

Regulation SHO currently provides a limited exception from the requirement that a person selling a security aggregate all of the person's positions in that security to determine whether the seller has a net long position. This provision, which is contained in Rule 200(e) of Regulation SHO, allows broker-dealers to liquidate (or unwind) certain existing index arbitrage positions involving long baskets of stocks and short index futures or options without aggregating short stock positions in other proprietary accounts if, and to the extent that, those short stock positions are fully hedged.[61] The current exception, however, does not apply if the sale occurs during a period commencing at a time when the Dow Jones Industrial Average (''DJIA'') has declined below its closing value on the previous trading day by at least two percent and terminating upon the establishment of the closing value of the DJIA on the next succeeding trading day.[62] If a market decline triggers the

[55] *See, e.g.*, comment letter from Feeney, *supra* note 10.

[56] *See* comment letter from SIA, *supra* note 39.

[57] *See, e.g., supra* note 18 (providing data regarding the impact of Regulation SHO since adoption).

[58] *See* comment letter from SIA, *supra* note 39.

[59] *See* Proposing Release, 71 FR 41710.

[60] *See* Exchange Act Release No. 56213 (Aug. 7, 2007).

[61] To qualify for the exception under Rule 200(e), the liquidation of the index arbitrage position must relate to a securities index that is the subject of a financial futures contract (or options on such futures) traded on a contract market, or a standardized options contract, notwithstanding that such person may not have a net long position in that security. 17 CFR 242.200(e).

[62] Specifically, the exception under Rule 200(e) is limited to the following conditions: (1) The index arbitrage position involves a long basket of stock and one or more short index futures traded on a board of trade or one or more standardized options contracts; (2) such person's net short position is solely the result of one or more short positions created and maintained in the course of bona-fide arbitrage, risk arbitrage, or bona-fide hedge activities; and (3) the sale does not occur during a period commencing at the time that the DJIA has declined below its closing value on the previous day by at least two percent and terminating upon the establishment of the closing value of the DJIA on the next succeeding trading day. *Id.*

The two percent market decline restriction was included in Rule 200(e)(3) so that the market could avoid incremental temporary order imbalances during volatile trading days. Regulation SHO

Continued

application of Rule 200(e)(3), a broker-dealer must aggregate all of its positions in that security to determine whether the seller has a net long position.[63]

The reference to the DJIA in the Commission's rule was based in part on NYSE Rule 80A (Index Arbitrage Trading Restrictions).[64] However, on August 24, 2005, the Commission approved an amendment to NYSE Rule 80A to use the NYSE Composite Index (''NYA'') to calculate limitations on index arbitrage trading as provided in the rule instead of the DJIA.[65] As noted in the Commission's approval order, according to the NYSE, the NYA is a better reflection of market activity with respect to the S&P 500 and, therefore, is a better indicator as to when the restrictions on index arbitrage trading provided by NYSE Rule 80A should be triggered.[66]

In addition, NYSE Rule 80A provides that the two percent limitation in that rule must be calculated at the beginning of each quarter and shall be two percent, rounded down to the nearest 10 points, of the average closing value of the NYA for the last month of the previous quarter.[67] As adopted, Rule 200(e)(3) of Regulation SHO did not refer to the basis for determining the two percent limitation in the rule.

Because the Commission approved the change to NYSE Rule 80A to reference the NYA rather than the DJIA and because we believe that this is an appropriate index to reference for purposes of Rule 200(e)(3) of Regulation SHO, the Commission proposed to amend Rule 200(e)(3) to: (i) Reference the NYA instead of the DJIA; and (ii) add language to clarify that the two percent limitation is to be calculated in accordance with NYSE Rule 80A. The proposed amendments are intended to maintain consistency with NYSE Rule 80A so that market participants need refer to only one index in connection with restrictions regarding index arbitrage trading.

2. Comments

The Commission received four comment letters addressing the proposed amendment to Rule 200(e) of Regulation SHO. Three of the four commenters supported the proposed amendment. While one of these commenters supported the amendment as proposed,[68] the other two commenters suggested revisions that would make the provision more consistent with NYSE Rule 80A by providing that the restriction be terminated at the end of the trading day rather than upon the establishment of the closing value of the NYA on the next succeeding trading day, as provided in the current rule.[69] One commenter suggested that the Commission examine whether to retain Rule 200(e) at all.[70]

3. Adoption

After considering the above comments, we are amending Rule 200(e)(3) of Regulation SHO to: (i) Reference the NYA instead of the DJIA; (ii) add language to clarify how the two percent limitation is to be calculated for purposes of the market decline limitation; and (iii) provide that the market decline limitation will remain in effect for the remainder of the trading day. As adopted, Rule 200(e) will reference the NYA instead of the DJIA. In the Proposing Release, we proposed that Rule 200(e)(3) of Regulation SHO state that the two percent be calculated pursuant to NYSE Rule 80A. We have determined, however, that it is more appropriate to describe in the rule text how the two percent must be calculated rather than referring to NYSE Rule 80A. Thus, the amendments provide that the two percent limitation is to be calculated at the beginning of each quarter and shall be two percent, rounded down to the nearest 10 points, of the average closing value of the NYA for the last month of the previous quarter. In response to commenter concerns regarding maintaining consistency with NYSE Rule 80A, we are also amending Rule 200(e) to provide that the market decline limitation will terminate at the end of the trading day rather than upon the establishment of the closing value of the NYA on the next succeeding trading day.

D. Amendments to Rule 203 for Sales of Securities Pursuant to Rule 144

1. Proposal

In the Proposing Release we asked whether we should amend Rule 203 to extend the close-out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act. Currently, Regulation SHO provides for an exception from the locate requirement of Rule 203(b)(1) for situations where a broker-dealer effects a short sale on behalf of a customer that is deemed to own the security pursuant to Rule 200, although, through no fault of the customer or broker-dealer, it is not reasonably expected that the security will be in the physical possession or control of the broker-dealer by settlement date and, therefore, is a ''short'' sale under the marking requirements of Rule 200(g).[71] Rule 203(b)(2)(ii) of Regulation SHO provides that in such circumstances, delivery must be made on the sale as soon as all restrictions on delivery have been removed, and in any event no later than 35 days after trade date, at which time the broker-dealer that sold on behalf of the person must either borrow securities or close out the open position by purchasing securities of like kind and quantity.[72] If the security is a threshold security, however, any fails to deliver in the security must be closed out in accordance with the requirements of Rule 203(b)(3) of Regulation SHO, *i.e.*, within 13 consecutive settlement days.[73]

2. Comments

The majority of commenters who responded to this request for comment supported extending the close-out requirement to 35 consecutive settlement days for fails to deliver resulting from sales of threshold

Adopting Release, 69 FR at 48011. The two percent market decline restriction limits temporary order imbalances at the close of trading on a volatile trading day and at the opening of trading on the following day, since trading activity at these times may have a substantial effect on the market's short-term direction. The two percent safeguard also provides consistency within the equities markets. *Id.*

[63] *See* 17 CFR 242.200(e)(3); Regulation SHO Adopting Release, 69 FR at 48012.

[64] *See* 2003 Proposing Release, 68 FR at 62994–62995 (discussing proposed Rule 200 regarding netting and the liquidation of index arbitrage activities and changes to the language of the rule text to keep the language consistent with the language in NYSE Rule 80A).

[65] *See* Exchange Act Release No. 52328 (Aug. 24, 2005), 70 FR 51398 (Aug. 30, 2005).

[66] *See id.*

[67] *See id. See also*, NYSE Rule 80A (Supplementary Material .10).

[68] *See*, *e.g.*, comment letter from UBS, *supra* note 39.

[69] *See* comment letters from SIA, *supra* note 39; CBOE, *supra* note 39.

[70] *See* comment letter from Angel, *supra* note 38 (stating that in today's fast markets, there are better ways of managing volatility than ''kludges'' like Rule 200(e) and other circuit breakers).

[71] Pursuant to Rule 200(g)(2) of Regulation SHO, as adopted in August 2004, generally these sales were marked ''short exempt.'' *See* Adopting Release, 69 FR at 48030–48031; *but cf* Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348 (July 3, 2007) (removing the ''short exempt'' marking requirement).

[72] *See* 17 CFR 242.203(b)(2)(ii). In the Adopting Release, the Commission stated that it believed that 35 calendar days is a reasonable outer limit to allow for restrictions on a security to be removed if ownership is certain. In addition, the Commission noted that Section 220.8(b)(2) of Regulation T of the Federal Reserve Board allows 35 calendar days to pay for securities delivered against payment if the delivery delay is due to the mechanics of the transactions. *See* Adopting Release, 69 FR at 48015, n.72.

[73] *See* 17 CFR 242.203(b)(3).

securities pursuant to Rule 144 of the Securities Act.[74]

Commenters that supported extending the close-out requirement for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act stated that these are legitimate long sale transactions that fail to settle within the normal 3-day settlement cycle only because of the time necessary to transfer the securities.[75] One commenter stated that the current requirement in Regulation SHO to close out *all* fails in threshold securities that remain for 13 consecutive settlement days, including fails resulting from sales of securities which the seller owns, has imposed serious unintended consequences on clearing firms and the broker-dealer and non-broker-dealer customers for which they clear.[76] Another commenter noted that these types of transactions do not reflect any of the abusive short sale transactions targeted by Regulation SHO since the seller has an ownership position in the security being sold and, therefore, no incentive to depress the price of the security.[77] In addition, commenters noted that clearing firms may have to effect buy-ins even though the security will be available for delivery as soon as the restrictions on sale have been removed.[78] Another commenter stated that it believes that all sellers who actually own a security and are permitted a maximum of 35 days after trade date to deliver such securities to their broker-dealer in accordance with Rule 203(b)(2)(ii) of Regulation SHO, not just owners of securities eligible for resale under Rule 144, should be free from the risk of being bought in.[79]

However, some commenters opposed allowing a longer period for closing out fails to deliver in threshold securities sold pursuant to Rule 144 of the Securities Act. These commenters stated their belief that legended shares should not be sold until the legend has been removed.[80] Commenters also stated that, because sellers are free to borrow shares to deliver while they await receipt of their securities from the transfer agent, any additional time for delivery is unnecessary.[81] One commenter stated that given that ''most 144 sellers are insiders who have received their stocks at very low prices,'' it is ''both fair and in the interests of ensuring market integrity and confidence to expect them to bear the cost of borrowing shares until delivery of unrestricted stock.'' [82] Another commenter stated that the exception allows Rule 144 shares to be used as collateral for delivery failures, and stated that any errors, difficulties, inconveniences and expense in having restrictions lifted should be borne by the owner of the restricted securities.[83]

3. Adoption

While commenters raise valid concerns, we believe that adopting the amendments is justified by the benefit of permitting the orderly settlement of fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act without causing market disruption due to unnecessary purchasing activity (particularly if the purchases are for a sizeable amount). Thus, we are amending Rule 203 of Regulation SHO to extend the close-out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act.

In addition, because we are extending the close-out requirement for fails to deliver resulting from sales of threshold securities pursuant to Rule 144, we are also extending the pre-borrow requirement of Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, for these fails to deliver. Thus, if the fail to deliver position persists for 35 consecutive settlement days, the amendment will prohibit a participant of a registered clearing agency, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

Securities sold pursuant to Rule 144 of the Securities Act are formerly restricted securities that a seller is ''deemed to own,'' as defined by Rule 200(a) of Regulation SHO. The securities, however, may not be capable of being delivered on the settlement date due to processing delays related to removal of the restricted legend and, therefore, sales of these securities frequently result in fails to deliver. Following our review of the comment letters, and based on our understanding of industry practices, we understand that such processing delays, which are often out of the seller's and broker-dealer's control, frequently result in delivery taking longer than 13 consecutive settlement days. We believe, however, that 35 consecutive settlement days will provide sufficient time for delivery of these securities.

We believe that extending the current close-out requirement to 35 consecutive settlement days for fails to deliver resulting from sales of these securities will permit the orderly settlement of such sales without the risk of causing market disruption due to unnecessary purchasing activity (particularly if the purchases are for sizable quantities of stock). Because the security sold will be received as soon as all processing delays have been removed, this additional time will allow participants to close out fails to deliver resulting from the sale of the security with the security sold, rather than having to close out such fail to deliver position by purchasing securities in the market.

Although this amendment will allow fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act 35 rather than 13 consecutive settlement days in which to be closed out, these fails to deliver must be closed out within 35 consecutive settlement days and, therefore, these fails to deliver cannot continue indefinitely. Thus, we believe that this amendment is consistent with our goal of further reducing fails to deliver in threshold securities, while balancing the concerns associated with closing out fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act.

IV. Paperwork Reduction Act

The amendments to Regulation SHO will not impose a new ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[84]

[74] A few commenters, namely NASAA and some retail investors, opposed allowing additional time for delivery of these types of threshold securities. *See, e.g.*, comment letter from NASAA, *supra* note 38.

[75] *See, e.g.*, comment letters from UBS, *supra* note 39; Knight, *supra* note 39.

[76] For example, one commenter noted that firms have discovered in numerous instances that their CNS fail positions in threshold securities are attributable to situations where sales are effected pursuant to Rule 144 of the Securities Act; however, due to delays in getting the restricted legend removed from the certificates (or other such delays outside the seller's control), such shares are not available for a period of time after settlement date. *See* comment letter from SIA, *supra* note 39.

[77] *See* comment letter from UBS, *supra* note 39.

[78] *See* comment letter from SIA, *supra* note 39.

[79] *See* comment letter from ABA, *supra* note 39.

[80] *See, e.g.*, comment letters from NASAA, *supra* note 38; NCANS, *supra* note 9.

[81] *See* comment letters from Utah Division of Securities, *supra* note 38; NASAA, *supra* note 38.

[82] Comment letter from NASAA, *supra* note 38.

[83] *See* comment letter from Thomas Vallarino, dated May 5, 2007.

[84] 44 U.S.C. 3501 *et seq.*

V. Cost-Benefit Analysis

We are sensitive to the costs and benefits of our rules and we have considered the costs and the benefits of the amendments to Regulation SHO. In order to assist us in evaluating the costs and benefits, in the Proposing Release, we encouraged commenters to discuss any costs or benefits that the amendments might impose. In particular, we requested comment on the potential costs for any modifications to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposals for registrants, issuers, investors, brokers or dealers, other securities industry professionals, regulators, and other market participants. Commenters were encouraged to provide analysis and data to support their views on the costs and benefits associated with the proposed amendments to Regulation SHO. We did not receive any comments providing specific cost or benefit estimates.

A. Amendments to Rule 203(b)(3)'s Delivery Requirements

1. Amendment to Rule 203(b)(3)(i)'s Grandfather Provision

a. Benefits

As adopted, the amendment eliminates the grandfather provision from Regulation SHO and amends Rule 203 to require that all fails to deliver be closed out within either 13 consecutive settlement days or, in the case of a previously-grandfathered fails to deliver in a security that is on the threshold list on the effective date of the amendment, 35 consecutive settlement days from the effective date of the amendment.[85]

We believe the amendment strikes the appropriate balance between reducing fails to deliver in threshold securities from persisting for extended periods of time and still providing participants flexibility and advance notice to close out the previously-grandfathered fails to deliver. While some delays in closing out may be understandable and necessary, a seller should deliver shares to the buyer within a reasonable time period. Although high fails levels exist only for a small percentage of issuers,[86] we are concerned that persistent fails to deliver may have a negative effect on the market in these securities. For example, persistent fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending. In addition, where a seller of securities fails to deliver securities on trade settlement date, in effect the seller unilaterally converts a securities contract (which should settle within the standard 3-day settlement period) into an undated futures-type contract, to which the buyer may not have agreed, or that may have been priced differently. Moreover, sellers that fail to deliver securities on trade settlement date may enjoy fewer restrictions than if they were required to deliver the securities within a reasonable period of time, and such sellers may use this additional freedom to engage in trading activities that deliberately and improperly depress the price of a security.

We believe the amendment will benefit investors by facilitating the receipt of shares so that more investors receive the benefits associated with share ownership. The amendment may enhance investor confidence as they make investment decisions by providing investors with greater assurance that securities will be delivered as expected. An increase in investor confidence in the market may facilitate investment.

We believe the amendment will also benefit issuers. A high level of persistent fails to deliver in a security may be perceived by potential investors negatively and may affect their decision about making a capital commitment.[87] Some issuers may believe they have endured unwarranted reputational damage due to investors' negative perceptions regarding a security having a large fail to deliver position and becoming a threshold security.[88] Thus, issuers may believe that elimination of the grandfather provision will restore their good name. Some issuers may also believe that large and persistent fails to deliver indicate that they have been the target of potentially manipulative conduct as a result of ''naked'' short sales.[89] Thus, elimination of the grandfather provision may decrease the possibility of artificial market influences and, therefore, may contribute to price efficiency.

We believe the 35 day phase-in period will reduce disruption to the market and foster greater market stability because it gives participants a sufficient length of time to effect purchases to close out grandfathered positions in an orderly manner, particularly since participants could have begun to close out grandfathered positions anytime before the 35 day phase-in period was adopted. Some of the commenters that supported eliminating the grandfather provision stated that the 35 day phase-in proposal would restore investor confidence and would not cause excessive volatility.[90]

b. Costs

In order to comply with Regulation SHO when it became effective in January 2005, market participants needed to modify their recordkeeping, systems, and surveillance mechanisms. In addition, market participants should have retained and trained the necessary personnel to ensure compliance with the rule. Thus, the infrastructure necessary to comply with the amendments is likely already in place. As such, any additional changes to the infrastructure will likely be minimal. In the Proposing Release, we requested specific comment on the system changes to computer hardware and software, or surveillance costs that might be necessary to comply with this rule. One investor, in his comment letter, stated that elimination of the grandfather provision will not increase costs for surveillance and compliance but, instead, will actually reduce costs because firms will no longer have to identify and track which fails to deliver are grandfathered and which are not.[91]

We also requested comment regarding the economic costs of eliminating the grandfather provision and how this would affect the liquidity of equity securities. One commenter contended that elimination of the grandfather provision could adversely impact stock liquidity and borrowing, increasing costs to investors.[92] Another commenter stated its belief that eliminating the grandfather provision would lead to increased volatility and short squeezes as individuals attempted to close out positions.[93] This commenter also stated that eliminating the grandfather provision would negatively impact bona

[85] In addition, similar to the pre-borrow requirement in Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, if the fail to deliver position persists for 35 consecutive settlement days from the effective date of the amendment, the amendment will prohibit a participant of a registered clearing agency, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

[86] *See supra* note 7.

[87] *See, e.g.*, comment letter from Feeney, *supra* note 10.

[88] *See, e.g.*, comment letter from Zix, *supra* note 10.

[89] *See, e.g.*, comment letters from Feeney, *supra* note 10; Zix, *supra* note 10.

[90] *See* comment letters from MFA, *supra* note 38; NCANS, *supra* note 9; State of Connecticut, *supra* note 9.

[91] *See* comment letter from David Patch, dated July 22, 2006.

[92] *See, e.g.*, comment letter from CBOE, *supra* note 39.

[93] *See* comment letter from Knight, *supra* note 39.

fide market making and the ability of market makers to provide liquidity, which would lead to less liquidity, greater volatility, and widening of spreads.[94] Another commenter stated that eliminating the grandfather provision would cause substantial market disruption by increasing significantly the number of buy-ins in the market without sufficiently targeting the abusive ''naked'' short sellers.[95]

There could be some risk of market disruption in requiring market participants to close out grandfathered fails to deliver. However, we believe that any market disruption, including increased volatility, reduction in liquidity and potential short squeezes are justified by the benefits of reducing the number of persistent fails to deliver. In addition, we believe that such effects, if any, will be minimal.

First, we believe that these potential effects, if any, of eliminating the grandfather provision will be minimal because the number of securities that will be impacted by elimination of the grandfather provision will be relatively small. Regulation SHO's close-out requirement is narrowly tailored in that it targets only those securities where the level of fails to deliver is high (0.5% of total shares outstanding and 10,000 shares or more) for a continuous period (five consecutive settlement days).[96] Requiring close out only for securities with large and persistent fails to deliver limits the overall market impact. Moreover, the amendment only impacts those fails to deliver in threshold securities that were created before the security became a threshold security. Because the current grandfather provision has a limited application, the overall impact of its removal on liquidity, volatility, and short squeezes, is expected to be relatively small.

Second, to the extent that the amendment could result in a decrease in liquidity, increased volatility, or short squeezes, we believe that any such potential effects will likely be mitigated by the fact that even though fails to deliver that were previously-grandfathered from the close-out requirement of Regulation SHO will not be permitted to continue indefinitely, such fails to deliver will not have to be closed out immediately, or even within the standard 3-day settlement period. Instead, under Rule 203(b)(3)'s mandatory close-out requirement, both new and previously-grandfathered fails to deliver in threshold securities will have 13 consecutive settlement days within which to be closed out.

Third, as noted above, the grandfather provision excepts from Rule 203(b)(3)'s mandatory 13 consecutive settlement day close-out requirement only those fails to deliver created before the security became a threshold security. Thus, it does not apply to fails to deliver created after the security became a threshold security. In examining the application of the current mandatory close-out requirement of Regulation SHO for all non-grandfathered fail to deliver positions, we have not become aware of any evidence that the current close-out requirement for non-grandfathered fails to deliver in threshold securities has negatively impacted liquidity or volatility in these securities, or resulted in short squeezes.

Fourth, to the extent that elimination of the grandfather provision results in decreased liquidity, or increased volatility in certain securities, or results in short squeezes, we believe that these potential effects are justified by the benefits of requiring that fails to deliver in all threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely. As discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to manipulative conduct.

2. Amendments to Rule 203 for Sales of Securities Pursuant to Rule 144

a. Benefits

The amendments to Rule 203 will extend the close out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act. In addition, because we are extending the close-out requirement for fails to deliver resulting from sales of threshold securities pursuant to Rule 144, we are also extending the pre-borrow requirement of Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted, for these fails to deliver. Thus, if the fail to deliver position persists for 35 consecutive settlement days, the amendment will prohibit a participant of a registered clearing agency, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

Securities sold pursuant to Securities Act Rule 144 are formerly restricted securities that a seller is ''deemed to own'' as defined by Rule 200(a) of Regulation SHO. The securities, however, may not be capable of being delivered on the settlement date due to processing delays related to removal of the restricted legend. We understand, however, that such processing delays, which are out of the seller's and broker-dealer's control, frequently result in delivery taking longer than 13 consecutive settlement days.[97]

We believe that extending the current close-out requirement to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act will permit the orderly settlement of such sales without the risk of causing market disruption due to unnecessary purchasing activity (particularly if the purchases are for sizable quantities of stock). Because the security sold will be received as soon as all processing delays have been removed, this additional time will allow participants to close out fails to deliver resulting from the sale of the security with the security sold, rather than having to close out such fail to deliver position by purchasing securities in the market. Thus, the amendments will reduce costs to participants and, in turn, investors.

Although this amendment will allow fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act 35 rather than 13 consecutive settlement days in which to be closed out, these fails to deliver must be closed out within 35 consecutive settlement days and, therefore, these fails to deliver cannot continue indefinitely. Thus, we believe that this amendment is consistent with our goal of further reducing fails to deliver in threshold securities, while balancing the concerns associated with closing out fails to deliver in threshold securities pursuant to Securities Act Rule 144.

[94] *See id.* According to this commenter, the proposal could also lead to upward price manipulation, causing investors to purchase shares at inflated prices.

[95] *See* comment letter from UBS, *supra* note 39.

[96] *See supra* note 7 (discussing the number of threshold securities as of March 31, 2007).

[97] *See, e.g.*, comment letter from SIA, *supra* note 39.

b. Costs

We do not believe these amendments will impose any significant burden or cost on market participants. As discussed in more detail above, we believe that extending the current close-out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from the sale of a threshold security pursuant to Rule 144 of the Securities Act is expected to reduce costs by allowing participants of a registered clearing agency with a fail to deliver position additional time for delivery of these securities beyond the current 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO.

Participants may incur, however, some added costs for minor changes to their current systems to reflect the extended close-out requirement. We believe any added costs are justified by the benefits of extending the close-out requirement for these securities.

3. Amendments to Rule 200(e)(3)

a. Benefits

The amendments to the market decline limitation in Rule 200(e) of Regulation SHO will reference the NYA rather than the DJIA. The previous reference in Rule 200(e)(3) to the DJIA was based in part on NYSE Rule 80A (Index Arbitrage Trading Restrictions). However, as discussed above, because the Commission approved an amendment to NYSE Rule 80A to use the NYA to calculate limitations on index arbitrage trading as provided in the rule instead of the DJIA,[98] and because we believe that this is an appropriate index to reference for purposes of Rule 200(e)(3) of Regulation SHO, we are amending Rule 200(e)(3) to reference the NYA instead of the DJIA.

In addition, the amendments provide that the two percent limitation is to be calculated at the beginning of each quarter and shall be two percent, rounded down to the nearest 10 points, of the average closing value of the NYA for the last month of the previous quarter.[99] In addition, Rule 200(e), as amended, will provide that the market decline limitation will terminate at the end of the trading day rather than upon the establishment of the closing value of the NYA on the next succeeding trading day. These amendments are intended to maintain consistency with NYSE Rule 80A so that market participants need refer to only one index in connection with restrictions regarding index arbitrage trading.

b. Costs

As discussed above, the reference in Rule 200(e)(3) of Regulation SHO to the DJIA was based, in part, on the reference in NYSE Rule 80A to the DJIA.[100] Following the Commission's approval of the amendment to NYSE Rule 80A to reference the NYA rather than the DJIA, market participants engaged in index arbitrage trading needed to reference the NYA for purposes of complying with NYSE Rule 80, and the DJIA for purposes of complying with Rule 200(e)(3) of Regulation SHO. By amending Rule 200(e)(3) to reference the NYA rather than the DJIA, market participants engaged in index arbitrage trading will need to reference only one index with respect to restrictions on such trading. Thus, we believe the amendments will not impose any significant costs or burdens on market participants.

VI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action will promote efficiency, competition, and capital formation.[101] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[102] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In the Proposing Release, we solicited comment on whether the proposed amendments are expected to promote efficiency, competition, and capital formation.

We believe the amendments will have minimal impact on the promotion of price efficiency. In the Proposing Release we sought comment on whether the proposals promote price efficiency, including whether the proposals might impact liquidity and the potential for manipulative short squeezes. One commenter stated that the Commission's concern over potential short squeezes is ''misplaced,'' as this is a risk short sellers assume when they sell short.[103] Another commenter maintained that elimination of the grandfather provision should not cause excessive volatility because, according to the commenter, DTCC and market participants have said that fails to deliver are a small problem.[104] However, one commenter stated its belief that elimination of the grandfather provision could adversely impact stock liquidity and borrowing, increasing costs to investors.[105] Another commenter stated its belief that eliminating the grandfather provision would lead to increased volatility and short squeezes as individuals attempted to close out positions.[106] This commenter also stated that eliminating the grandfather provision would negatively impact bona fide market making and the ability of market makers to provide liquidity, which would lead to less liquidity, greater volatility, and widening of spreads.[107] Another commenter stated that eliminating the grandfather provision would cause substantial market disruption by increasing significantly the number of buy-ins in the market without sufficiently targeting the abusive ''naked'' short sellers.[108]

We believe 13 consecutive settlement days will be a sufficient amount of time in which to close out fail to deliver positions even in hard to borrow securities and will likely limit the potential for short squeezes, increased volatility, or reduction in liquidity. In addition, these amendments will impact only threshold securities, which comprise a small subset of all equity securities trading in the market. For example, in March 2007, the average daily number of securities on the threshold list was approximately 311 securities, which comprised 0.39% of all equity securities, and 2.33% of those securities subject to Regulation SHO. Thus, we believe that the overall market impact of the amendments will be minimal, if any.

We also believe the 35 day phase-in period for previously-grandfathered fail

[98] *See* 70 FR 51398.

[99] This amendment provides consistency with how the two percent value is calculated pursuant to NYSE Rule 80A. *See* NYSE Rule 80A (Supplementary Material .10).

[100] *See* 2003 Proposing Release, 68 FR at 62994–62995 (discussing proposed Rule 200 regarding netting and the liquidation of index arbitrage activities and changes to the language of the rule text to keep the language consistent with the language in NYSE Rule 80A).

[101] 15 U.S.C. 78c(f).

[102] 15 U.S.C. 78w(a)(2).

[103] *See* comment letter from H. Glenn Bagwell, Jr., *supra* note 42.

[104] *See* comment letter from NCANS, *supra* note 9.

[105] *See* comment letter from CBOE, *supra* note 39.

[106] *See* comment letter from Knight, *supra* note 39.

[107] *See id.* According to this commenter, the proposal could also lead to upward price manipulation, causing investors to purchase shares at inflated prices.

[108] *See* comment letter from UBS, *supra* note 39.

to deliver positions will not result in market disruption because it allows participants of a registered clearing agency an extended period of time in which to effect purchases to close out previously-grandfathered fail to deliver positions as of the effective date of the amendment, particularly because these participants could have begun to close out previously-grandfathered fail to deliver positions before adoption of the 35 day phase-in period.

In addition, we believe that the amendments will have minimal impact on the promotion of capital formation. Large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct. In the Proposing Release, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about the potential impact of ''naked'' short selling on capital formation claiming that ''naked'' short selling causes a drop in an issuer's stock price that may limit the issuer's ability to access the capital markets.[109] Another commenter submitted a theoretical economic study concluding that ''naked'' short selling is economically similar to other shorting.[110]

By requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing them to continue indefinitely, we believe that there will be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on a threshold securities list leads to an unwarranted decline in investor confidence about the security, the amendments are expected to improve investor confidence about the security. We also believe that the proposed amendments will lead to greater certainty in the settlement of securities, which should strengthen investor confidence in the settlement process.

We also believe the amendments will not impose any burden on competition not necessary or appropriate in furtherance of the Exchange Act. By eliminating the grandfather provision and extending the close out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act, we believe the amendments to Regulation SHO will promote competition by requiring similarly situated participants to close out fails to deliver in threshold securities within the same time-frame or, in the case of threshold securities sold pursuant to Rule 144 of the Securities Act, it will provide the same additional time-frame within which to close out fails to deliver resulting from sales of these securities. The amendments also will promote competition by maintaining consistency with NYSE Rule 80A so that broker-dealers can refer to the same index with respect to restrictions regarding index arbitrage trading. Thus, we believe that the amendments will improve the functioning of the capital markets and, thereby, will enhance investor confidence in the markets.

VII. Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA''), in accordance with the provisions of the Regulatory Flexibility Act (''RFA''),[111] regarding the amendments to Regulation SHO, Rules 200 and 203, under the Exchange Act. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and was included in the Proposing Release. We solicited comments on the IRFA.

A. Reasons for and Objectives of the Amendments

We are adopting revisions to Rules 200 and 203 of Regulation SHO. The amendments to Rule 203(b)(3) of Regulation SHO are designed to further reduce the number of persistent fails to deliver in threshold securities by eliminating the grandfather provision. We are concerned that persistent, large fail positions may have a negative effect on the market in these securities. For example, although high fails levels exist only for a small percentage of issuers, they may impede the orderly functioning of the market for such issuers, particularly issuers of less liquid securities. A significant level of fails to deliver in a security may have adverse consequences for shareholders who may be relying on delivery of those shares for voting and lending purposes, or may otherwise affect an investor's decision to invest in that particular security. In addition, a seller that fails to deliver securities on trade settlement date effectively unilaterally converts a securities contract into an undated futures-type contract, to which the buyer might not have agreed, or that would have been priced differently.

To allow participants sufficient time to comply with the new close-out requirements, we are including a 35 settlement day phase-in period following the effective date of the amendment. The phase-in period is intended to provide participants with flexibility and advance notice to begin closing out previously-grandfathered fail to deliver positions.

The amendment to extend the close out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act also is intended to provide participants with flexibility by allowing additional time for delivery of these securities, thereby also permitting the orderly settlement of such sales. The amendment to update the market decline limitation referenced in Rule 200(e)(3) is intended to maintain consistency with NYSE Rule 80A, and to provide for an appropriate and consistent protective measure.

B. Significant Issues Raised by Public Comment

The IRFA appeared in the Proposing Release. We requested comment on any aspect of the IRFA. In particular, we requested comment on: (i) The number of small entities that would be affected by the amendments; and (ii) the existence or nature of the potential impact of the amendments on small entities. We requested that the comments specify costs of compliance with the amendments, and suggest alternatives that would accomplish the objectives of the amendments. We did not receive any comments that responded specifically to this request. One investor, in his comment letter, however, stated that elimination of the grandfather provision would not increase costs for surveillance and compliance but, instead, will actually reduce costs because firms would no longer have to identify and track which

[109] *See, e.g.*, comment letter from Feeney, *supra* note 10.

[110] *See* comment letter from J.B. Heaton, Bartlit Beck Herman Palenchar & Scott LLP, dated May 1, 2007.

[111] 5 U.S.C. 604.

fails to deliver are grandfathered and which are not.[112]

C. Small Entities Subject to the Amendments

The entities covered by these amendments will include small entities that are participants of a registered clearing agency, and small broker-dealers for which the participant clears trades or for which it is responsible for settlement. In addition, the entities covered by these amendments will include small entities that are market participants that effect sales subject to the requirements of Regulation SHO. Although it is impossible to quantify every type of small entity covered by these amendments, Paragraph (c)(1) of Rule 0–10 under the Exchange Act[113] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. We estimate that as of 2006 there were approximately 894 broker-dealers that qualified as small entities as defined above.[114]

As noted above, the entities covered by these amendments will include small entities that are participants of a registered clearing agency. As of May 2007, approximately 90% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually cleaned up within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

The federal securities laws do not define what is a ''small business'' or ''small organization'' when referring to a bank. The Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[115] As of May, 2007 no bank that was a participant of the NSCC was a small entity because none met this criteria.

Paragraph (e) of Rule 0–10 under the Exchange Act[116] states that the term ''small business'' or ''small organization,'' when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Rule 11Aa3–1 under the Exchange Act; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10. No U.S. registered exchange is a small entity because none meets these criteria. There is one national securities association (NASD) that is subject to these amendments. NASD is not a small entity as defined by 13 CFR 121.201.

Paragraph (d) of Rule 0–10 under the Exchange Act[117] states that the term ''small business'' or ''small organization,'' when referring to a clearing agency, means a clearing agency that: (1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter); (2) had less than $200 million in funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined by Rule 0–10. No clearing agency that is subject to the requirements of Regulation SHO is a small entity because none meets these criteria.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments may impose some new or additional reporting, recordkeeping, or compliance costs on small entities that are participants of a clearing agency registered with the Commission.[118] In order to comply with Regulation SHO when it became effective in January 2005, small entities needed to modify their systems and surveillance mechanisms. Thus, we believe that the infrastructure necessary to comply with the amendments regarding elimination of the grandfather provision is likely already in place. Any additional changes to the infrastructure are expected to be minimal. We do not believe, at this time, that any specialized professional skills will be necessary to comply with these new requirements.

E. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, the Commission considered the following alternatives: (a) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (c) use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.

The primary goal of the new amendments is to reduce the number of persistent fails to deliver in threshold securities. As such, we believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities will undermine the goal of reducing fails to deliver. In addition, we have concluded similarly that it is not consistent with the primary goal of the new amendments to further clarify, consolidate or simplify the new amendments for small entities. The Commission also believes that it is inconsistent with the purposes of the Exchange Act to use performance standards to specify different requirements for small entities or to exempt small entities from having to comply with the amended rules.

VIII. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 9(h), 10(a), 11A, 15, 17(a), 17A, 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78i(h), 78j, 78k–1, 78o, 78q(a), 78q–1, 78w(a), the

[112] *See* comment letter from David Patch, *supra* note 91.

[113] 17 CFR 240.0–10(c)(1).

[114] These numbers are based on the Commission's Office of Economic Analysis's review of 2006 FOCUS Report filings reflecting registered broker dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[115] *See* 13 CFR 121.201.

[116] 17 CFR 240.0–10(e).

[117] 17 CFR 240.0–10(d).

[118] *See* discussions above in Section VII.C. and note 28, regarding participants of a registered clearing agency that are broker-dealers as opposed to non broker-dealers.

Commission is adopting amendments to §§ 242.200 and 242.203.

Text of the Final Amendments to Regulation SHO

List of Subjects in 17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, Title 17, Chapter II, Part 242, of the Code of Federal Regulations is amended as follows.

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 2. Section 242.200 is amended by revising paragraph (e)(3) to read as follows:

§ 242.200 Definition of ''short sale'' and marking requirements.

* * * * *

(e) * * *

(3) The sale does not occur during a period commencing at the time that the NYSE Composite Index has declined by two percent or more from its closing value on the previous day and terminating upon the end of the trading day. The two percent shall be calculated at the beginning of each calendar quarter and shall be two percent, rounded down to the nearest 10 points, of the average closing value of the NYSE Composite Index for the last month of the previous quarter.

* * * * *

■ 3. Section 242.203 is amended by:

■ a. Revising paragraph (b)(3)(i);

■ b. Redesignating paragraphs (b)(3)(ii), (b)(3)(iii), (b)(3)(iv) and (b)(3)(v) as paragraphs (b)(3)(iii), (b)(3)(iv), (b)(3)(vi) and (b)(3)(vii), respectively; and

■ c. Adding new paragraphs (b)(3)(ii) and (b)(3)(v).

The additions and revision read as follows:

§ 242.203 Borrowing and delivery requirements.

* * * * *

(b) * * *

(3) * * *

(i) *Provided, however,* that a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment and which, prior to the effective date of this amendment, had been previously grandfathered from the close-out requirement in this paragraph (b)(3) (*i.e.*, because the participant of a registered clearing agency had a fail to deliver position at a registered clearing agency on the settlement day preceding the day that the security became a threshold security), shall close out that fail to deliver position within thirty-five consecutive settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

(ii) *Provided, however,* that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security that was sold pursuant to § 230.144 of this chapter for thirty-five consecutive settlement days, the participant shall immediately thereafter close out the fail to deliver position in the security by purchasing securities of like kind and quantity;

* * * * *

(v) If a participant of a registered clearing agency entitled to rely on the thirty-five consecutive settlement day close out requirement contained in paragraphs (b)(3)(i) or (b)(3)(ii) of this section has a fail to deliver position at a registered clearing agency in the threshold security for thirty-five consecutive settlement days, the participant and any broker or dealer for which it clears transactions, including any market maker, that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(iii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

* * * * *

By the Commission.

Dated: August 7, 2007.

Nancy M. Morris,

Secretary.

[FR Doc. E7–15708 Filed 8–13–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–56213; File No. S7–19–07]

RIN 3235–AJ57

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is re-proposing amendments to Regulation SHO under the Securities Exchange Act of 1934 (''Exchange Act''). The proposed amendments are intended to further reduce the number of persistent fails to deliver in certain equity securities by eliminating the options market maker exception. In addition, we are requesting comment regarding specific alternatives to our proposal to eliminate the options market maker exception.

We are also proposing an amendment to the long sale marking provisions of Regulation SHO that would require that brokers and dealers marking a sale as ''long'' document the present location of the securities being sold.

DATES: Comments should be received on or before September 13, 2007.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–19–07 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

All submissions should refer to File Number S7–19–07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: James A. Brigagliano, Associate Director, Josephine J. Tao, Assistant Director, Victoria L. Crane, Branch Chief, Elizabeth A. Sandoe, Branch Chief, Joan M. Collopy, Special Counsel, and Lillian S. Hagen, Special Counsel, Office of Trading Practices and Processing, Division of Market Regulation, at (202) 551–5720, at the Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–6628.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed amendments to Rules 200 and 203 of Regulation SHO [17 CFR 242.200 and 242.203] under the Exchange Act.

I. Introduction

Regulation SHO, which became fully effective on January 3, 2005, sets forth the regulatory framework governing short sales.[1] Among other things, Regulation SHO imposes a close-out requirement to address failures to deliver stock on trade settlement date[2] and to target potentially abusive ''naked'' short selling[3] in certain equity securities.[4] While the majority of trades settle on time,[5] Regulation SHO is intended to address those situations where the level of fails to deliver for the particular stock is so substantial that it might impact the market for that security.[6] Although high fails levels exist only for a small percentage of issuers,[7] we are concerned that large and persistent fails to deliver may have a negative effect on the market in these securities. For example, large and persistent fails to deliver may deprive shareholders of the benefits of

[1] 17 CFR 242.200. *See also* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (Aug. 6, 2004) (''Adopting Release''), available at *http://www.sec.gov/rules/final/34-50103.htm.*

A short sale is the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller. In order to deliver the security to the purchaser, the short seller may borrow the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owns, and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or in a related security.

[2] Generally, investors must complete or settle their security transactions within three business days. This settlement cycle is known as T+3 (or ''trade date plus three days''). T+3 means that when the investor purchases a security, the purchaser's payment must be received by its brokerage firm no later than three business days after the trade is executed. When the investor sells a security, the seller must deliver its securities, in certificated or electronic form, to its brokerage firm no later than three business days after the sale. The three-day settlement period applies to most security transactions, including stocks, bonds, municipal securities, mutual funds traded through a brokerage firm, and limited partnerships that trade on an exchange. Government securities and stock options settle on the next business day following the trade. Because the Commission recognized that there are many legitimate reasons why broker-dealers may not deliver securities on settlement date, it adopted Rule 15c6–1, which prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1. However, failure to deliver securities on T+3 does not violate the rule.

[3] We have previously noted that abusive ''naked'' short selling, while not defined in the federal securities laws generally refers to selling short without having stock available for delivery and intentionally failing to deliver stock within the standard three day settlement cycle. *See* Securities Exchange Act Release No. 54154 (July 14, 2006), 71 FR 41710 (July 21, 2006) (''2006 Proposing Release'').

[4] In 2003, the Commission settled a case against certain parties relating to allegations of manipulative short selling in the stock of Sedona Corporation. The Commission alleged that the defendants profited from engaging in massive naked short selling that flooded the market with Sedona stock, and depressed its price. *See Rhino Advisors, Inc. and Thomas Badian,* Lit. Rel. No. 18003 (Feb. 27, 2003); *see also, SEC* v. *Rhino Advisors, Inc. and Thomas Badian,* Civ. Action No. 03 civ 1310 (RO) (S.D.N.Y). *See also,* Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62975 (Nov. 6, 2003) (''2003 Proposing Release'') (describing the alleged activity in the case involving stock of Sedona Corporation); Adopting Release, 69 FR at 48016, n.76.

[5] According to the National Securities Clearing Corporation (''NSCC''), 99% (by dollar value) of all trades settle on time. Thus, on an average day, approximately 1% (by dollar value) of all trades, including equity, debt, and municipal securities fail to settle. The vast majority of these fails are closed out within five days after T+3.

[6] These fails to deliver may result from either short or long sales of stock. There may be many reasons for a fail to deliver. For example, human or mechanical errors or processing delays can result from transferring securities in physical certificate rather than book-entry form, thus causing a failure to deliver on a long sale within the normal three-day settlement period. Also, broker-dealers that make a market in a security (''market makers'') and who sell short thinly-traded, illiquid stock in response to customer demand may encounter difficulty in obtaining securities when the time for delivery arrives.

[7] The average daily number of securities on a threshold list (as defined *infra* note 13) in March 2007 was approximately 311 securities, which comprised 0.39% of all equity securities, including those that are not covered by Regulation SHO. Regulation SHO's current close-out requirement applies to any equity security of an issuer that is registered under Section 12 of the Exchange Act, or that is required to file reports pursuant to Section 15(d) of the Exchange Act.

ownership, such as voting and lending. In addition, where a seller of securities fails to deliver securities on settlement date, in effect the seller unilaterally converts a securities contract (which should settle within the standard 3-day settlement period) into an undated futures-type contract, to which the buyer might not have agreed, or that might have been priced differently. Moreover, sellers that fail to deliver securities on settlement date may enjoy fewer restrictions than if they were required to deliver the securities within a reasonable period of time, and such sellers may attempt to use this additional freedom to engage in trading activities that are designed to improperly depress the price of a security.

In addition, many issuers and investors continue to express concerns about extended fails to deliver in connection with ''naked'' short selling.[8] To the extent that large and persistent fails to deliver might be indicative of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price, such fails to deliver may undermine the confidence of investors.[9] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[10] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding large and persistent fails to deliver in the issuer's security.[11] Any unwarranted reputational damage caused by large and persistent fails to deliver might have an adverse impact on the security's price.[12]

The close-out requirement, which is contained in Rule 203(b)(3) of Regulation SHO, applies only to securities in which a substantial amount of fails to deliver have occurred (also known as ''threshold securities'').[13] As adopted in August 2004, Rule 203(b)(3) of Regulation SHO included two exceptions to the mandatory close-out requirement. The first was the ''grandfather'' provision, which excepted fails to deliver established prior to a security becoming a threshold security.[14] The second was the ''options market maker exception,'' which excepted any fail to deliver in a threshold security resulting from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the underlying security became a threshold security.[15]

At the time of Regulation SHO's adoption, the Commission stated that it would monitor the operation of Regulation SHO to determine whether grandfathered fail to deliver positions were being cleared up under the existing delivery and settlement guidelines or whether any further regulatory action with respect to the close out provisions of Regulation SHO was warranted.[16] In addition, with respect to the options market maker exception, the Commission noted that it would take into consideration any indications that this provision was operating significantly differently from the Commission's original expectations.[17]

Based, in part, on the results of examinations conducted by the Commission's staff and the SROs since Regulation SHO's adoption, as well as the persistence of certain securities on threshold securities lists, on July 14, 2006, the Commission published proposed amendments to Regulation SHO,[18] which were intended to reduce the number of persistent fails to deliver in certain equity securities by eliminating the grandfather provision and narrowing the options market maker exception contained in that rule. In addition, in March 2007, the Commission re-opened the comment period to the 2006 Proposing Release for thirty days to provide the public with an opportunity to comment on a summary of the National Association of Securities Dealers, Inc.'s (''NASD's'') analysis that the NASD had submitted to the public file on March 12, 2007. In addition, the notice regarding the re-opening of the comment period directed the public's attention to summaries of data collected by the Commission's Office of Compliance Inspections and Examinations and the New York Stock Exchange LLC (''NYSE'').[19]

On June 13, 2007, in a companion rule to this proposal, after careful consideration of public comments, we approved the adoption of the amendment, as proposed, to eliminate the grandfather provision of Regulation

[8] *See, e.g.*, letter from Patrick M. Byrne, Chairman and Chief Executive Officer, Overstock.com, Inc., dated Sept. 11, 2006 (''Overstock''); letter from Daniel Behrendt, Chief Financial Officer, and Douglas Klint, General Counsel, TASER International, dated Sept. 18, 2006 (''TASER''); letter from John Royce, dated April 30, 2007; letter from Michael Read, dated April 29, 2007; letter from Robert DeVivo, dated April 26, 2007; letter from Ahmed Akhtar, dated April 26, 2007.

[9] *See, e.g.*, letter from Mary Helburn, Executive Director, National Coalition Against Naked Shorting, dated Sept. 30, 2006 (''NCANS''); letter from Richard Blumenthal, Attorney General, State of Connecticut, dated Sept. 19, 2006 (''State of Connecticut'') (discussing the impact of fails to deliver on investor confidence).

[10] *See, e.g.*, letter from Congressman Tom Feeney—Florida, U.S. House of Representatives, dated Sept. 25, 2006 (''Feeney'') (expressing concern about the impact of potential ''naked'' short selling on capital formation, claiming that ''naked'' short selling causes a drop in an issuer's stock price and may limit the issuer's ability to access the capital markets); letter from Zix Corporation, dated Sept. 19, 2006 (''Zix'') (stating that ''[m]any investors attribute the Company's frequent re-appearances on the Regulation SHO list to manipulative short selling and frequently demand that the Company ''do something'' about the perceived manipulative short selling. This perception that manipulative short selling of the Company's securities is continually occurring has undermined the confidence of many of the Company's investors in the integrity of the market for the Company's securities'').

[11] Due, in part, to such concerns, issuers have taken actions to attempt to make transfer of their securities ''custody only,'' thus preventing transfer of their stock to or from securities intermediaries such as the Depository Trust Company (''DTC'') or broker-dealers. A number of issuers have attempted to withdraw their issued securities on deposit at DTC, which makes the securities ineligible for book-entry transfer at a securities depository. We note, however, that in 2003 the Commission approved a DTC rule change clarifying that its rules provide that only its participants may withdraw securities from their accounts at DTC, and establishing a procedure to process issuer withdrawal requests. *See* Securities Exchange Act Release No. 47978 (June 4, 2003), 68 FR 35037 (June 11, 2003).

[12] *See also* 2006 Proposing Release, 71 FR at 41712 (discussing the impact of large and persistent fails to deliver on the market). *See also* 2003 Proposing Release, 68 FR at 62975 (discussing the impact of ''naked'' short selling on the market).

[13] A threshold security is defined in Rule 203(c)(6) as any equity security of an issuer that is registered pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*) or for which the issuer is required to file reports pursuant to section 15(d) of the Exchange Act (15 U.S.C. 78o(d)): (i) for which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more, and that is equal to at least 0.5% of the issue's total shares outstanding; and (ii) that is included on a list (''threshold securities list'') disseminated to its members by a self-regulatory organization (''SRO''). *See* 17 CFR 242.203(c)(6). Each SRO is responsible for providing the threshold securities list for those securities for which the SRO is the primary market.

[14] *See* Adopting Release, 69 FR at 48031. The ''grandfathered'' status applied in two situations: (i) to fail to deliver positions occurring before January 3, 2005, Regulation SHO's effective date; and (ii) to fail to deliver positions that were established on or after January 3, 2005 but prior to the security appearing on a threshold securities list.

[15] *See* Adopting Release, 69 FR at 48031.

[16] *See id.* at 48018.

[17] *See id.* at 48019.

[18] *See* 2006 Proposing Release, 71 FR 41719.

[19] In formulating its proposal to eliminate the grandfather provision and narrow the options market maker exception of Regulation SHO, the Commission relied in part on data collected by the NASD. In response to commenters' concerns regarding the public availability of data relied on by the Commission, we re-opened the comment period to the 2006 Proposing Release for thirty days to provide the public with an opportunity to comment on a summary of the NASD's analysis that the NASD had submitted to the public file on March 12, 2007. *See* Securities Exchange Act Release No. 55520 (March 26, 2007), 72 FR 15079 (March 30, 2007) (''Regulation SHO Re-Opening Release'').

SHO.[20] With respect to the options market maker exception, however, in response to comments to the 2006 Proposing Release, we are re-proposing amendments to the current options market maker exception that would eliminate the exception.

We are concerned that persistent fails to deliver will continue in certain equity securities unless the options market maker exception is eliminated entirely. Thus, as discussed more fully below, our proposal would modify Rule 203(b)(3) by eliminating the exception. In addition, we are requesting comment regarding alternatives to eliminating the options market maker exception that would require fails to deliver in threshold securities underlying options to be closed out within specific time-frames.

We are also proposing an amendment to the long sale marking provisions of Rule 200(g)(1) of Regulation SHO that would require that brokers and dealers marking a sale as ''long'' document the present location of the securities.

II. Background

A. Rule 203(b)(3)'s Close-out Requirement

One of Regulation SHO's primary goals is to reduce fails to deliver in those securities with a substantial amount of fails to deliver by imposing additional delivery requirements on participants of a registered clearing agency with fails to deliver in these securities.[21] As discussed above, we believe that additional delivery requirements help protect and enhance the operation, integrity and stability of the markets, as well as reduce short selling abuses.

Thus, Rule 203(b)(3)'s close-out requirement requires a participant of a clearing agency registered with the Commission [22] to take immediate action to close out a fail to deliver position in a threshold security in the Continuous Net Settlement (''CNS'') [23] system that has persisted for 13 consecutive settlement days by purchasing securities of like kind and quantity.[24] In addition, if the failure to deliver has persisted for 13 consecutive settlement days, Rule 203(b)(3)(iv) prohibits the participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.[25]

B. Regulation SHO's Options Market Maker Exception

1. Current Options Market Maker Exception

Regulation SHO's options market maker exception excepts from the close-out requirement of Rule 203(b)(3) any fail to deliver position in a threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security.[26] The options market maker exception was created to address concerns regarding liquidity and the pricing of options.[27] The exception does not require that such fails to deliver be closed out.

Since Regulation SHO's effective date in January, 2005, the Staff and the SROs have been examining firms for compliance with Regulation SHO, including the close-out provisions. We have received preliminary data that indicates that Regulation SHO appears to be significantly reducing fails to deliver without disruption to the market.[28] However, despite this positive

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[20] *See* Securities Exchange Act Release No. 56212 (Aug. 7, 2007).

[21] *See* Adopting Release, 69 FR at 48009.

[22] For purposes of Regulation SHO, the term ''participant'' has the same meaning as in section 3(a)(24) of the Exchange Act. *See* 15 U.S.C. 78c(a)(24). The term ''registered clearing agency'' means a clearing agency, as defined in section 3(a)(23) of the Exchange Act, that is registered as such pursuant to section 17A of the Exchange Act. *See* 15 U.S.C. 78c(a)(23)(A), 78q–1 and 15 U.S.C. 78q–1(b), respectively. *See also,* Adopting Release, 69 FR at 48031. As of May 2007, approximately 90% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Those participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually closed out within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

[23] The majority of equity trades in the United States are cleared and settled through systems administered by clearing agencies registered with the Commission. The National Securities Clearing Corporation (''NSCC'') clears and settles the majority of equity securities trades conducted on the exchanges and over the counter. NSCC clears and settles trades through the CNS system, which nets the securities delivery and payment obligations of all of its members. NSCC notifies its members of their securities delivery and payment obligations daily. In addition, NSCC guarantees the completion of all transactions and interposes itself as the contraparty to both sides of the transaction. While NSCC's rules do not authorize it to require member firms to close out or otherwise resolve fails to deliver, NSCC reports to the SROs those securities with fails to deliver of 10,000 shares or more. The SROs use NSCC fails data to determine which securities are threshold securities for purposes of Regulation SHO.

[24] 17 CFR 242.203(b)(3).

[25] *Id.* at (b)(3)(iv). It is possible under Regulation SHO that a close out by a participant of a registered clearing agency may result in a fail to deliver position at another participant if the counterparty from which the participant purchases securities fails to deliver. However, Regulation SHO prohibits a participant of a registered clearing agency, or a broker-dealer for which it clears transactions, from engaging in ''sham close outs'' by entering into an arrangement with a counterparty to purchase securities for purposes of closing out a fail to deliver position and the purchaser knows or has reason to know that the counterparty will not deliver the securities, and which thus creates another fail to deliver position. *See id.* at (b)(3)(vii); Adopting Release, 69 FR at 48018 n.96. In addition, we note that borrowing securities, or otherwise entering into an arrangement with another person to create the appearance of a purchase would not satisfy the close-out requirement of Regulation SHO. For example, the purchase of paired positions of stock and options that are designed to create the appearance of a bona fide purchase of securities but that are nothing more than a temporary stock lending arrangement would not satisfy Regulation SHO's close-out requirement.

[26] 17 CFR 242.203(b)(3)(iii).

[27] In response to the proposal to adopt Regulation SHO and the Commission's determination at that time not to provide an exception for market makers, including options market makers, from the delivery requirements of proposed Regulation SHO, the Commission received letters that stated that the effect of not including such an exception would be to cease altogether options trading in securities that are difficult to borrow, as it was argued that no options market makers would make markets without the ability to hedge by selling short the underlying security. In addition, one commenter stated that the heightened delivery requirements of proposed Regulation SHO for threshold securities could drain liquidity in other securities where there is no current indication of significant settlement failures. The commenter believed that, while a blanket exception would be preferable, at a minimum the implementation of any such provision should not apply to market maker positions acquired prior to the effective date of the rule, and likewise should not apply to any short position acquired prior to the time that the subject security meets the designated threshold. See Adopting Release, 69 FR at 48019 (discussing the comment letters received in response to the delivery requirements of proposed Regulation SHO). In part, in response to these comments, we adopted a limited options market maker exception to the close-out requirement of Regulation SHO. As discussed in more detail in this release and, in particular, in Section II.B.3. below, we no longer believe that the current options market maker exception is necessary.

[28] For example, in comparing a period prior to the effective date of the current rule (April 1, 2004 to December 31, 2004) to a period following the effective date of the current rule (January 1, 2005 to March 31, 2007) for all stocks with aggregate fails to deliver of 10,000 shares or more as reported by NSCC:

- The average daily aggregate fails to deliver declined by 29.5%;

impact, we continue to observe a small number of threshold securities with substantial and persistent fail to deliver positions that are not being closed out under existing delivery and settlement requirements.

Based on the examinations and our discussions with the SROs and market participants, we believe that these persistent fail to deliver positions may be attributable, in part, to reliance on the options market maker exception.[29] Accordingly, on July 14, 2006, the Commission published the 2006 Proposing Release that included proposed amendments to limit the duration of the options market maker exception.[30]

The Commission, in the 2006 Proposing Release, proposed that for securities that are threshold securities on the effective date of the amendment, any previously excepted fail to deliver position in the threshold security that resulted from short sales effected by a registered options market maker to establish or maintain a hedge on an options position that existed before the security became a threshold security, but that has expired or been liquidated on or before the effective date of the amendment, would be required to be closed out within 35 consecutive settlement days of the effective date of the amendment. In addition, if the fail to deliver position persisted for 35 consecutive settlement days, the proposal would have prohibited a participant of a registered clearing agency, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closed out the entire fail to deliver position by purchasing securities of like kind and quantity.

If the security became a threshold security after the effective date of the amendment, all fail to deliver positions in the security that result or resulted from short sales effected by a registered options market maker to establish or maintain a hedge on an options position that existed before the security became a threshold security would have to be closed out within 13 consecutive settlement days of the security becoming a threshold security or of the expiration or liquidation of the options position, whichever was later. In addition, if the fail to deliver position persisted for 13 consecutive settlement days from the date on which the security became a threshold security or the options position had expired or was liquidated, whichever was later, the proposal would have prohibited a participant of a registered clearing agency, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closed out the entire fail to deliver position by purchasing securities of like kind and quantity.

Thus, under the 2006 Proposing Release, registered options market makers would still have been able to continue to keep open fail to deliver positions in threshold securities that resulted from short sales to hedge an options position created prior to the time the underlying security became a threshold security, provided the options position had not expired or been liquidated. Once the underlying security became a threshold security and the specific options position being hedged had expired or been liquidated, however, such fails to deliver would have been subject to a 13 consecutive settlement day close-out requirement.

2. Comments to the 2006 Proposing Release

We received a number of comment letters on the proposed narrowing of the options market maker exception from a variety of entities including options market makers, SROs, associations, issuers, an academic, and individual retail investors.[31]

Several commenters supported the proposal to narrow the options market maker exception. For example, one commenter stated that 13 consecutive settlement days was more than a sufficient amount of time in which to close out a fail to deliver position relating to an options position.[32] Another commenter stated that it believes the current ''exemption can be exploited to manipulate prices downward by manipulators buying large numbers of put options in already heavily-shorted securities.'' [33] Some of these commenters recommended that the Commission eliminate the options market maker exception altogether,[34] or, reduce the close-out requirement to five consecutive settlement days.[35] In addition, commenters that supported the proposal to narrow the options market maker exception also urged the Commission to enhance the documentation requirements for establishing eligibility for the exception.[36]

Commenters who opposed the proposal to narrow the options market maker exception stated that the proposed amendments would disrupt the markets because they would not provide sufficient flexibility to permit efficient hedging by options market makers, would unnecessarily increase risks and costs to hedge, and would adversely impact liquidity and result in higher costs to customers.[37] These commenters stated that they believe the proposed amendments would likely

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• The average daily number of securities with aggregate fails to deliver of at least 10,000 shares declined by 5.8%;

• The average daily number of fails to deliver declined by 15.1%;

• The average age of a fail to deliver position declined by 25.5%;

• The average daily number of threshold securities declined by 39.0%; and

• The average daily fails to deliver of threshold securities declined by 52.9%.

See also supra note 7.

[29] As noted in the 2006 Proposing Release and the Regulation SHO Re-Opening Release, we believe that the persistent fails to deliver may be attributable primarily to the grandfather provision and, secondarily, to reliance on the options market maker exception. *See* 2006 Proposing Release, 71 FR at 41712; Regulation SHO Re-Opening Release, 72 FR at 15079 (providing a summary of data received from certain SROs regarding reasons for the extended fails to deliver).

[30] *See* 2006 Proposing Release, 71 FR at 41722.

[31] *See, e.g.*, letter from Overstock, *supra* note 8; letter from NCANS, *supra* note 9; letter from Joseph P. Borg, Esq., President, North American Securities Administrators Association, Inc., dated Oct. 4, 2006 (''NASAA''); letter from TASER, *supra* note 8; letter from James J. Angel, PhD, CFA, dated July 18, 2006 (''Angel''); letter from Margaret Wiermanski, Chief Operations Officer and Matthew Abraham, Compliance Officer, CTC LLC, dated Sept. 28, 2006 (''CTC LLC''); letter from Timothy D. Lobach, Keystone Trading Partners, dated Sept. 19, 2006 (''Keystone''); letter from Steve Keltz, General Counsel, Citigroup Derivatives Markets, Inc., dated Sept. 29, 2006 (''Citigroup''); letter from Robert Bellick, Managing Director, Chris Gust, Managing Director, and Megan Flaherty, Director of Compliance and Chief Legal Counsel, Wolverine Trading LLC, dated Sept. 25, 2006 (''Wolverine''); letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, dated October 11, 2006 (''CBOE''); letter from The American Stock Exchange, Boston Options Exchange, Chicago Board Options Exchange, International Securities Exchange, NYSE/Arca, The Options Clearing Corporation, Philadelphia Stock Exchange, dated Sept. 22, 2006 (''Options Exchanges''); letter from Ira D. Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated Sept. 19, 2006 (''SIA''); letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association Section of Business Law, dated Sept. 27, 2006 (''ABA''); letter from Gerard S. Citera, Executive Director, U.S. Equities, UBS Securities LLC, dated Sept. 22, 2006 (''UBS'').

[32] *See* letter from Overstock, *supra* note 8.

[33] *See* letter from NCANS, *supra* note 9.

[34] *See, e.g., id.*

[35] *See* letter from NASAA, *supra* note 31.

[36] *See, e.g., id.*; TASER, *supra* note 8.

[37] *See, e.g.*, letter from CBOE, *supra* note 31.

discourage options market makers from making markets in illiquid securities since the risk associated in maintaining the hedges in these option positions would be too great.[38] Moreover, these commenters claimed that the reluctance of options market makers to make markets in threshold securities would result in wider spreads in such securities to account for the increased costs of hedging, to the detriment of investors.[39]

Many of the commenters who opposed the proposal to narrow the options market maker exception argued that the requirement that fail to deliver positions be closed out upon liquidation or expiration of a specifically hedged options position was impracticable, given that the industry practice is to use hedges to manage risk of an entire inventory, not just a specific options position.[40] These commenters noted that options market makers typically facilitate an investor's rolling of an existing options position to either a different strike price within the same expiration month or to a future month as expiration approaches, and retain the short position to hedge the new options position.[41] These commenters argued that the amendment would require the options market maker to buy in the short position and/or pre-borrow to maintain a hedge, even though the overall position may have changed very little from a risk perspective, which, they argued, could potentially be a costly and time consuming measure.[42]

Commenters who opposed the proposed amendments to the options market maker exception favored maintaining the current exception, which they believe is already narrowly tailored.[43] For example, one commenter stated that it believes the current exception preserves the integrity of legitimate hedging practices and prevents manipulative short squeezes.[44] Another commenter stated that the current exception enables it to better service market participants by allowing it to continuously quote and disseminate bids and offers even where it may be difficult to borrow certain stock.[45] Another commenter stated that it is unaware of any statistics establishing that fails to deliver attributable to legitimate options market making activity are correlated to abusive short selling practices, and cautioned that ''the possible detrimental effects on options markets in threshold securities should first be quantified to guard against an unanticipated, significant peril to another facet of the capital markets.'' [46]

3. Response to Comments to the 2006 Proposing Release

We proposed to narrow the options market maker exception in Regulation SHO because we are concerned about large and persistent fails to deliver in threshold securities attributable, in part, to the options market maker exception, and our concerns that such fails to deliver might have a negative effect on the market in these securities.[47]

Regulation SHO's options market maker exception does not require fails to deliver to be closed out if they resulted from short sales effected by registered options market makers to establish or maintain a hedge on options positions established before the underlying security became a threshold security. For the reasons discussed below, although we recognize commenters' concerns that a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions could potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer buy orders, or result in wider bid-ask spreads or less depth, we believe that such an impact, if any, would be minimal.

First, we believe that the potential effects, if any, of a mandatory close-out requirement would be minimal because the number of securities that would be impacted by a mandatory close-out requirement would be relatively small. Regulation SHO's close-out requirement is narrowly tailored in that it targets only those securities where the level of fails to deliver is high (0.5% of total shares outstanding and 10,000 shares or more) for a continuous period (five consecutive settlement days).[48] Requiring close-out only for securities with large and persistent fails to deliver limits the overall market impact. In addition, as noted by one commenter, a small number of securities that meet the definition of a ''threshold security'' have listed options, and those securities form a very small percentage of all securities that have options traded on them.[49] Moreover, the current options market maker exception only excepts from Regulation SHO's mandatory 13 consecutive settlement day close-out requirement those fail to deliver positions that result from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it does not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. Because the current options market maker exception has a very limited application, the overall impact of its removal on liquidity, hedging costs, spreads, and depth, should be relatively small.

Second, to the extent that a mandatory close-out requirement could potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer buy orders, or result in wider bid-ask spreads or less depth, we believe that any such potential effects would likely be mitigated by the fact that even though fails to deliver that were previously-excepted from the close-out requirement of Regulation SHO would not be permitted to continue indefinitely, such fails to deliver would not have to be closed out immediately, or even within the standard 3-day settlement period. Instead, under a mandatory close-out requirement, such as that imposed

[38] *See id.*

[39] *See* letter from Citigroup, *supra* note 31.

[40] For example, CBOE stated that options market makers hedge on a class basis and, therefore, as options positions are rolled to forward months, the options market maker may need to maintain the hedge. Thus, the stock position would need to be maintained not because it hedges a particular series, but because it maintains a delta of an overall position. *See* letter from CBOE, *supra* note 31. *See, also*, letters from CTC LLC, *supra* note 31; Citigroup, *supra* note 31; Wolverine, *supra* note 31.

[41] *See, e.g.*, letters from Citigroup, *supra* note 31; Wolverine, *supra* note 31; Options Exchanges, *supra* note 31.

[42] *See, e.g.*, letters from Wolverine, *supra* note 31; Citigroup, *supra* note 31.

[43] *See id.*

[44] *See* letter from Keystone, *supra* note 31.

[45] *See* letter from Citigroup, *supra* note 31.

[46] *See* letter from CTC LLC, *supra* note 31. Statistical evidence of options market maker failing practices can be found in *Failure is an Option: Impediments to Short Selling and Options Prices* by Evans, Geczy, Musto, and Reed, forthcoming in the *Review of Financial Studies. See http://finance.wharton.upenn.edu/~musto/papers/egmr.pdf.*

[47] *See* 2006 Proposing Release, 71 FR at 41711–41712; *see also*, Regulation SHO Re-Opening Release, 72 FR 15079–15080. *See also*, discussion above in Section I. Introduction.

[48] *See supra* note 7 (discussing the number of threshold securities as of March 31, 2007).

[49] *See* letter from Options Exchanges, *supra* note 31 (noting that as of the date of the 2006 Proposing Release, approximately 84 of the approximately 300 threshold securities had options traded on them). This commenter also noted that ''options on a number of these threshold securities are very actively traded as are the securities themselves. Among the actively traded threshold securities with active options trading are iShares Russell 2000 ETF, Avanir Pharmaceuticals, Krispy Kreme Donuts, Martha Stewart Living Omnimedia, Mittal Steel, Navarre Corp., and Novastar Financial.'' *See id.*

currently by the 13 consecutive settlement day requirement of Rule 203(b)(3) of Regulation SHO, fails to deliver in threshold securities would have an extended period of time within which to be closed out. An extended close-out requirement would provide options market makers with some flexibility in conducting their hedging activities in that it would allow them to not buy-in a fail to deliver position or pre-borrow to maintain a hedge for the time that the fail to deliver position can remain open.

Third, as noted above, Regulation SHO's current options market maker exception is limited to only those fail to deliver positions that result from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it does not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. In examining the application of the current mandatory close-out requirement of Regulation SHO for all non-excepted fail to deliver positions, we have not become aware of any evidence that the current close-out requirement for non-excepted fails to deliver in threshold securities has impacted options market makers' willingness to provide liquidity in threshold securities, made it more costly for options market makers to accommodate customer orders, or resulted in wider bid-ask spreads or less depth.

Similarly, all fails to deliver in threshold securities resulting from long or short sales of securities in the equities markets must be closed out in accordance with Regulation SHO's mandatory 13 consecutive settlement day close-out requirement, and we are not aware that such a requirement has impacted the willingness of market makers to make markets in securities subject to the close-out requirement, or led to decreased liquidity, wider spreads, or less depth in these securities. Thus, we believe that the impact of requiring that fails to deliver in threshold securities resulting from short sales to hedge options positions created before the security became a threshold security be closed out would similarly be minimal, if any.

Fourth, to the extent that a mandatory close-out requirement for all fails to deliver resulting from hedging activity in the options markets could potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make markets in certain securities, we believe that such effects are justified by our belief, as discussed in more detail below, that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets.

Fifth, to the extent that a mandatory close-out requirement for all fails to deliver resulting from hedging activity in the options markets could potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make a market in certain securities, we believe that these potential effects are justified by the benefits of requiring that fails to deliver in all threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely. As discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to manipulative conduct.

In the 2006 Proposing Release, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about ''naked'' short selling causing a drop in an issuer's stock price and that it may limit an issuer's ability to access the capital markets.[50] We believe that, by requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing them to continue indefinitely, there would be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the proposed amendments should improve investor confidence about the security. We also believe that the proposed amendments should lead to greater certainty in the settlement of securities which should strengthen investor confidence in the settlement process. The reduction in fails to deliver and the resulting reduction in the number of securities on the threshold securities lists could result in increased investor confidence, and the promotion of price efficiency and capital formation.

Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continue to observe a small number of threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, we adopted amendments to eliminate Regulation SHO's grandfather provision that allowed fails to deliver resulting from long or short sales of equity securities to persist indefinitely if the fails to deliver occurred prior to the security becoming a threshold security.[51] We believe that once a security becomes a threshold security, fails to deliver in that security must be closed out, regardless of whether or not the fails to deliver resulted from sales of the security in connection with the options or equities markets.

Moreover, we believe that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets. We are also concerned that the current options market maker exception might allow for a regulatory arbitrage not permitted in the equities markets. For example, an options market maker who sells short to hedge put options purchased by a market participant unable to locate shares for a short sale in accordance with Rule 203(b)(2) of Regulation SHO may not have to close out any fails to deliver that result from such short sales under the current options market maker exception. The ability of options market makers to sell short and never have to close out a resulting fail to deliver position, provided the short sale was effected to hedge options positions created before the security became a threshold security, runs counter to the goal of similar treatment for fails to deliver resulting from sales of securities in the options and equities markets, because

[50] *See, e.g.*, letter from Feeney, *supra* note 10.

[51] *See* Securities Exchange Act Release No. 56212 (Aug. 7, 2007); *see also*, 2006 Proposing Release, 71 FR at 41711–41712.

no such ability is available in the equity markets.[52]

Although commenters who opposed the proposed amendments to the options market maker exception favored maintaining Regulation SHO's current options market maker exception, it has become apparent to us during the comment process that the language of the current exception is being interpreted more broadly than the Commission intended, such that the exception seems to be operating significantly differently from our original expectations.[53] Thus, we are concerned that options market makers are claiming the exception even where options positions are created *after* the underlying security becomes a threshold security. For example, options market makers' practice of ''rolling'' positions from one expiration month to the next potentially allows these options market makers to not close out fail to deliver positions as required by the close-out requirements of Regulation SHO. According to commenters, when the options that allow an options market maker to be exempt from the close-out requirement expire or are closed out, investors on the opposite side may roll their long put or short call positions to a new expiration month.[54] It appears that options market makers are not treating the rolling of options positions to a new expiration month as creating new options positions for purposes of the current options market maker exception even though the current options position typically is closed out and the same position is opened in the next expiration month.[55]

Thus, options market makers providing liquidity to customers who are ''rolling'' positions from one expiration month to the next appear to use the original short sale to maintain the hedge on these new options positions, rather than closing out that original short sale and any fails to deliver that resulted from the short sale and establishing a new hedge. Regulation SHO's current options market maker exception provides that a fail to deliver position does not have to be closed out if it results from a short sale effected to establish or maintain a hedge on options positions created before the underlying security became a threshold security. Options market makers also may not be closing out fails to deliver that result from short sales effected to maintain or establish a hedge on options positions created *after* the underlying security became a threshold security. Such conduct would not be in compliance with the current options market maker exception and would allow options market makers to avoid improperly Regulation SHO's close-out requirement.[56]

In addition, as a practical matter, we note that the cost of maintaining a fail to deliver position may change over time and, in particular, when a security becomes a threshold security. Thus, if options market makers, in accommodating their customers' rolling of options positions from one expiration month to the next, use the original short sale to maintain the hedge on these new options positions rather than closing out that short sale and any fails to deliver that resulted from the short sale and establishing a new hedge, any additional cost of maintaining a fail to deliver in the underlying security would not be properly transferred to the options positions.

Despite our concerns noted above regarding the application of Regulation SHO's current options market maker exception, we credit commenters' statements that the amendments proposed in 2006 to narrow the current options market maker exception would be costly and difficult to implement, or even possibly unworkable, because they do not reflect how options market makers hedge their options positions. According to commenters, options market makers usually hedge their options positions on a portfolio basis.[57] Thus, an options market maker typically does not assign a particular short or long position to a particular options position as would be required if the Commission were to adopt the 2006 amendments, as proposed. Only one commenter asked that the Commission be sensitive to the time necessary to make systems changes to track the requirements of the proposed amendments.[58] Most commenters simply stated that the amendments proposed in 2006 would be difficult and costly to implement or possibly unworkable.

Based on commenters' concerns that they would be unable to comply with the amendments to the options market maker exception as proposed in the 2006 Proposing Release, and statements indicating that options market makers might be violating the current exception, we have determined to re-propose amendments to the options market maker exception.

III. Proposed Amendments to the Options Market Maker Exception

A. Elimination of the Options Market Maker Exception

We propose to eliminate the options market maker exception in Rule 203(b)(3) of Regulation SHO. In particular, the proposed amendment would require that any previously excepted fail to deliver position in a threshold security on the effective date of the amendment, including any adjustments to that fail to deliver position, be closed out within 35 consecutive settlement days[59] of the effective date of the amendment. This 35 consecutive settlement day requirement would be a one-time phase-in period. Thus, after 35 consecutive settlement days from the effective date of the amendment this phase-in period would expire and any additional fails to deliver in the threshold security would be subject to the current mandatory 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO.[60]

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[52] *See* Securities Exchange Act Release No. 56212 (Aug. 7, 2007).

[53] The Commission noted in the Adopting Release that it would monitor the operation of Regulation SHO and, in so doing, would take into consideration any indications that the options market maker exception was operating significantly differently from the Commission's original expectations. *See* Adopting Release, 69 FR at 48018–48019.

[54] *See, e.g.*, letters from ABA, *supra* note 31; Wolverine, *supra* note 31.

[55] *See, e.g.*, letter from Wolverine, *supra* note 31.

[56] In addition, we are concerned that options market makers may not have systems in place to determine whether or not fails to deliver resulted from short sales effected to establish or maintain a hedge on options positions created before or after the underlying security became a threshold security, and, therefore, may not be complying with the requirements of the current exception.

[57] *See, e.g.*, letters from CBOE, *supra* note 31; Options Exchanges, *supra* note 31; Wolverine, *supra* note 31; UBS, *supra* note 31; Angel, *supra* note 31.

[58] *See* letter from UBS, *supra* note 31.

[59] If the security is a threshold security on the effective date of the amendment, participants of a registered clearing agency would have to close out that position within 35 consecutive settlement days, regardless of whether the security becomes a non-threshold security after the effective date of the amendment.

We chose 35 settlement days because 35 days was used in Regulation SHO as adopted in August 2004, and in Regulation SHO, as amended. *See* Adopting Release, 69 FR at 48031; Securities Exchange Act Release No. 56212 (Aug. 7, 2007). In addition, we believe that 35 settlement days would allow participants time to close out their previously-excepted fail to deliver positions given that some participants may have large previously-excepted fails with respect to a number of securities.

[60] For example, assume that on the effective date of the amendment XYZ security is a threshold security and a participant of a registered clearing agency has fails to deliver in XYZ security that resulted from short sales by a registered options market maker to hedge options positions that were created before XYZ security became a threshold security. The participant must close out the fails to deliver in XYZ security within 35 consecutive settlement days of the effective date of the amendment, including any additional fails to deliver during that 35-day period that result from short sales by the registered options market maker to hedge options positions that were created before XYZ security became a threshold security. After the

In addition, similar to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO, if the fail to deliver position persists for 35 consecutive settlement days from the effective date of the amendment, the proposed amendment would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity. Any fails to deliver that were not previously-excepted from the close-out requirement of Rule 203(b)(3) of Regulation SHO as of the effective date of the amendment and, therefore, not subject to the one-time 35 consecutive settlement day phase-in period, would be subject to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO.

If a security becomes a threshold security after the effective date of the amendment, any fails to deliver that result or resulted from short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security would be subject to Rule 203(b)(3)'s mandatory 13 consecutive settlement day close-out requirement, similar to any other fail to deliver position in a threshold security.

For the reasons discussed above and in the 2006 Proposing Release, we believe that no fail to deliver position should be left open indefinitely. Although we included in Rule 203 of Regulation SHO exceptions to the close-out requirement of the rule, we also stated that we would pay close attention to the operation and efficacy of the provisions adopted in Rule 203, and would consider whether any further action was warranted.[61] As discussed above, we continue to see a small number of threshold securities with large and persistent fails to deliver that are not being closed out under existing delivery and settlement requirements. We are concerned that these fails to deliver may have a potentially negative impact on the market for these securities by impeding the orderly functioning of the markets for these securities, depriving investors of ownership rights, undermining investor and issuer confidence in the markets, and being indicative of potentially manipulative trading activities. In addition, a seller that fails to deliver securities on trade settlement date effectively unilaterally converts a securities contract (that should settle within the standard 3-day settlement period) into an undated futures-type contract, to which the buyer might not have agreed, or that might have been priced differently.

Thus, by proposing to eliminate the current options market maker exception of Regulation SHO so that all fails to deliver in threshold securities that result from short sales effected to maintain or establish a hedge on options positions would have to be closed out within Regulation SHO's current mandatory 13 consecutive settlement day close-out requirement similar to all other fails to deliver in threshold securities, we hope to reduce the number of threshold securities with large and persistent fails to deliver and, thereby, limit any potential negative impact of such fails to deliver on the market for these securities.

In addition, the overly-broad interpretation of the current options market maker exception, as discussed above, could be contributing to some securities with listed options having large and persistent fails to deliver and remaining on the threshold securities list. Thus, we further believe it would be appropriate to eliminate the current exception.

By proposing to eliminate the current options market maker exception, fails to deliver from hedging activities by options market makers would be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options market would not receive an advantage over those trading such securities in the equities markets.

In addition, we believe the proposed amendment would be warranted because it strikes the appropriate balance between reducing large and persistent fails to deliver in threshold securities while still allowing participants some flexibility in conducting their hedging activities. Under the proposed amendment, other than those previously-excepted fails to deliver that would be subject to the one-time 35-day phase-in period, all fails to deliver in threshold securities would be subject to the current mandatory 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO. Thus, the proposed amendment would provide flexibility because it would allow an extended period of time (*i.e.*, 13 consecutive settlement days) within which to close out all fails to deliver in threshold securities, rather than, for example, requiring that such fails to deliver be closed out immediately, or even within the standard 3-day settlement period. During the period of time that the fail to deliver position could remain open, options market makers would be able to continue any hedging activity without having to close out the fail to deliver position or pre-borrow to maintain the hedge.

In addition, we note that the one-time 35 consecutive settlement day phase-in period would help reduce any potential for market disruption, such as increased volatility or short squeezes, from having to close-out previously-excepted fail to deliver positions particularly as participants would be able to begin to close out such positions at anytime before the 35-day phase-in period.

Request for Comment

The Commission seeks comment generally on all aspects of this proposed amendment to Regulation SHO. In addition, we seek comment on the following:

- The proposed amendment to eliminate the options market maker exception would require that fails to deliver that result from short sales effected to maintain or establish a hedge on options positions be closed out within Regulation SHO's current mandatory 13 consecutive settlement day close-out requirement similar to other fails to deliver in any threshold security. We believe that fails to deliver in threshold securities should not last indefinitely. Thus, we proposed and adopted amendments to eliminate the grandfather provision in Regulation SHO so that fails to deliver resulting from long or short sales in the equities markets must be closed out within 13 consecutive settlement days. Should fails to deliver that result from short sales effected to maintain or establish a hedge on options positions be treated differently from fails to deliver that result from short or long sales of threshold securities in the equities markets? If so, why? Should market makers in the options markets be permitted to maintain a fail to deliver position in a threshold security for an extended period of time or indefinitely when market makers in the equities markets are not able to do so? If so, why? If not, why not?

35-day period has expired, if XYZ security remains a threshold security, any additional fails to deliver in XYZ security must be closed out in accordance with Regulation SHO's 13 consecutive settlement day close-out requirement, regardless of whether or not the fails to deliver resulted from short sales by a registered options market maker to hedge options positions that were created before XYZ security became a threshold security.

[61] *See* Adopting Release, 69 FR at 48019.

• The options market maker exception was created to provide options market makers with flexibility in establishing and maintaining hedges on options positions created before the underlying security became a threshold security. Would elimination of the options market maker exception be appropriate? If so, why? If not, why not? Would elimination of the options market maker exception result in fewer options on threshold securities and what effect would this have on market efficiency and capital formation? Would eliminating the exception reduce the willingness of options market makers to make markets in securities that might become threshold securities or that are threshold securities? Would eliminating the exception result in increased costs to investors? Would options investors bear any additional costs that are not borne by the equivalent equity investors? Would eliminating this exception reduce liquidity in securities that might become threshold securities or that are threshold securities? How significant would such an impact be, if any, given that fails to deliver would be subject to Regulation SHO's current 13 consecutive settlement days close-out requirement similar to all other fails to deliver in threshold securities and that we are not aware that compliance with the current mandatory close-out requirement of Regulation SHO for non-excepted fails to deliver has resulted in market disruption? What other measures or time-frames would be effective in fostering Regulation SHO's goal of reducing fails to deliver while at the same time allowing market making by options market makers?

• Based on current experience with Regulation SHO, what have been the costs and benefits of the current options market maker exception?

• What are the costs and benefits of the proposed amendment to eliminate the options market maker exception?

• What technical or operational challenges would options market makers face in complying with the proposed amendment?

• Would the proposed amendment create additional costs, such as costs associated with systems, surveillance, or recordkeeping modifications that may be needed for participants to track fails to deliver subject to the 35 consecutive settlement day phase-in period from fails to deliver that are not eligible for the phase-in period? If there are additional costs associated with tracking fails to deliver subject to the 35 versus 13 consecutive settlement day requirements, would these additional costs justify the benefits of providing firms with a 35 consecutive settlement day phase-in period? Would a 35 consecutive settlement day phase-in period be necessary given that firms would have been on notice that they would have to close out these fail to deliver positions following the effective date of the amendment?

• Should we consider changing the proposed phase-in period to 35 calendar days? If not, why not? If so, would this create systems problems or other costs? Would a phase-in period create examination or surveillance difficulties?

• Please provide specific comment as to what length of implementation period would be necessary such that participants would be able to meet the requirements that fail to deliver positions in threshold securities be closed out within the applicable time-frames, if adopted.

B. Alternatives To Eliminating the Options Market Maker Exception

As discussed above, due to the fact that large and persistent fails to deliver are not being closed out under existing delivery and settlement requirements and because we are concerned that these fails to deliver may have a negative impact on the market for those securities, we believe that the options market maker exception to the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO should be eliminated. In addition, we believe that the options market maker exception should be eliminated because we believe that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities market.

We anticipate, however, that in response to our request for comment on the proposed amendments to eliminate the options market maker exception, we will receive comment that an options market maker exception, similar to the current exception in Regulation SHO, is necessary. It has become apparent to us, however, that the current exception is being interpreted in such a way that the exception seems to be operating significantly differently from our original expectations, and that options market makers might be using the current exception to improperly avoid closing out certain fails to deliver in threshold securities. In addition, commenters stated that the proposed amendments to the options market maker exception set forth in the 2006 Proposing Release would be impractical given the industry practice of using hedges to manage the risk of an entire inventory, not just a specific options position.[62] Thus, in conjunction with our proposal to eliminate the options market maker exception, we have determined to solicit comment regarding two narrowly-tailored alternatives to the current options market maker exception and to our proposed elimination of that exception.

Because we are concerned that any exception to Regulation SHO's close-out requirement for fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions might result in continued large and persistent fails to deliver in securities with options traded on them, the proposed alternatives would provide very limited exceptions to the close-out requirement of Regulation SHO so that all fails to deliver in threshold securities underlying options would eventually have to be closed out. Similar to elimination of the options market maker exception, by proposing to require that all fails to deliver be closed out within specific time-frames, the proposed alternatives should reduce large and persistent fails to deliver. The proposed alternatives, however, would provide participants of a registered clearing agency, or options market makers for which they clear transactions, longer periods of time than Regulation SHO's current mandatory 13 consecutive settlement day close-out requirement, within which to close out such fails to deliver.

Also, similar to the proposed amendment to eliminate the options market maker exception, by proposing to require that fails to deliver be closed out within specific time-frames, the proposed alternatives would be more likely to result in shareholders receiving the benefits of ownership than under the current options market maker exception. Sellers would also be less able to unilaterally convert securities contracts into undated futures-type contracts to which the buyer may not have agreed, or that would have been priced differently. In addition, the delivery requirements of the proposed alternatives could enhance investor confidence as they make investment decisions by providing investors with greater assurance that securities would be delivered as expected. An increase in investor confidence in the market could facilitate investment.

The proposed alternatives could benefit issuers because investors may be

[62] *See, e.g.*, letters from CBOE, *supra* note 31; CTC LLC, *supra* note 31; Citigroup, *supra* note 31; Wolverine, *supra* note 31.

more willing to commit capital where fails levels are lower. In addition, some issuers could believe that a reduction in fails to deliver could reverse unwarranted reputational damage potentially caused by large and persistent fails to deliver and what they believe might be an indication of manipulative trading activities, such as ''naked'' short selling.[63] Thus, the proposed requirement that all fails to deliver be closed out within specific time-frames, as proposed to be required by the alternatives, could decrease the possibility of artificial market influences and, therefore, could contribute to price efficiency.

Although the proposed alternatives could lessen the potential negative impact of large and persistent fails to deliver similar to the proposed elimination of the options market maker exception because the proposed alternatives would require that fails to deliver in threshold securities eventually be closed out, we believe that complete elimination of the options market maker exception would achieve this goal more effectively. Under the proposed elimination of the options market maker exception, all fails to deliver in threshold securities would have to be closed out within Regulation SHO's mandatory 13 consecutive settlement day close-out requirement. The proposed alternatives, however, would each allow a longer period of time for fail to deliver positions to be closed out. Specifically, the first alternative would allow certain fails to deliver to be closed out within 35 consecutive settlement days of the security becoming a threshold security. Under the second alternative, although some fails to deliver would be required to be closed out in less than 35 consecutive settlement days, other fails to deliver would not have be closed out until 35 consecutive settlement days from the security becoming a threshold security.

Similar to our discussions above in connection with our response to comments regarding the proposed amendment in the 2006 Proposing Release to limit the duration of the current options market maker exception and regarding the proposed amendment to eliminate the options market maker exception, we believe the mandatory close-out requirements of each of the proposed alternatives would similarly minimally impact, if at all, liquidity, hedging costs, spreads, or depth in the securities subject to the close-out requirements of the proposed alternatives, or the willingness of options market makers to make markets in such securities.

We believe that these potential effects of the close-out requirements of the proposed alternatives would be minimal, if any, because the number of securities that would be impacted by the close-requirements would be relatively small. The proposed alternatives would apply only to those threshold securities with listed options[64] and would only impact fails to deliver in those securities that resulted from short sales by registered options market makers to hedge options series that were created before, rather than after, the security became a threshold security because all other fails to deliver in threshold securities are subject to Regulation SHO's current mandatory 13 consecutive settlement day close-out requirement.

In addition, the proposed alternatives would provide options market makers with flexibility in conducting their hedging activities because they would each allow an extended period of time (*i.e.*, 35 consecutive settlement days for purposes of proposed Alternative 1 and 13 or 35 consecutive settlement days for purposes of proposed Alternative 2) within which to close out all fails to deliver in threshold securities. As discussed above in connection with the proposed amendment to eliminate the options market maker exception, we believe that even a 13 consecutive settlement day close-out requirement would result in minimal impact on the willingness of options market makers to make markets, liquidity, hedging costs, depth, and spreads because it would allow options market makers flexibility in conducting their hedging activities by permitting fails to deliver to remain open for an extended period of time (*i.e.*, 13 consecutive settlement days) rather than, for example, requiring that such fails to deliver be closed out immediately, or even within the standard 3-day settlement period. During the period of time that the fail to deliver position can remain open, options market makers would be able to continue any hedging activity without having to close out the fail to deliver position or pre-borrow to maintain the hedge.

The extended close-out requirements of the proposed alternatives would expire, however, after 35 consecutive settlement days of the security becoming a threshold security. In each of the proposed alternatives, after the excepted period expires, any additional fails to deliver that result from short sales in the threshold security, whether or not effected to establish or maintain a hedge on options series in the portfolio that were created before the security became a threshold security, would have to be closed within Rule 203(b)(3)'s mandatory 13 consecutive settlement day close-out requirement.

The proposed alternatives are narrowly tailored in response to our concerns that options market makers are interpreting the current exception more broadly than the Commission intended and in response to comments that options market makers manage their risk based on an assessment of the entire portfolio rather than of a specific options position. Based on comments that portfolio hedging is the industry practice, the proposed alternatives refer to the hedging of options series in a portfolio rather than an options position. In addition, the proposed alternatives would permit options market makers to adjust their hedges on options series created before the underlying security became a threshold security provided any resulting fails to deliver are closed out within the applicable time-frames.

The proposed alternatives would also require that participants of a registered clearing agency and options market makers document that any fails to deliver in threshold securities that have not been closed out in accordance with the 13 consecutive settlement days close-out requirement of Rule 203(b)(3) of Regulation SHO are eligible for the options market maker exception.[65] The current exception does not set forth a specific documentation requirement, although some options market makers may in fact keep records that relate to their compliance with the exception. In the absence of such a requirement, we are concerned that many options market makers are not preparing or retaining records with regard to their eligibility for the exception. Without such a documentation requirement, it may be difficult for the Commission and SROs to monitor whether the options market maker exception is being applied consistently with the rule.

Thus, to the extent we retain an options market maker exception, we believe it would be necessary to add a provision to Regulation SHO that would

[63] *See, e.g., supra* note 8 (citing to comment letters from issuers and investors discussing extended fails to deliver in connection with ''naked'' short selling).

[64] *See* letter from Options Exchanges, *supra* note 49 (discussing the number of threshold securities with listed options).

[65] Commenters to the 2006 Proposing Release urged the Commission to add specific documentation requirements for establishing eligibility for the options market maker exception. *See, e.g.,* letters from NASAA, *supra* note 31; TASER, supra note 8.

require both options market makers and participants of a registered clearing agency that rely on the options market maker exception to not close out a fail to deliver position in accordance with the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO to obtain, prepare, and keep documentation demonstrating that a fail to deliver position has not been closed out because it qualified for the exception. Such documentation could indicate, among other things, when the series being hedged was created, when the underlying security became a threshold security, and the age of the fail to deliver position that is not being closed out.

A documentation requirement would enable the Commission and the SROs to monitor more effectively whether or not the options market maker exception is being applied correctly. In addition, the information would provide a record that would aid surveillance for compliance with this limited exception to Regulation SHO's close-out requirement.

The Alternatives

We are requesting comment regarding specific alternatives, as described below, to eliminating the options market maker exception. Each of the proposed alternatives would provide for a 35 consecutive settlement day phase-in period similar to the phase-in period discussed above for securities that are threshold securities on the effective date of the amendment and that have previously excepted fail to deliver positions.[66] In addition, as explained in more detail below, these alternatives would apply only to fails to deliver resulting from short sales effected by a registered options market maker to establish or maintain a hedge on any options series created before an underlying security became a threshold security. These alternatives would also require such fails to deliver to be closed out within specific time-frames so that the fails to deliver would not last indefinitely.

i. Alternative 1

We request comment regarding an options market maker exception that would require a participant of a registered clearing agency that has a fail to deliver position in a threshold security that results or resulted from a short sale by a registered options market maker to establish or maintain a hedge on any options series within a portfolio that were created before the security became a threshold security to close out the entire fail to deliver position, including any adjustments to that position, within 35 consecutive settlement days of the security becoming a threshold security. After the 35 consecutive settlement days has expired, any additional fails to deliver would be subject to the mandatory 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO.

We propose 35 consecutive settlement days for purposes of proposed Alternative 1 because 35 days was used in Regulation SHO as adopted in August 2004, and in Regulation SHO, as amended and, therefore, is a period of time with which market participants subject to Regulation SHO are familiar.[67] In addition, because we believe that all fails to deliver should be closed out within specific time-frames we did not want to propose an alternative that would allow fails to deliver to continue indefinitely, or for a period of time that would undermine the goal of requiring that all fails to deliver be closed out within a reasonable time period. We believe that 35 consecutive settlement days would allow participants time to close out their excepted fail to deliver positions without extending the close-out requirement beyond what we believe would be a reasonable period of time within which fails to deliver should be closed out.

In addition, similar to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO, if the fail to deliver position persists for 35 consecutive settlement days, the proposed alternative would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

Example: The following is an example of how proposed Alternative 1 would work if it were effective in February. XYZ security becomes a threshold security in March. On the date on which XYZ security becomes a threshold security, a participant of a registered clearing agency has fails to deliver in XYZ security that resulted from short sales by a registered options market maker to hedge options series in XYZ portfolio that were created before XYZ security became a threshold security. The participant must close out the entire fail to deliver position in XYZ security, including any additional fails that result from short sales to hedge options series in XYZ portfolio that were created before XYZ security became a threshold security, within 35 consecutive settlement days of the date on which XYZ security became a threshold security in March. After the 35 consecutive settlement days, any additional fails to deliver in XYZ security, whether or not they result or resulted from short sales by a registered options market maker to hedge options series in XYZ portfolio that were created before XYZ security became a threshold security, must be closed out in accordance with Regulation SHO's mandatory 13 consecutive settlement day close-out requirement.

ii. Alternative 2

As another alternative to eliminating the options market maker exception, we request comment regarding a proposed options market maker exception that would require a participant of a registered clearing agency that has a fail to deliver position in a threshold security that results or resulted from a short sale by a registered options market maker to establish or maintain a hedge on any options series in a portfolio that were created before the security became a threshold security to close out the entire fail to deliver position, including any adjustments to that position, within the earlier of: (i) 35 Consecutive settlement days from the date on which the security became a threshold security, or (ii) 13 consecutive settlement days from the last date on which all options series within the portfolio that were created before the security became a threshold security expire or are liquidated. After the 35 or 13 consecutive settlement days has expired, any additional fails to deliver would be subject to the mandatory 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO.

We propose to require in Alternative 2 that fails to deliver be closed out within 13 consecutive settlement days if all options series within the portfolio that were created before the security became a threshold security expire or are liquidated because, at that point, there would be nothing in the portfolio for the original short sale and resulting fail to deliver position to hedge. We chose a proposed close-out requirement of 13 consecutive settlement days for such situations because it is a time-frame currently used in the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO[68] and, therefore, is a time-frame with which market

[66] This 35 consecutive settlement day phase-in period would operate in the same manner as that outlined above in the discussion of the elimination of the options market maker exception.

[67] *See* Adopting Release, 69 FR at 48031; Securities Exchange Act Release No. 56212 (Aug. 7, 2007).

[68] *See* 17 CFR 242.203(b)(3).

participants subject to the close-out requirement of Regulation SHO are currently familiar and with which such entities appear able to comply.

In addition, as discussed above for proposed Alternative 1, we chose 35 consecutive settlement days for purposes of proposed Alternative 2 because this is also a time-frame already used in Regulation SHO as adopted in August 2004, and in Regulation SHO, as amended and, therefore, is a time-frame with which market participants subject to Regulation SHO are already familiar.[69] In addition, because we believe that all fails to deliver should be closed out within specific time-frames we did not want to propose an alternative that would allow fails to deliver to continue indefinitely, or for a period of time that would undermine the goal of requiring that all fails to deliver be closed out within a reasonable time period. We believe that a close-out requirement that provides that fails to deliver must be closed out within the time-frames specified by proposed Alternative 2 would allow participants time to close out their excepted fail to deliver positions without extending the close-out requirement beyond what we believe would be a reasonable period of time within which fails to deliver should be closed out.

In addition, similar to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO, if the excepted fail to deliver position has persisted for longer than the earlier of: (i) 35 Consecutive settlement days from the date on which the security became a threshold security, or (ii) 13 consecutive settlement days from the last date on which all options series within the portfolio that were created before the security became a threshold security expire or are liquidated, the proposal would prohibit a participant, and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting further short sales in the particular threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire excepted fail to deliver position by purchasing securities of like kind and quantity.

Example 1. The following is an example of how proposed Alternative 2 would work if it were effective in February. XYZ security becomes a threshold security in March. On the date on which XYZ security becomes a threshold security, a participant of a registered clearing agency has fails to deliver in XYZ security that resulted from short sales by a registered options market maker to hedge its XYZ portfolio that were created before XYZ security became a threshold security. On the date on which XYZ security becomes a threshold security, XYZ portfolio consists of XYZ April 50 Calls and XYZ July 50 Calls. The last date on which the options within XYZ portfolio expire is July, which is later than 35 consecutive settlement days from the date on which XYZ security became a threshold security. In addition, none of the options series within XYZ portfolio have been exercised. Thus, the participant must close out the entire fail to deliver position in XYZ security, including any additional fails that result from short sales to hedge options series in XYZ portfolio that were created before XYZ security became a threshold security, within 35 consecutive settlement days of the date on which XYZ security became a threshold security in March. After the 35 consecutive settlement days, any additional fails to deliver in XYZ security, whether or not they result or resulted from short sales by a registered options market maker to hedge options series in XYZ portfolio that were created before XYZ security became a threshold security, must be closed out in accordance with Regulation SHO's mandatory 13 consecutive settlement day close-out requirement.

Example 2. The following is another example of how proposed Alternative 2 would work if it were effective in February. XYZ security becomes a threshold security in March. On the date on which XYZ security becomes a threshold security, a participant of a registered clearing agency has fails to deliver in XYZ security that resulted from short sales by a registered options market maker to hedge options series in its XYZ portfolio that were created before XYZ security became a threshold security. On the date on which XYZ security becomes a threshold security, XYZ portfolio consists of XYZ April 50 Calls and XYZ July 50 Calls. Options market maker firm exercises both call options in March, shortly after XYZ security became a threshold security. Because options market maker firm liquidated the entire XYZ portfolio prior to the expiration of 35 consecutive settlement days from the date on which XYZ security became a threshold security, or the last expiration date for the options comprising the XYZ portfolio, the participant must close out the entire fail to deliver position in XYZ security, including any additional fails to deliver that result from short sales by a registered options market maker to hedge options series in XYZ portfolio that were created before XYZ security became a threshold security, within 13 consecutive settlement days of the date on which the options series within XYZ portfolio were exercised.

Request for Comment

The Commission seeks comment generally on all aspects of the proposed alternatives to elimination of the options market maker exception. In addition, we seek comment on the following:

- As set forth in proposed Alternative 1, should participants of a registered clearing agency, or options market makers that have been allocated the close-out requirement under Regulation SHO, have a limited exception to the close-out requirement that would allow 35 consecutive settlement days from the security becoming a threshold security for the fail to deliver position to be closed out? If so, why? If not, why not? Alternatively, as set forth in proposed Alternative 2, should the limited exception allow the earlier of: (i) 35 Consecutive settlement days from the date on which the security becomes a threshold security, or (ii) 13 consecutive settlement days from the last date on which all options series within the portfolio that were created before the security became a threshold security expire or are liquidated, for the fail to deliver position to be closed out? If so, why?
- In our discussion above regarding the impact of the proposed amendment to eliminate Regulation SHO's current options market maker exception on liquidity, spreads, depth, and hedging costs, we stated that we believe that such an impact would be minimal, if any. For similar reasons, we believe that the impact of the mandatory close-out requirements in the proposed alternatives on liquidity, spreads, depth, and hedging costs would be minimal, if any. To what extent would an options market maker exception as set forth in the proposed alternatives, rather than eliminating the exception, impact liquidity in securities that might become threshold securities or in threshold securities? To what extent would an options market maker exception as set forth in the proposed alternatives, rather than eliminating the exception, impact the willingness of options market makers to make markets in securities that might become threshold securities or in threshold securities? What other measures or time-frames would be effective in fostering Regulation SHO's goal of reducing fails to deliver while at the same time not discouraging market making by options market makers?
- In the proposed alternatives to eliminating the options market maker exception, fails to deliver would only be excepted from the close out requirement of Regulation SHO if the fail to deliver position results or resulted from a short sale effected to establish or maintain a hedge on options series created before the security became a threshold security. Is the reference to ''options series'' appropriate? Please explain.

[69] *See* Adopting Release, 69 FR at 48031; Securities Exchange Act Release No. 56212 (Aug. 7, 2007).

• Are the terms ''expiration'' and ''liquidation'' of an options series sufficiently inclusive to prevent participants from evading the close-out requirements in the proposed alternatives? Are these terms understandable for compliance purposes? If not, what terms would be more appropriate? What difficulties, if any, could arise from having to determine the last date on which all options series within a portfolio that were created before the security became a threshold securities have expired or been liquidated?

• We provide examples of how the proposed alternatives would be applied. We request comment regarding these examples, and suggestions regarding additional examples that would be helpful in understanding how the proposed alternatives would work that could be incorporated by the Commission into any future releases, if the Commission were to adopt either of the proposed alternatives.

• What types of costs would be incurred in complying with the proposed alternatives? For example, what types of costs, if any, could be incurred for tracking the 35 or 13 consecutive settlement day close-out requirements? What types of costs, if any, could be incurred in determining whether or not options series were created before the security became a threshold security? What types of costs could be incurred in determining whether or not a fail to deliver position resulted from a short sale to establish or maintain a hedge on options series created before the security became a threshold security? How would these costs differ from costs incurred to comply with the current options market maker exception in Regulation SHO? Would the costs relating to the alternative proposals justify the benefits of allowing for a limited exception to the close-out requirement for options market makers?

• What would be the costs and benefits of the proposed alternatives to eliminating the options market maker exception?

• Under the proposed alternatives, after the specific time-frames have expired, fails to deliver would be required to be closed out in compliance with the 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO regardless of whether or not the fails to deliver result or resulted from short sales effected by a registered options market maker to establish or maintain a hedge on options series created before the security became a threshold security. Under the proposed alternatives, might an options market maker need to maintain such fail to deliver positions beyond the 13 consecutive settlement days allowed by the close-out requirement of Rule 203(b)(3) of Regulation SHO? What might be the impact, if any, of requiring such fails to deliver to be closed out?

• What technical or operational challenges would options market makers face in complying with the proposed alternatives?

• Should we consider changing the proposed alternatives to 35 calendar days from the date on which the security becomes a threshold security? If so, would this create systems problems or other costs?

• The proposed alternatives would require that options market makers document eligibility for the exception. What should options market makers and participants of a registered clearing agency be required to include in the documentation? Should we specify in detail what would be required to be retained? For example, should we require that such documentation include, at a minimum, documentation evidencing when the series being hedged was created, when the underlying security became a threshold security, and the age of the fail to deliver position that is not being closed out?

• The proposed alternatives would require that participants of a registered clearing agency maintain documentation to demonstrate that a fail to deliver position has not been closed out due to the options market maker exception. Would this documentation requirement raise compliance concerns or any other concerns for participants? If so, please explain.

• The proposed alternatives would allow for a 35 consecutive settlement day phase-in period for previously excepted fails to deliver to be closed out. Is 35 consecutive settlement days from the effective date of the amendment a long enough period of time, or too long, for fails to deliver that were previously excepted from the close-out requirement of Regulation SHO to be closed out? If so, what would be an appropriate period of time?

• Would the proposed phase-in period create additional costs, such as costs associated with systems, surveillance, or recordkeeping modifications that could be needed for participants to track fails to deliver subject to the 35 consecutive settlement day phase-in period from fails to deliver that are not eligible for the phase-in period? If there were additional costs associated with tracking fails to deliver subject to the phase-in period, would these additional costs justify the benefits of providing firms with a 35 consecutive settlement day phase-in period? Is a 35 consecutive settlement day phase-in period necessary given that firms would have been on notice that they would have to close out these fail to deliver positions following the effective date of the amendment? Please provide estimates of these costs.

• Please provide specific comment as to what length of implementation period would be necessary such that participants would be able to meet the requirements that fail to deliver positions in threshold securities be closed out within the applicable time-frames, if adopted.

IV. Proposed Amendment to Rule 200(g)(1) of Regulation SHO

We are proposing an amendment to the long sale marking provisions of Rule 200(g)(1) of Regulation SHO that would require that brokers-dealers marking orders as ''long'' sales document the present location of the securities.

Prior to the adoption of Regulation SHO in August 2004, broker-dealers that were members of the NASD were obligated to comply with former NASD Rule 3370(b). Former NASD Rule 3370(b) required a broker-dealer making an affirmative determination that a customer was long to notate on the order ticket at the time an order was taken, the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days.[70]

Regulation SHO does not contain a similar provision to former NASD Rule 3370(b) regarding documentation of long sales.[71] Rule 200(g)(1) of

[70] NASD repealed NASD Rule 3370(b), the ''affirmative determination'' for long sales, following the adoption of Regulation SHO. The repeal of NASD Rule 3370(b) was effective on January 3, 2005, the effective date of Regulation SHO. *See* NASD Notice to Members 04–93. *See also,* Securities Exchange Act Release No. 50822 (Dec. 8, 2004), 69 FR 74554 (Dec. 14, 2004).

[71] Because Regulation SHO does not include a similar provision to former NASD Rule 3370(b) regarding documentation of long sales, on July 20, 2005, the NASD filed with the Commission, pursuant to Section 19(b)(3)(A) of the Exchange Act, a rule filing to amend NASD Rule 3370 to clarify that members must make an affirmative determination and document compliance when effecting long sale orders. In the filing, the NASD stated that it proposed to amend NASD Rule 3370 ''to re-adopt expressly the affirmative determination requirements as they now relate to member obligations with respect to long sales under Regulation SHO.'' The NASD designated the rule change as ''non-controversial.'' In response to the proposed rule change, the Commission received three comment letters, the substance of which called into question the ''non-controversial'' designation of the proposal. The Commission found that it was appropriate in the public interest, for the

Regulation SHO, however, provides that a broker-dealer may mark an order to sell ''long'' only if the seller is deemed to own the security being sold pursuant to paragraphs (a) through (f) of Rule 200,[72] and either the security is in the physical possession or control of the broker or dealer or it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction.[73] Thus, in marking a sell order ''long,'' a broker-dealer must determine whether the customer is ''deemed to own'' the securities being sold.

In the 2006 Proposing Release we requested comment regarding whether we should consider amending Regulation SHO to include documentation requirements for long sales similar to those required by former NASD Rule 3370(b).[74] We received approximately 8 comment letters in response to the request for comment.[75]

Commenters that supported documentation requirements for long sales argued that the ''volume of outstanding fails is too large to permit the execution of trades where there is doubt about delivery.'' [76] Commenters opposing documentation requirements for long sales stated that pre-trade documentation would unnecessarily impair efficiency, as broker-dealers already have procedures to ensure orders are marked properly based on information provided by customers and their own books and records, and the documentation requirements would add substantial cost.[77] One commenter stated that compliance with such pre-trade documentation requirements would require a complete revamping of front end systems.[78] Another commenter stated that the requirements would be inconsistent with the goal of fostering liquidity.[79]

Commenters also argued that the Commission has not presented evidence that long sales are contributing to a troublesome level of fails [80] or abusive or manipulative activity,[81] and that lack of documentation is related to those fails.[82] One commenter stated that there is no valid purpose to put this additional burden on the industry.[83] Another commenter argued that requiring this additional documentation should be considered only where the benefits clearly outweigh the burdens.[84] Commenters also suggested that if the Commission did adopt additional long sale documentation requirements, it should except prime broker and DVP trades, ''done with'' trades, and orders submitted electronically,[85] or where settlement instructions are on file with the executing broker.[86]

Although some commenters stated that pre-trade documentation for long sales would be inconsistent with the goal of fostering liquidity, would unnecessarily impair efficiency, and would add substantial cost,[87] we believe that such costs, to the extent that there are any, would be justified by the benefits of a documentation requirement, as described below. In addition, we note that under former NASD Rule 3370(b), NASD member firms making an affirmative determination that a customer was long were required to make a notation on the order ticket at the time an order was taken which reflected the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days.[88] Thus, many broker-dealers should already be familiar with a documentation requirement and one method that could be used to comply with such a requirement. Such familiarity should help reduce any costs associated with implementing the proposed documentation requirement. In addition, unlike with former NASD Rule 3370(b), the proposed amendment would not specify the format or methodology of the proposed documentation requirement. The absence of such specifications should help reduce costs to broker-dealers that would have to comply with this proposal because broker-dealers would be able to determine the most cost effective format and methodology for meeting the proposed documentation requirement.

We are proposing for further comment a documentation requirement for broker-dealers marking orders to sell ''long'' pursuant to Regulation SHO that would require such broker-dealers to document the present location of the securities being sold. First, we believe that such a proposed documentation requirement would aid in ensuring the correct marking of sell orders. To the extent that the seller is unable to provide the present location of the securities being sold, the broker-dealer

protection of investors, and otherwise in furtherance of the purposes of the Exchange Act, to abrogate the proposed rule change. *See* Securities Exchange Act Release No. 52426 (Sept. 14, 2005); Securities Exchange Act Release No. 52131 (July 27, 2005), 70 FR 44707 (Aug. 3, 2005). The NASD took no further action with respect to the proposed rule change.

[72] Rule 200(a) defines the term ''short sale,'' while Rules 200(b) through 200(f) set forth circumstances in which a seller is deemed to own securities. *See* 17 CFR 242.200(a)–(f).

[73] 17 CFR 242.200(g)(1).

[74] *See* 2006 Proposing Release, 71 FR at 41714. Specifically we stated: ''Current Rule 203(a) provides that on a long sale, a broker-dealer cannot fail or loan shares unless, in advance of the sale, it has demonstrated that it has ascertained that the customer owned the shares, and had been reasonably informed that the seller would deliver the security prior to settlement of the transaction. Former NASD Rule 3370 required that a broker making an affirmative determination that a customer was long must make a notation on the order ticket at the time an order was taken which reflected the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days. Should we consider amending Regulation SHO to include these additional documentation requirements? If so, should any modifications be made to these additional requirements? In the prior SRO rules, brokers did not have to document long sales if the securities were on deposit in good deliverable form with certain depositories, if instructions had been forwarded to the depository to deliver the securities against payment (''DVP trades''). Under Regulation SHO, a broker may not lend or arrange to lend, or fail, on any security marked long unless, among other things, the broker knows or has been reasonably informed by the seller that the seller owns the security and that the seller would deliver the security prior to settlement and failed to do so. Is it generally reasonable for a broker to believe that a DVP trade will settle on time? Should we consider including or specifically excluding an exception for DVP trades or other trades on any rule requiring documentation of long sales?''

[75] *See, e.g.*, letters from NASAA, *supra* note 31; UBS, *supra* note 31; SIA, *supra* note 31. *See also,* letter from Leonard J. Amoruso, Compliance and Regulatory Affairs, Knight Capital Group, Inc., dated Sept. 20, 2006 (''Knight''); letter from John G. Gaine, President, Managed Funds Association, dated Sept. 19, 2006 (''MFA''); letter from Martin Schwartz, Chief Compliance Officer, Millennium Partners, LP, Oct. 10, 2006 (''Millennium''); letter from Susan Trimbath, Ph.D., CEO and Chief Economist, STP Advisory Services, LLC, Aug. 29, 2006 (''Trimbath''); letter from Wayne Klein, Director, Division of Securities, State of Utah Department of Commerce, Sept. 13, 2006 (''Utah Department of Commerce'').

[76] *See, e.g.*, Letters from NASAA, *supra* note 31; Utah Department of Commerce, *supra* note 75.

[77] *See* letters from MFA, *supra* note 75; UBS, *supra* note 31; Knight, *supra* note 75.

[78] *See* letter from SIA, *supra* note 31.

[79] *See* letter from Millennium, *supra* note 75.

[80] *See* letter from MFA, *supra* note 75. *See also,* letter from Millennium, *supra* note 75.

[81] *See* letter from SIA, *supra* note 31 .

[82] *See* letter from MFA, *supra* note 75.

[83] *See* letter from UBS, *supra* note 31.

[84] *See* letter from MFA, *supra* note 75.

[85] *See* letters from SIA, *supra* note 31; Knight, *supra* note 75. The SIA commented that ''a broker-dealer should be provided an exception from such long sale annotation requirements if the broker-dealer has information regarding the client's custodial relationship. Providing such an exception would be consistent with the Commission's long-standing policy of allowing broker-dealers to enter into bona-fide agreements with their customers regarding marking of orders.'' *See* letter from SIA, *supra* note 31.

[86] *See* letter from Knight, *supra* note 75.

[87] *See, e.g.*, letters from MFA, *supra* note 75; UBS, *supra* note 31; Knight, *supra* note 75; SIA, *supra* note 31; Millenium, *supra* note 75.

[88] Brokers and dealers that were members of the NASD were obligated to comply with former NASD Rule 3370(b) prior to the adoption of Regulation SHO.

would have reason to believe that the seller is not ''deemed to own'' the securities being sold and that the securities would not be in its physical possession or control no later than settlement of the transaction and, therefore, that the broker-dealer would be required to mark the sale ''short'' rather than ''long.'' [89] We believe that this proposed documentation requirement could also reduce the number of fails to deliver because, after making the inquiry into the present location of the securities being sold, a broker-dealer would know whether or not it needed to obtain securities for delivery.

Second, we are concerned that broker-dealers marking orders ''long'' may not be making a determination prior to marking the order that the seller is ''deemed to own'' the security being sold.[90] Rule 200(g)(1) currently requires that broker-dealers ascertain whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' [91] We believe that a proposed documentation requirement would help ensure that the broker-dealer marking the sale ''long'' has inquired into, and determined that, the seller is ''deemed to own'' the securities being sold because the broker-dealer would be required to document the present location of the securities being sold.

Third, we believe that the proposed documentation requirement would enable the Commission and SROs to examine for compliance with the long sale marking provisions of Rule 200(g) more effectively because this proposed documentation requirement would provide a record that the seller is ''deemed to own'' the securities being sold in compliance with that rule. We also believe that the proposed documentation requirement would aid the Commission and SROs in reviewing for mismarking designed to avoid compliance with other rules and regulations of the federal securities laws, such as the ''locate'' requirement of Regulation SHO,[92] and Rule 105 of Regulation M.[93]

We believe that any costs that would arise from the proposed requirement that a broker-dealer must document the present location of securities being sold long when making the determination that a customer is deemed to own the securities being sold would be minimal because Rule 200(g)(1) currently requires that broker-dealers must ascertain whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' [94] Today's proposed amendment would require that the broker-dealer take the additional step of documenting the present location of the securities being sold. Broker-dealers could, however, need to put mechanisms in place to facilitate efficient documenting of the information required by the proposed amendment.

Request for Comment

The Commission seeks comment generally on all aspects of the proposed amendment to Rule 200(g) of Regulation SHO. In addition, we seek comment on the following:

- Is the proposed documentation requirement appropriate? If not, why not?
- Commenters that responded to the request for comment regarding documentation of long sales in the 2006 Proposing Release stated that market participants already have in place procedures to ensure that orders to sell shares are properly marked. What are those procedures and how do they ensure that orders are properly marked? How do broker-dealers currently comply with the ''deemed to own'' requirement of Rule 200(g)(1) of Regulation SHO?
- One commenter that responded to the request for comment regarding documentation of long sales in the 2006 Proposing Release stated that the requirement would be inconsistent with the goal of fostering liquidity.[95] To what extent, if any, would the proposed amendment impact liquidity in securities being sold long? Please explain.
- The ''locate'' requirement of Rule 203(b)(1) of Regulation SHO contains an exception for market makers. Should market makers also have an exception for the proposed long sale documentation requirement? Please explain.
- Should we specify the proposed format of the documentation? Should the proposed documentation be on the order ticket or elsewhere? Please provide recommended alternatives and estimates of the costs of various alternatives.
- Under what circumstances, if any, should we allow the documentation to be generated post-trade?
- In addition to proposing documentation of the present location of the securities being sold, should we require additional documentation requirements to those proposed, such as requiring broker-dealers to make a record reflecting the basis for believing that the securities are in good deliverable form, and the basis for believing that the securities will be in the broker-dealer's possession or control no later than settlement of the transaction?
- The Commission has previously stated that it may be unreasonable for a broker-dealer to treat a sale as long where orders marked ''long'' from the same customer repeatedly require borrowed shares for delivery or result in fails to deliver.[96] A broker-dealer also may not treat a sale as long if the broker-dealer knows or has reason to know that the customer borrowed the shares being sold.[97] Should broker-dealers be required to take additional steps to determine whether or not the seller is deemed to own the securities being sold in conjunction with documenting the present location of the securities?
- The proposed amendment would impose an obligation on broker-dealers to inquire into the present location of securities being sold and to document that location. To what extent would this proposed requirement impact the accuracy of marking by broker-dealers? To what extent would this proposed requirement impact the level of fails to

[89] *See* 17 CFR 242.200(g).

[90] *See id.* at 242.200(g)(1).

[91] In the Adopting Release, we stated that ''* * * Rule 203(a) provides that on a long sale, a broker-dealer cannot fail or loan shares unless, in advance of the sale, it ascertained that the customer owned the shares, and had been reasonably informed that the seller would deliver the security prior to settlement of the transaction. This requirement is consistent with changes being made to the order marking requirements, which require that for an order to be marked long, the seller must own the security.'' *See* Adopting Release, 69 FR at 48021.

[92] *See* 17 CFR 242.203(b)(1). Rule 203(b)(1) of Regulation SHO provides that ''[a] broker or dealer may not accept a short sale order in an equity security from another person, or effect a short sale in an equity security for its own account, unless the broker or dealer has: (i) Borrowed the security, or entered into a bona fide arrangement to borrow the security; or (ii) Reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due * * *.'' This provision is commonly referred to as the ''locate'' requirement.

[93] *See* 17 CFR 242.105 (prohibiting persons from covering a short sale with offering securities if the short sale occurred during the Rule 105 restricted period). *See also, In the Matter of Goldman Sachs Execution & Clearing, L.P. f/k/a Spear, Leeds, & Kellogg, L.P.*, Securities Exchange Act Release No. 55465 (Mar. 14, 2007), Admin. Proc. File No. 3–12590 (settling enforcement proceedings against a prime broker and clearing affiliate of The Goldman Sachs Group, Inc., Goldman Sachs Execution and Clearing L.P., for its violations arising from an illegal trading scheme carried out by customers through their accounts at the firm, which included the mismarking of sell orders as ''long.'').

[94] *See* 17 CFR 242.200(g).

[95] *See* letter from Millennium, *supra* note 75.

[96] *See* Adopting Release, 69 FR at 48019, n.111.

[97] *See id.*

deliver in a security, such as fails to deliver due to mismarking? To what extent would this proposed requirement impact compliance with other short sale-related regulations, such as the locate requirement of Regulation SHO and Rule 105 of Regulation M?

• Should any trades be excepted from the proposed documentation requirement? For example, under former NASD Rule 3370(b) broker-dealers did not have to document long sales if the securities were on deposit in good deliverable form with certain depositories, if instructions had been forwarded to the depository to deliver the securities against payment (''DVP trades''). Should we consider including or specifically excluding an exception for DVP trades? Should any other trades be specifically included or excluded from the proposed documentation requirement?

• Former NASD Rule 3370(b) required broker-dealers making an affirmative determination that a customer was long to make a notation on the order ticket at the time an order was taken regarding the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days. The proposed amendment would require broker-dealers to document only the present location of the securities being sold long. To what extent would the requirements of the proposed amendment impose costs, such as personnel, systems, or surveillance costs on market participants that are any different from such costs imposed on market participants to comply with former NASD Rule 3370(b)?

• Most broker-dealers allow investors to submit orders electronically. Do these systems automatically verify the location of shares for long sales before routing the orders for execution? If so, how much would it cost for broker-dealers to adjust their systems to record the location of the securities being sold on the trade record? If not, what changes would the proposed documentation requirement require and how much would it cost for broker-dealers to adjust their systems to verify and document the location of the shares for long sales? To what extent do investors communicate order requests via other means, such as by telephone or in person? How do the costs of the proposed documentation requirement differ for these order requests versus electronic order submissions?

• Some investors have direct access to alternative trading systems. Are alternative trading systems already programmed to verify the location of the shares in orders marked as long sales? If not, to what extent, if any, should alternative trading systems be responsible for meeting this requirement? How much would it cost?

• Some broker-dealers sponsor direct access to exchanges for preferred clients. To what extent do these broker-dealers currently document the location of shares for long sales that their clients send directly to exchanges? What costs are associated with such documentation?

• Do algorithmic trading systems [98] present any problems for compliance with the proposed amendment? Are there any other current market practices that present problems for compliance with documentation requirements?

V. General Request for Comment

The Commission seeks comment generally on all aspects of the proposed amendments to Regulation SHO under the Exchange Act, including the proposed alternatives to the proposal to eliminate the options market maker exception. Commenters are requested to provide empirical data to support their views and arguments related to the proposals herein. In addition to the questions posed above, commenters are welcome to offer their views on any other matter raised by the proposed amendments to Regulation SHO. With respect to any comments, we note that they are of the greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and if accompanied by alternative suggestions to our proposals where appropriate.

VI. Paperwork Reduction Act

Certain provisions of the proposed amendments to Regulation SHO would impose new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'') [99] which the Commission has submitted to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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. OMB has not yet assigned a control number to the new collection of information.

A. Summary of Collections of Information

The proposed amendment to eliminate the options market maker exception to the close-out requirement of Regulation SHO would not impose a new ''collection of information'' within the meaning of the PRA. The two proposed alternatives to elimination of the options market maker exception and the proposed amendment to Rule 200(g) of Regulation SHO would impose a new ''collection of information'' within the meaning of the PRA.

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The proposed alternatives to elimination of the options market maker exception would both require that options market makers and participants of a registered clearing agency document that any fail to deliver positions that have not been closed out are excepted from the close-out requirement of Regulation SHO because the fails to deliver resulted from short sales effected by a registered options market maker to establish or maintain a hedge on options series in a portfolio that were created before the security became a threshold security. This would be a new collection of information because Regulation SHO does not currently require documentation to show eligibility for the options market maker exception.

ii. Proposed Amendment to Rule 200(g)(1)

The proposed amendment to Rule 200(g)(1) of Regulation SHO would require that brokers and dealers marking orders as ''long'' sales document the present location of the securities.

Under Rule 200(g)(1), a broker-dealer may mark an order to sell ''long'' only if the seller is deemed to own the security being sold pursuant to paragraphs (a) through (f) of Rule 200,[100] and either the security is in the physical possession or control of the broker or dealer or it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction.[101] Thus, in marking a sell order ''long,'' a broker or dealer must determine whether the customer is ''deemed to own'' the securities being sold.

This would be a new collection of information because Regulation SHO

[98] An algorithmic trading program detects trading opportunities for the strategies input by investors and responds to them by placing and managing orders on behalf of those investors.

[99] 44 U.S.C. 3501 *et seq.*

[100] Rule 200(a) defines the term ''short sale,'' while Rules 200(b) through 200(f) set forth circumstances in which a seller is deemed to own securities. *See* 17 CFR 242.200(a)–(f).

[101] 17 CFR 242.200(g)(1).

does not currently require documentation by brokers and dealers when marking sell orders as ''long.''

B. Proposed Use of Information

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The information that would be required by the proposed alternatives to elimination of the options market maker exception would assist the Commission in fulfilling its mandate under the Exchange Act to prevent fraudulent, manipulative, and deceptive acts and practices. The Commission and SROs would use the information collected to monitor whether or not the options market maker exception to the close-out requirement of Regulation SHO is being applied consistently with the rule. The information required by the proposed amendment would provide a record that would aid surveillance for compliance with this limited exception to Regulation SHO's close-out requirement.

ii. Proposed Amendment to Rule 200(g)(1)

The information that would be required by the proposed amendment to Rule 200(g)(1) would assist the Commission in fulfilling its mandate under the Exchange Act to prevent fraudulent, manipulative, and deceptive acts and practices. Such a documentation requirement would aid in ensuring the correct marking of sell orders. To the extent that the seller is unable to provide the present location of the securities being sold, the broker-dealer would have reason to believe that the seller is not ''deemed to own'' the securities being sold and that the securities would not be in its physical possession or control no later than settlement of the transaction and, therefore, that the broker-dealer would be required to mark the sale ''short'' rather than ''long.'' [102] We believe that this documentation requirement could also reduce the number of fails to deliver because, after making the inquiry into the present location of the securities being sold, a broker-dealer would know whether or not it needed to obtain securities for delivery.

In addition, we are concerned that broker-dealers marking orders ''long'' may not be making a determination prior to marking the order that the seller is ''deemed to own'' the security being sold. Rule 200(g)(1) currently requires that broker-dealers ascertain whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' [103] We believe that a documentation requirement would help ensure that the broker-dealer marking the sale ''long'' has inquired into, and determined that, the seller is ''deemed to own'' the securities being sold because the broker-dealer would be required to document the present location of the securities being sold.

We also believe that the documentation requirement would enable the Commission and SROs to examine for compliance with the long sale marking provisions of Rule 200(g) more effectively because this documentation requirement would provide a record that the seller is ''deemed to own'' the securities being sold in compliance with that rule. We also believe that the documentation requirement would aid the Commission and SROs in reviewing for mismarking designed to avoid compliance with other rules and regulations of the federal securities laws, such as the ''locate'' requirement of Regulation SHO,[104] and Rule 105 of Regulation M.[105]

C. Respondents

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The documentation requirement of the proposed alternatives to elimination of the options market maker exception would apply to all participants of a registered clearing agency and options market makers who have not closed out a fail to deliver position in a threshold security because it resulted from short sales effected by the registered options market maker to establish or maintain a hedge on options series in a portfolio that were created before the security became a threshold security.

ii. Proposed Amendment to Rule 200(g)(1)

The proposed amendment to Rule 200(g)(1) of Regulation SHO would require that brokers and dealers marking orders as ''long'' sales document the present location of the securities. Thus, the amendment would apply to all brokers-dealers registered with the Commission as they could all execute long sales. The Commission's Office of Economic Analysis (''OEA'') estimates that at year-end 2006 there are approximately 5,808 active brokers-dealers registered with the Commission.[106]

D. Total Annual and Recordkeeping Burdens

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The proposed alternatives to elimination of the options market maker exception would require that options market makers and participants of a registered clearing agency document that any fail to deliver positions that have not been closed out are excepted from the close-out requirement of Regulation SHO because the fails to deliver resulted from short sales effected by a registered options market maker to establish or maintain a hedge on options series in a portfolio that were created before the security became a threshold security.

We estimate that it would take an options market maker no more than approximately 0.16 hours (10 minutes) to document that a fail to deliver position has not been closed out due to its eligibility for the options market maker exception.[107] We understand that eligibility for the options market maker exception would likely be determined on a daily basis, rather than on a trade by trade basis. Based on data from the first quarter of 2006,[108] for purposes of this PRA, we estimate that, on average, there would be approximately 75 securities each day that are (i) on a threshold securities list, and (ii) have open interest in exchange traded options. On average, we estimate there would be approximately 5 options market makers engaged in delta hedging these options.[109] Thus, we estimate that on average, options market makers would have to document compliance with the proposed alternatives to the elimination of the options market maker exception 94,500 times per year (5 options market makers checking for compliance once per day on 75 securities, multiplied by 252 trading

[102] *See id.*

[103] *See id.*

[104] *See supra* note 92.

[105] *See supra* note 93.

[106] This number is based on OEA's review of 2006 FOCUS Report filings reflecting registered brokers-dealers. This number does not include broker-dealers that are delinquent with FOCUS Report filings.

[107] We do not believe that the documentation requirement is complex. We understand that options market makers receive daily trading reports from NSCC reflecting an options market maker's trading activity for that day. Options market makers should be able to use such information to document eligibility for the exception from the close-out requirement of Regulation SHO. Because options market makers receive these daily trading reports, we estimate that it would take an options market maker no more than approximately 10 minutes to document that a fail to deliver position has not been closed out due to its eligibility for the options market maker exception.

[108] We used the first quarter of 2006 because this is the most recent period over which we have access to option open interest data.

[109] This estimate is based on there being 5 options exchanges that have a specialist or specialist-like structure and an estimation that each exchange would have 1 options market maker actively engaged in hedging threshold securities with listed options.

days in a year). Thus, the total approximate estimated annual burden hour per year would be 15,120 burden hours (94,500 @ 0.16 hours/documentation). A reasonable estimate for the paperwork compliance for the proposed alternatives for each options market maker would be approximately 3,024 burden hours (18,900 instances of documentation per respondent @ 0.16 hours/documentation).

We estimate that it would take a participant of a registered clearing agency no more than approximately 0.16 hours (10 minutes) to document that a fail to deliver position has not been closed out due to its eligibility for the options market maker exception.[110] If a participant of a registered clearing agency had a fail to deliver position in a threshold security and after twelve consecutive settlement days the participant determined whether or not the fail to deliver position was excepted from Regulation SHO's close-out requirement due to hedging activity by a registered options market maker, we estimate that a participant of a registered clearing agency would have to make such determination with respect to approximately three threshold securities per day.[111] We understand that there are currently approximately sixteen participants of a registered clearing agency that clear transactions for options market makers.[112] Thus, we estimate that on average, a participant of a registered clearing agency would have to document compliance with the proposed alternatives to the elimination of the options market maker exception 12,096 times per year (16 participants checking for compliance once per day on three securities, multiplied by 252 trading days in a year). Thus, the total approximate estimated annual burden hour per year would be approximately 1,935 burden hours (12,096 @ 0.16 hours/documentation). A reasonable estimate for the paperwork compliance for the proposed alternatives for each participant would be approximately 120 burden hours (756 instances of documentation per respondent @ 0.16 hours/documentation).

ii. Proposed Amendment to Rule 200(g)(1)

The proposed amendment to Rule 200(g)(1) of Regulation SHO would require that brokers and dealers marking orders as ''long'' sales document the present location of the securities. We estimate that all of the approximately 5,808 registered broker-dealers may effect sell orders in securities covered by Regulation SHO and, therefore, would be required to comply with the proposed documentation requirement.

For purposes of the PRA, OEA has estimated that a total of 2,750,000,000 trades are executed annually.[113] Of these 2,750,000,000 trades, OEA estimates that approximately 75%, that is, 2,062,500,000, of these trades would be ''long'' sales.[114] This would be an average of approximately 355,114 annual long sales by each respondent. In addition, because we believe that the documentation process is or will be automated, we estimate that it would take a registered broker-dealer approximately 0.000139 hours (0.5 seconds) to document the present location of the securities being sold.[115]

Thus, the total approximate estimated annual burden hour per year would be 286,688 burden hours (2,062,500,000 trades @ 0.000139 hours/trade). A reasonable estimate for the paperwork compliance for the proposed amendment for each broker-dealer would be approximately 49 burden hours (355,114 trades per respondent @ 0.000139 hours/response).

To the extent that broker-dealers need to automate the documentation process, we anticipate that such broker-dealers would spend varying amounts of time reprogramming systems, integrating systems, and potentially updating front-end software. Some broker-dealers may spend very little time automating the documentation process, while changes at other broker-dealers might be more involved. On average, we estimate that reprogramming burdens at a broker-dealer would be approximately 16 hours (or two days) with one programmer.[116] If broker-dealers hired new computer programmers at $67/hour, this would cost $1,072 per broker-dealer (16 hours @ $67 per hour) or an aggregate of $6,226,176 across all broker-dealers.[117]

E. Collection of Information is Mandatory

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The proposed collection of information for the proposed alternatives to elimination of the options market maker exception would be mandatory for a participant of a registered clearing agency and options market maker where a fail to deliver position has not been closed out because the fails to deliver resulted from short sales effected by a registered options market maker to establish or maintain a hedge on options series in a portfolio that were created before the security became a threshold security.

ii. Proposed Amendment to Rule 200(g)(1)

The proposed collection of information would be mandatory for a

[110] We do not believe that the documentation requirement is complex. Such documentation requirement could involve a participant of a registered clearing agency contacting a registered options market maker for which it clears transactions to determine whether or not trading activity by the registered options market maker was responsible for the fail to deliver position and whether or not the fail to deliver position resulted from short sales effected by the registered options market maker to establish or maintain a hedge on options series in a portfolio that were created before the security became a threshold security. After making such determination, the proposed amendment would require that the participant document this information. We estimate that such procedures would take a participant of a registered clearing agency no more than approximately 10 minutes to complete.

[111] We estimated that a participant would make such a determination for approximately 3 threshold securities per day based on data from the first quarter of 2006. We used the first quarter of 2006 because this is the most recent period over which we have access to option open interest data.

[112] This number is based on information received from the Options Clearing Corporation.

[113] In calendar year 2006, there were approximately 2.099 billion trades in NYSE and Nasdaq-listed stocks. In addition, there were approximately 2.114 billion trades in over-the-counter bulletin board (''OTCBB'') traded stocks. OEA estimates that if we were to include Amex-listed and pink sheet stocks, the total annual trades would be approximately 2.75 billion trades.

[114] *See* Office of Economic Analysis U.S. Securities and Exchange Commission, *Economic Analysis of the Short Sale Price Restrictions Under the Regulation SHO Pilot* (Sept. 14, 2006), available at *http://www.sec.gov/about/economic/shopilot091506/draft_reg_sho_pilot_report.pdf.*

[115] In the 2003 Proposing Release, we stated that we thought it was reasonable that it would only take 0.5 seconds or 0.000139 hours to mark an order ''long,'' ''short,'' or ''short exempt.'' *See* 2003 Proposing Release, 68 FR at 63000. We believe it is reasonable that it would take a similar amount of time to document the present location of the securities being sold, if the documentation process were automated. In addition, we note that Regulation SHO requires broker-dealers executing short sales to document compliance with the ''locate'' requirements of Rule 203(b)(1) of Regulation SHO, *i.e.*, prior to accepting or effecting a short sale in an equity security, a broker-dealer must document that it has (i) borrowed the security, or entered into a bona-fide arrangement to borrow the security, or (ii) reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due. Thus, broker-dealers should already have in place systems similar to those necessary to document the present location of the securities being sold for purposes of long sales.

[116] We believe that most of the relevant information is already stored in electronic form and, therefore, we do not believe that the automation process would be difficult or time-consuming to implement. Hence, we estimate that automation would on average take no longer than approximately 16 hours (2 days) to complete.

[117] The $67/hour figure for a computer programmer is based on the salary for a Senior Computer Operator from the SIA *Report on Office Salaries in the Securities Industry 2006*, modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

broker-dealer marking a sell order as ''long'' pursuant to Rule 200(g)(1).

F. Confidentiality

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The proposed collection of information for the proposed alternatives to elimination of the options market maker exception would be retained by participants of a registered clearing agency and options market makers and provided to the Commission and SRO examiners upon request, but not subject to public availability.

ii. Proposed Amendment to Rule 200(g)(1)

The proposed collection of information under the proposed amendment to Rule 200(g)(1) would be retained by the broker-dealer and provided to the Commission and SRO examiners upon request, but would not be subject to public availability.

G. Record Retention Period

i. Proposed Alternatives to Elimination of the Options Market Maker Exception

The proposed alternatives to elimination of the options market maker exception do not contain any new record retention requirements. All registered broker-dealers that would be subject to the proposed alternatives are currently required to retain records in accordance with Rule 17a–4 of the Exchange Act.[118]

As discussed above, participants of a registered clearing agency include entities not registered as broker-dealers, such as banks, U.S. exchanges, and clearing agencies.[119] Although we do not believe that participants of a registered clearing agency other than broker-dealers would trigger the obligations of the proposed alternatives, all banks subject to the proposed alternatives would be required to retain records in compliance with any existing or future record retention requirements established by the banking agencies. All U.S. exchanges and clearing agencies subject to the proposed alternatives would be required to retain records in compliance with Rule 17a–1 of the Exchange Act.[120]

ii. Proposed Amendment to Rule 200(g)(1)

The proposed amendment to Rule 200(g)(1) does not contain any new record retention requirements. All registered broker-dealers that would be subject to the proposed amendment are currently required to retain records in accordance with Rule 17a–4 of the Exchange Act.[121]

H. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–19–07. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File No. S7–19–07, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549–1090. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VII. Consideration of Costs and Benefits of Proposed Amendments to Regulation SHO

The Commission is considering the costs and the benefits of the proposed amendments to Regulation SHO. The Commission is sensitive to these costs and benefits, and encourages commenters to discuss any additional costs or benefits beyond those discussed here, as well as any reductions in costs. In particular, the Commission requests comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposals for registrants, issuers, investors, brokers or dealers, other securities industry professionals, regulators, and other market participants. Commenters should provide analysis and data to support their views on the costs and benefits associated with the proposed amendments to Regulation SHO.

A. Elimination of the Options Market Maker Exception

1. Benefits

The proposed amendment would eliminate the options market maker exception in Rule 203(b)(3)(iii) of Regulation SHO. In particular, as a transition measure, the proposal would require that any previously-excepted fail to deliver position in a threshold security on the effective date of the amendment be closed out within 35 consecutive settlement days of the effective date of the amendment. If a security becomes a threshold security after the effective date of the amendment, any fails to deliver that result or resulted from short sales effected by a registered options market maker to establish or maintain a hedge on any options positions created before the security became a threshold security would be subject to Rule 203(b)(3)'s mandatory 13 consecutive settlement day close-out requirement, similar to any other fail to deliver position in a threshold security.

On July 14, 2006, the Commission published proposed amendments to the options market maker exception contained in Regulation SHO to limit the duration of the exception.[122] We proposed to narrow the options market maker exception at that time because we have observed a small number of threshold securities with substantial and persistent fail to deliver positions that are not being closed out under existing delivery and settlement guidelines and we believed that these persistent fail to deliver positions were attributable, in part, to the options market maker exception in Regulation SHO.[123]

As a result of the comment process, however, we learned that commenters were concerned that the proposed

[118] 17 CFR 240.17a–4.

[119] *See supra* note 22.

[120] 17 CFR 240.17a–1.

[121] *Id.* at 240.17a–4.

[122] *See* 2006 Proposing Release, 71 FR 41710.

[123] *See id.* at 41712; Regulation SHO Re-Opening Release, 72 FR at 15079–15080.

amendments to the options market maker exception could be costly and difficult to implement or possibly unworkable because options market makers typically use hedges to manage the risk of an entire inventory, not just a specific options position.

We remain concerned that large and persistent fails to deliver are not being closed out due to the options market maker exception in Regulation SHO and that these fails to deliver may have a negative effect on the market in these securities. For example, large and persistent fails to deliver may deprive shareholders of the benefits of ownership, such as voting and lending. In addition, where a seller of securities fails to deliver securities on trade settlement date, in effect the seller unilaterally converts a securities contract (which should settle within the standard 3-day settlement period) into an undated futures-type contract, to which the buyer may not have agreed, or that would have been priced differently. Moreover, sellers that fail to deliver securities on settlement date may enjoy fewer restrictions than if they were required to deliver the securities within a reasonable period of time, and such sellers may attempt to use this additional freedom to engage in trading activities that deliberately depress the price of a security.

In addition, many issuers and investors continue to express concern about extended fails to deliver in connection with ''naked'' short selling.[124] To the extent that large and persistent fails to deliver may be indicative of manipulative ''naked'' short selling, which could be used as a tool to drive down a company's stock price, fails to deliver may undermine the confidence of investors.[125] These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct.[126] In addition, issuers may believe that they have suffered unwarranted reputational damage due to investors' negative perceptions regarding large and persistent fails to deliver.[127] Thus, large and persistent fails to deliver may result in an increase in artificial market influences on a security's price.[128]

Also, as part of the comment process to the proposed amendments to the options market maker exception as set forth in the 2006 Proposing Release, some commenters' statements indicated to us that the current options market maker exception might not be sufficiently narrowly tailored to limit the extent to which options market makers can claim an exception to the close-out requirement of Regulation SHO. Thus, we determined to re-propose amendments to the options market maker exception that would eliminate the exception and, thereby, reduce the number of large and persistent fails to deliver in threshold securities.

Consistent with the Commission's investor protection mandate, the proposed amendment would benefit investors by facilitating the receipt of shares so that more investors receive the benefits associated with share ownership, such as the use of the shares for voting and lending purposes. The proposal could enhance investor confidence as they make investment decisions by providing investors with greater assurance that securities would be delivered as expected. An increase in investor confidence in the market could facilitate investment.

The proposed amendment should also benefit issuers. A high level of persistent fails to deliver in a security could be perceived by potential investors negatively and could affect their decision about making a capital commitment.[129] Some issuers could believe that they have endured unwarranted reputational damage due to investors' negative perceptions regarding a security having a large fail to deliver position and becoming a threshold security.[130] Thus, issuers could believe the elimination of the options market maker exception would restore their good name. Some issuers could also believe that large and persistent fails to deliver indicate that they have been the target of potentially manipulative conduct as a result of ''naked'' short selling.[131] Thus, elimination of the options market maker could decrease the possibility of artificial market influences and, therefore, could contribute to price efficiency.

We solicit comment on any additional benefits that could be realized with the proposed amendment, including both short-term and long-term benefits. We solicit comment regarding other benefits to market efficiency, pricing efficiency, market stability, market integrity, and investor protection.

2. Costs

To comply with Regulation SHO when it became effective in January 2005, market participants needed to modify their recordkeeping systems and surveillance mechanisms. In addition, market participants should have retained and trained the necessary personnel to ensure compliance with the rule. Thus, the infrastructure necessary to comply with the proposed amendment should already be in place because the proposed amendment, if adopted, would require that all fails to deliver be closed out in accordance with the 13 consecutive settlement day mandatory close-out requirement of Regulation SHO. The only fails to deliver not subject to Regulation SHO's mandatory close-out requirement would be those fails to deliver that would be previously-excepted from the close-out requirement and, therefore, eligible for the one-time 35 day phase-in period of the proposed amendment. Thus, any changes to personnel, computer hardware and software, recordkeeping or surveillance costs should be minimal.

In the 2006 Proposing Release we requested comment regarding the costs of the proposed amendments to the options market maker exception and how those costs would affect liquidity in the options markets. Commenters who opposed the proposal to narrow the options market maker exception stated that the amendments would disrupt the markets because they would not provide sufficient flexibility to permit efficient hedging by options market makers, would unnecessarily increase risks and costs to hedge, and would adversely impact liquidity and result in higher costs to customers.[132] These commenters stated that they believe the proposed amendments would likely discourage options market makers from making markets in illiquid securities since the risk associated in maintaining the hedges in these option positions would be too great.[133] Moreover, these

[124] *See, e.g.,* supra note 8 (citing to comment letters from issuers and investors discussing extended fails to deliver in connection with ''naked'' short selling).

[125] *See, e.g., supra* note 9 (citing to comment letters discussing the impact of fails to deliver on investor confidence).

[126] *See, e.g., supra* note 10 (citing to comment letters expressing concern regarding the impact of potential ''naked'' short selling on capital formation).

[127] *See supra* note 11.

[128] *See also,* 2006 Proposing Release, 71 FR at 41712 (discussing the impact of large and persistent fails to deliver on the market). *See also,* 2003 Proposing Release, 68 FR at 62975 (discussing the impact of ''naked'' short selling on the market).

[129] *See, e.g., supra* note 10 (citing to comment letters expressing concern regarding the impact of potential ''naked'' short selling on capital formation).

[130] *See, e.g., supra* note 11.

[131] *See, e.g., supra* note 8 (citing to comment letters from issuers and investors discussing extended fails to deliver in connection with ''naked'' short selling).

[132] *See, e.g.,* letter from CBOE, *supra* note 31.

[133] *See id.*

commenters stated that the reluctance of options market makers to make markets in threshold securities would result in wider spreads in such securities to account for the increased costs of hedging, to the detriment of investors.[134]

Although we recognize commenters' concerns that a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions could potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer buy orders, or result in wider bid-ask spreads or less depth, for the reasons discussed below, we believe that such an impact, if any, would be minimal.

First, we believe that the potential effects, if any, of a mandatory close-out requirement would be minimal because the number of securities that would be impacted by a mandatory close-out requirement would be small. Regulation SHO's close-out requirement is narrowly tailored in that it targets only those securities where the level of fails to deliver is high (0.5% of total shares outstanding and 10,000 shares or more) for a continuous period (five consecutive settlement days).[135] Requiring close out only for securities with large and persistent fails to deliver limits the overall market impact. In addition, as noted by one commenter, a small number of securities that meet the definition of a ''threshold security'' have listed options, and those securities form a very small percentage of all securities that have options traded on them.[136] Moreover, the current options market maker exception only excepts from Regulation SHO's mandatory 13 consecutive settlement day close-out requirement those fail to deliver positions that result from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it does not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. Because the current options market maker exception has a very limited application, the overall impact of its removal on liquidity, hedging costs, spreads, and depth should be relatively small.

Second, to the extent that a mandatory close-out requirement could potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer buy orders, or result in wider bid-ask spreads or less depth, we believe that any such potential effects would likely be mitigated by the fact that even though fails to deliver that were previously-excepted from the close-out requirement of Regulation SHO would not be permitted to continue indefinitely, such fails to deliver would not have to be closed out immediately, or even within the standard 3-day settlement period. Instead, under Rule 203(b)(3)'s 13 consecutive settlement day close-out requirement, fails to deliver in threshold securities would have an extended period of time within which to be closed out. An extended close-out requirement would provide options market makers with some flexibility in conducting their hedging activities in that it would allow them to not close out a fail to deliver position or pre-borrow to maintain a hedge in a threshold security for 13 consecutive settlement days.

Third, as noted above, Regulation SHO's current options market maker exception is limited to only those fail to deliver positions that result from short sales effected by registered options market makers to establish or maintain a hedge on options positions established *before* the underlying security became a threshold security. Thus, it does not apply to fails to deliver resulting from short sales effected to establish or maintain a hedge on options positions established *after* the underlying security became a threshold security. In evaluating the application of the current mandatory close-out requirement of Regulation SHO for all non-excepted fail to deliver positions, we have not become aware of any evidence that the current close-out requirement for non-excepted fails to deliver in threshold securities has impacted options market makers' willingness to provide liquidity in threshold securities, made it more costly for options market makers to accommodate customer orders, or resulted in wider bid-ask spreads or less depth. Similarly, all fails to deliver in threshold securities resulting from long or short sales of securities in the equities markets must be closed out in accordance with Regulation SHO's mandatory 13 consecutive settlement day close-out requirement, and we are not aware that such a requirement has impacted the willingness of market makers to make markets in securities subject to the close-out requirement, or led to decreased liquidity, wider spreads, or less depth in these securities. Thus, we believe that the impact of requiring that fails to deliver in threshold securities resulting from short sales to hedge options positions created before the security became a threshold security be closed out would similarly be minimal, if any.

Fourth, to the extent that a mandatory close-out requirement for all fails to deliver resulting from hedging activity in the options markets could potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make a market in certain securities, we believe that such effects are justified by our belief, as discussed in more detail below, that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets.

Fifth, to the extent that a mandatory close-out requirement for all fails to deliver resulting from hedging activity in the options markets could potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make a market in certain securities, we believe that these potential effects are justified by the benefits of requiring that fails to deliver in all threshold securities be closed out within specific time-frames rather than being allowed to continue indefinitely. As discussed above, large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to manipulative conduct.

In the 2006 Proposing Release, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about ''naked'' short selling

[134] *See* letter from Citigroup, *supra* note 31.

[135] *See supra* note 7 (discussing the number of threshold securities as of March 31, 2007).

[136] *See* letter from Options Exchanges, *supra* note 49.

causing a drop in an issuer's stock price and that it may limit an issuer's ability to access the capital markets.[137] We believe that, by requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing them to continue indefinitely, there would be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the proposed amendments should improve investor confidence about the security. We also believe that the proposed amendments should lead to greater certainty in the settlement of securities which should strengthen investor confidence in the settlement process.

Due to our concerns about the potentially negative market impact of large and persistent fails to deliver, and the fact that we continue to observe a small number of threshold securities with fail to deliver positions that are not being closed out under existing delivery and settlement requirements, we adopted amendments to eliminate Regulation SHO's grandfather provision that allowed fails to deliver resulting from long or short sales of equity securities to persist indefinitely if the fails to deliver occurred prior to the security becoming a threshold security.[138] We believe that once a security becomes a threshold security, fails to deliver in that security must be closed out, regardless of whether or not the fails to deliver resulted from sales of the security in connection with the options or equities markets.

Moreover, we believe that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets. We are also concerned that the current options market maker exception might allow for a regulatory arbitrage not permitted in the equities markets. For example, an options market maker who sells short to hedge put options purchased by a market participant unable to locate shares for a short sale in accordance with Rule 203(b)(2) of Regulation SHO may not have to close out any fails to deliver that result from such short sales under the current options market maker exception. The ability of options market makers to sell short and never have to close out a resulting fail to deliver position, provided the short sale was effected to hedge options positions created before the security became a threshold security, runs counter to the goal of similar treatment for fails to deliver resulting from sales of securities in the options and equities markets, because no such ability is available in the equity markets.[139]

In addition, we believe the proposed 35 consecutive settlement day phase-in period should not result in market disruption, such as increased volatility or short squeezes, because it would provide time for participants of a registered clearing agency, or options market makers for which they clear transactions, to close out previously-excepted fail to deliver positions in an orderly manner, particularly because participants and options market makers could begin closing out previously-excepted fail to deliver positions at any time before the proposed 35 day phase-in period. The 35 day phase-in period may result in some systems and surveillance-related costs, but these costs should be one-time rather than ongoing costs because the phase-in period would expire 35 settlement days after the effective date of the proposed amendment, if adopted.

Also, the proposed pre-borrow requirement for fail to deliver positions that are not closed out within the applicable time-frames set forth in the proposed amendment would result in limited, if any, costs to participants of a registered clearing agency, and options market makers for which they clear transactions. The proposed pre-borrow requirement is similar to the pre-borrow requirement of Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted. Thus, participants of a registered clearing agency, and any options market maker for which it clears transactions, must already comply with such a requirement if a fail to deliver position has not been closed out in accordance with Regulation SHO's mandatory close-out requirement. Accordingly, these entities should already have in place the personnel, recordkeeping, systems, and surveillance mechanisms necessary to comply with the proposed pre-borrow requirement.

We seek comment about any other costs and cost reductions associated with the proposed amendment or alternative suggestions. Specifically:

- What would be the costs of the proposed elimination of the options market maker exception? How would the proposed elimination of the options market maker exception affect the liquidity of securities with options traded on them? Would the proposed elimination of the options market maker exception mean that fewer market makers would be willing to make markets in securities with options traded on them, and could the proposed amendment increase transaction costs for securities with options traded on them? Would such an effect, if any, be more severe for liquid or illiquid securities? Would it lead to fewer listed options?
- How much would this proposed amendment to the options market maker exception affect the compliance costs for small, medium, and large participants of a registered clearing agency and for options market makers (*e.g.*, personnel or system changes)? We seek comment on the costs of compliance that could arise as a result of the proposed amendment. For instance, to comply with the proposed amendment, would these entities be required to:
- Purchase new systems or implement changes to existing systems? Would changes to existing systems be significant? What would be the costs associated with acquiring new systems or making changes to existing systems? How much time would be required to fully implement any new or changed systems?
- Change existing records? What changes would need to be made? What would be the costs associated with any changes? How much time would be required to make any changes?
- Increase staffing and associated overhead costs? Would entities subject to the proposed amendment have to hire more staff? How many, and at what experience and salary level? Could existing staff be retrained? What would be the costs associated with hiring new staff or retraining existing staff? If retraining were required, what other costs could be incurred, *e.g.*, would retrained staff be unable to perform existing duties in order to comply with the proposed amendment? Would other resources need to be re-dedicated to comply with the proposed amendment?
- Implement, enhance or modify surveillance systems and procedures? Please describe what would be needed, and what costs would be incurred.
- Establish and implement new supervisory or compliance procedures, or modify existing procedures? What would be the costs associated with such changes? Would new compliance or

[137] *See, e.g.,* letter from Feeney, *supra* note 10.

[138] *See* Securities Exchange Act Release No. 56212 (Aug. 7, 2007); *see also* 2006 Proposing Release, 71 FR at 41711–41712.

[139] *See* Securities Exchange Act Release No. 56212 (Aug. 7, 2007).

supervisory personnel be needed? What would be the costs of obtaining such staff?

• Are there any costs that market participants could incur as a result of the proposed 35 consecutive settlement day phase-in period? Would the costs of a phase-in period be too significant to justify having one? Would a phase-in period create examination or surveillance difficulties? If so, how? What would be the costs and economic tradeoffs associated with longer or shorter phase-in periods?

• What would be the costs associated with including the pre-borrow requirement for the proposed amendment to the options market maker exception?

B. Alternatives to Eliminating the Options Market Maker Exception

1. Benefits

Due to the fact that large and persistent fails to deliver are not being closed out under existing delivery and settlement requirements and the fact that we are concerned that these fails to deliver may have a negative impact on the market for those securities, we believe that the options market maker exception to the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO should be eliminated.

In part, in anticipation of commenters stating that a limited options market maker exception is necessary we are requesting comment regarding two specific limited alternatives to elimination of the options market maker exception. Each of the proposed alternatives would provide for a 35 consecutive settlement day phase-in period similar to the phase-in period discussed above in connection with the proposed elimination of the options market maker exception for securities that are threshold securities on the effective date of the amendment and that have previously-excepted fail to deliver positions. The phase-in period would reduce any potential market disruption, such as increased volatility or short squeezes, from having to close-out previously-excepted fail to deliver positions because it would provide time for participants of a registered clearing agency to close out previously-excepted fail to deliver positions in an orderly manner, particularly because participants could begin closing out these fail to deliver positions at any time before the proposed 35 day phase-in period.

In addition, in response to comments about the proposed amendments to the options market maker exception in the 2006 Proposing Release that those proposed amendments would be costly and difficult to implement because portfolio hedging is the industry practice, the proposed alternatives would apply to fails to deliver resulting from short sales effected by a registered options market maker to establish or maintain a hedge on any options series, rather than an options position, created before an underlying security became a threshold security. Thus, the proposed alternatives would be more in line with industry practice and, therefore, less costly and difficult to implement than the commenters believed the proposed amendment in the 2006 Proposing Release would be.

The first alternative would require that a participant of a registered clearing agency that has a fail to deliver position in a threshold security that results or resulted from a short sale by a registered options market maker to establish or maintain a hedge on any options series within a portfolio that were created before the security became a threshold security close out the entire fail to deliver position, including any adjustments to that position, within 35 consecutive settlement days of the security becoming a threshold security. After the 35 consecutive settlement days has expired, any additional fails to deliver would be subject to the 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO. In addition, the proposed first alternative would impose a pre-borrow requirement similar to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO.

The second alternative would require that a participant of a registered clearing agency that has a fail to deliver position in a threshold security that results or resulted from a short sale by a registered options market maker to establish or maintain a hedge on any options series in a portfolio that were created before the security became a threshold security to close out the entire fail to deliver position, including any adjustments to that position, within the earlier of: (i) 35 Consecutive settlement days from the date on which the security became a threshold security, or (ii) 13 consecutive settlement days from the last date on which all options series within the portfolio that were created before the security became a threshold security expire or are liquidated. After the 35 or 13 consecutive settlement days has expired, any additional fails to deliver would be subject to the 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO. In addition, the proposed amendment would impose a pre-borrow requirement similar to the pre-borrow requirement of Rule 203(b)(3)(iv) of Regulation SHO.

Similar to elimination of the options market maker exception, by proposing to require that all fails to deliver be closed out within specific time-frames, the proposed alternatives would reduce large and persistent fails to deliver. In addition, by proposing to require that shares be delivered to a buyer within a reasonable period of time, the proposed alternatives would result in shareholders receiving the benefits of ownership. Sellers would also be less able to unilaterally convert securities contracts into undated futures-type contracts to which the buyer would not have agreed, or that would have been priced differently. In addition, the delivery requirements of the proposed alternatives would enhance investor confidence as they make investment decisions by providing investors with greater assurance that securities would be delivered as expected.[140] An increase in investor confidence in the market could facilitate investment. The proposed alternatives could benefit issuers because investors may be more willing to commit capital where fails levels are lower.[141] In addition, some issuers could believe that a reduction in fails to deliver could reverse unwarranted reputational damage potentially caused by large and persistent fails to deliver and what they believe might be an indication of manipulative trading activities, such as ''naked'' short selling.[142] Thus, the proposed requirement that all fails to deliver be closed out within specific time-frames, as would be required by the proposed alternatives, could decrease the possibility of artificial market influences and, therefore, could contribute to price efficiency.

The proposed alternatives would also require that participants of a registered clearing agency and options market makers document that any fails to deliver in threshold securities that have not been closed out in accordance with the 13 consecutive settlement days close-out requirement of Rule 203(b)(3) of Regulation SHO qualify for the options market maker exception. The proposed alternatives would require both options market makers and participants of a registered clearing agency that rely on the options market maker exception to not close out a fail

[140] *See, e.g., supra* note 9 (citing to comment letters discussing the impact of fails to deliver on investor confidence).

[141] *See, e.g., supra* note 10 (citing to comment letters expressing concern regarding the impact of potential ''naked'' short selling on capital formation).

[142] *See, e.g., supra* note 11.

to deliver position in accordance with the mandatory close-out requirement of Rule 203(b)(3) of Regulation SHO to obtain, prepare, and keep documentation demonstrating that a fail to deliver position has not been closed out because it qualified for the exception. We anticipate such documentation could include, among other things, when the series being hedged was created, when the underlying security became a threshold security, and the age of the fail to deliver position that is not being closed out.

A documentation requirement would enable the Commission and the SROs to monitor more easily whether or not the options market maker exception is being applied correctly. In addition, the information would provide a record that would aid surveillance for compliance with this limited exception to Regulation SHO's close-out requirement.

We solicit comment on any additional benefits that could be realized with the proposed alternatives, including both short-term and long-term benefits. We solicit comment regarding other benefits to market efficiency, pricing efficiency, market stability, market integrity, and investor protection.

2. Costs

To comply with Regulation SHO when it became effective in January 2005, market participants needed to modify their recordkeeping, systems, and surveillance mechanisms. In addition, market participants should have retained and trained the necessary personnel to ensure compliance with the rule. Thus, for the most part the infrastructure necessary to comply with the proposed alternatives should already be in place because the proposed alternatives, if adopted, would require that all fails to deliver be closed out in accordance with specific time-frames similar to the mandatory 13 consecutive settlement day close-out requirement of Regulation SHO. In addition, similar to the current options market maker exception in Regulation SHO, the proposed alternatives would only except from the mandatory close-out requirement of Rule 203(b)(3) those fails to deliver that resulted from short sales by a registered options market maker in connection with options created before the security became a threshold security.

The proposed alternatives, however, would result in some increased recordkeeping, systems, and surveillance costs. The proposed alternatives would require that participants of a registered clearing agency, and options market makers for which they clear transactions, have the necessary recordkeeping, systems, and surveillance mechanisms in place to track whether a fail to deliver position resulted from a short sale effected by a registered options market maker to maintain or establish a hedge on option series created before the security became a threshold security. In addition, under the first proposed alternative, these entities would need to have systems and surveillance mechanisms in place to ensure that such fails to deliver are closed out within 35 consecutive settlement days of the security becoming a threshold security. Under the second proposed alternative, these entities would need to have systems and surveillance mechanisms in place to determine whether the fails to deliver would be required to be closed out within the earlier of 13 consecutive settlement days of all options series within the portfolio expiring or being liquidated, or within 35 consecutive settlement days of the security becoming a threshold security. Thus, participants of a registered clearing agency, and options market makers for which they clear, could incur costs in meeting these requirements.

In addition, the proposed alternatives would allow for a one-time 35 consecutive settlement day phase-in period for previously-excepted fail to deliver positions. Although any personnel, computer hardware and software, recordkeeping, or surveillance costs, associated with complying with this proposed phase-in period would not be an ongoing cost, entities subject to the requirement could incur some one-time costs in complying with this proposed requirement.

Any costs associated with compliance with the proposed pre-borrow requirement for fail to deliver positions that are not closed out within the applicable time-frames set forth in the proposed alternatives should be limited, if any. The proposed pre-borrow requirements in the proposed alternatives are similar to the pre-borrow requirement of Rule 203(b)(3)(iii) of Regulation SHO, as originally adopted. Thus, participants of a registered clearing agency, and any broker-dealers for which it clears transactions, must already comply with such a requirement if a fail to deliver position has not been closed out in accordance with Regulation SHO's mandatory close-out requirement. Accordingly, these entities should already have in place the personnel, recordkeeping, systems, and surveillance mechanisms necessary to comply with the proposed pre-borrow requirement.

As discussed above in connection with costs regarding the proposed elimination of the options market maker exception, although we recognize commenters' concerns that a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions could potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer orders, or result in wider bid-ask spreads or less depth,[143] we believe the mandatory close-out requirements of each of the proposed alternatives would similarly minimally impact, if at all, liquidity, hedging costs, spreads, or depth in the securities subject to the close-out requirements of the proposed alternatives, or the willingness of options market makers to make markets in such securities.

We believe that these potential effects of the close-out requirements of the proposed alternatives would be minimal, if any, because the number of securities that would be impacted by the close-out requirements of the proposed alternatives would be small. The proposed alternatives would apply only to those threshold securities with listed options[144] and would only impact fails to deliver in those securities that resulted from short sales by registered options market makers to hedge options series that were created before rather than after the security became a threshold security because all other fails to deliver in threshold securities are subject to Regulation SHO's current mandatory 13 consecutive settlement day close-out requirement.

In addition, the proposed alternatives would provide options market makers with flexibility in conducting their hedging activities because they would each allow an extended period of time (*i.e.*, 35 consecutive settlement days for purposes of Alternative 1 and 13 or 35 consecutive settlement days for purposes of Alternative 2) within which to close out all fails to deliver in threshold securities. As discussed above in connection with the proposed amendment to eliminate the options market maker exception, we believe that even a 13 consecutive settlement day close-out requirement would result in minimal impact on the willingness of

[143] *See, e.g.*, letters from CBOE, *supra* note 31; Citigroup, *supra* note 31.

[144] *See* letter from Options Exchanges, *supra* note 49 (discussing the number of threshold securities with listed options).

options market makers to make markets, liquidity, hedging costs, depth, and spreads because it would allow options market makers flexibility in conducting their hedging activities by permitting fails to deliver to remain open for an extended period of time (*i.e.*, 13 consecutive settlement days) rather than, for example, requiring that such fails to deliver be closed out immediately, or even within the standard 3-day settlement period. During the period of time that the fail to deliver position can remain open, options market makers would be able to continue any hedging activity without having to close out the fail to deliver position or pre-borrow to maintain the hedge.

In addition, we believe the proposed 35 consecutive settlement day phase-in period should not result in market disruption, such as increased volatility or short squeezes, because it would provide time for participants of a registered clearing agency to close out previously-excepted fail to deliver positions in an orderly manner, particularly because participants could begin closing out previously-excepted fail to deliver positions at any time before the proposed 35 day phase-in period.

As discussed above in connection with the costs associated with elimination of the options market maker exception, to the extent that the mandatory close-out requirements of the proposed alternatives could potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make markets in securities subject to the proposed alternatives, we believe such effects are justified by our belief that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets. In addition, we believe that such potential costs would be justified by the benefits, as discussed above, of requiring that all fails to deliver be closed out within specific time-frames rather than being allowed to continue indefinitely.

Although the proposed alternatives would lessen the potential negative impact on the market of large and persistent fails to deliver similar to the proposed elimination of the options market maker exception because they would require that fails to deliver in threshold securities eventually be closed out, we believe that the proposed elimination of the options market maker exception would achieve this goal more effectively because under the proposed elimination of the options market maker exception, all fails to deliver in threshold securities would have to be closed out within Regulation SHO's mandatory 13 consecutive settlement day close-out requirement. The proposed alternatives, however, would each allow a longer period of time for fail to deliver positions to be closed out. Specifically, the first alternative would allow certain fails to deliver to be closed out within 35 consecutive settlement days of the security becoming a threshold security. Under the second alternative, although some fails to deliver would be required to be closed out in less than 35 consecutive settlement days, other fails to deliver would not have be closed out until 35 consecutive settlement days from the security becoming a threshold security.

The proposed alternatives would also impose recordkeeping costs not imposed by the proposed amendment to eliminate the options market maker exception. The documentation requirement of the proposed alternatives would require options market makers and participants of a registered clearing agency to obtain, prepare, and keep documentation demonstrating that a fail to deliver position has not been closed out because it was eligible for the exception. This documentation requirement could result in these entities incurring costs related to personnel, recordkeeping, systems and surveillance mechanisms. For example, as discussed in detail in Section VI.D.i. above, for purposes of the PRA, we estimate that it would take each options market maker or participant of a registered clearing agency no more than approximately 10 minutes to document that a fail to deliver position has not been closed out due to its eligibility for the options market maker exception. In addition, we estimate that the total annual hour burden per year for each options market maker subject to the documentation requirement would be 3,024 burden hours. We estimate that the total annual hour burden per year for each participant of a registered clearing agency subject to the documentation requirement would be 120 burden hours.

We request specific comment on the systems changes to computer hardware and software, or surveillance costs that would be necessary to implement the proposed alternatives. Specifically:

- What would be the costs and benefits of the proposed alternatives to elimination of the options market maker exception? For instance, what would be the costs of the proposed alternatives if either of the alternatives were to reduce the willingness of options market makers to make markets in securities that could become threshold securities or in threshold securities?
- What would be the costs associated with including the pre-borrow requirement for the proposed alternatives to the options market maker exception? What would be the costs of excluding a pre-borrow requirement for these proposals?
- What costs would be associated with the documentation requirement of the proposed alternatives?
- Based on the current requirements of Regulation SHO, what have been the costs and benefits of the current options market maker exception?
- What would be the specific costs associated with any technical or operational challenges that options market makers would face in complying with the proposed alternatives?
- Would the proposed alternatives create any costs, such as costs associated with systems, surveillance, or recordkeeping modifications that may be needed for participants to track fails to deliver subject to the proposed alternatives? If there were any costs associated with tracking fails to deliver would these costs justify the benefits of providing firms with additional time to close out fails to deliver resulting from short sales effected to establish or maintain a hedge on options series that were created before the security becomes a threshold security?
- How much would the proposed alternatives affect compliance costs for small, medium, and large participants of a clearing agency or options market maker for which they clear transactions (*e.g.*, personnel or system changes)? We seek comment on the costs of compliance that may arise. For instance, to comply with the proposed alternatives, would these entities be required to:
- Purchase new systems or implement changes to existing systems? Would changes to existing systems be significant? What would be the costs associated with acquiring new systems or making changes to existing systems? How much time would be required to fully implement any new or changed systems?
- Change existing records? What changes would need to be made? What would be the costs associated with any changes? How much time would be required to make any changes?
- Increase staffing and associated overhead costs? Would entities subject to the proposed alternatives have to hire more staff? How many, and at what

experience and salary level? Could existing staff be retrained? What would be the costs associated with hiring new staff or retraining existing staff? If retraining were required, what other costs could be incurred, *e.g.*, would retrained staff be unable to perform existing duties in order to comply with the proposed amendment? Would other resources need to be re-dedicated to comply with the proposed amendment?

- Implement, enhance or modify surveillance systems and procedures? Please describe what would be needed, and what costs would be incurred.
- Establish and implement new supervisory or compliance procedures, or modify existing procedures? What would be the costs associated with such changes? Would new compliance or supervisory personnel be needed? What would be the costs of obtaining such staff?
- Are there any costs that participants could incur as a result of the proposed 35 consecutive settlement day phase-in period? Would the costs of a phase-in period be too significant to justify having one? Would a phase-in period create examination or surveillance difficulties? If so, how? What would be the costs and economic tradeoffs associated with longer or shorter phase-in periods?

C. Proposed Amendment to Rule 200(g)(1) of Regulation SHO

1. Benefits

We are proposing for comment a documentation requirement for broker-dealers marking orders to sell ''long'' pursuant to Regulation SHO that would require such broker-dealers to document the present location of the securities being sold. We believe that such a proposed documentation requirement would aid in ensuring the correct marking of sell orders. To the extent that the seller is unable to provide the present location of the securities being sold, the broker-dealer would have reason to believe that the seller is not ''deemed to own'' the securities being sold and that the securities would not be in its physical possession or control no later than settlement of the transaction and, therefore, that the broker-dealer would be required to mark the sale ''short'' rather than ''long.'' [145] We believe that this proposed documentation requirement could also reduce the number of fails to deliver because, after making the inquiry into the present location of the securities being sold, a broker-dealer would know whether or not it needed to obtain securities for delivery.

We are concerned that broker-dealers marking orders ''long'' may not be making a determination prior to marking the order that the seller is ''deemed to own'' the security being sold. Rule 200(g)(1) currently requires that broker-dealers ascertain whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' [146] Thus, we believe that the proposed documentation requirement would help ensure that the broker-dealer marking the sale ''long'' has inquired into, and determined that, the seller is ''deemed to own'' the securities being sold because the broker-dealer would be required to document the present location of the securities being sold.

We also believe that the proposed documentation requirement would enable the Commission and SROs to more easily examine for compliance with the long sale marking provisions of Rule 200(g) more effectively because this proposed documentation requirement would provide a record that the seller is ''deemed to own'' the securities being sold in compliance with that rule. We also believe that the proposed documentation requirement would aid the Commission and SROs in reviewing for mismarking designed to avoid compliance with other rules and regulations of the federal securities laws, such as the ''locate'' requirement of Regulation SHO,[147] and Rule 105 of Regulation M.[148]

2. Costs

In response to our request for comment in the 2006 Proposing Release regarding a long sale documentation requirement, commenters stated that pre-trade documentation would unnecessarily impair efficiency as broker-dealers already have procedures to ensure orders are marked properly based on information provided by customers and their own books and records, and that documentation requirements would add substantial cost.[149] One commenter also stated that compliance with such pre-trade documentation requirements would require a complete revamping of front end systems.[150] Another commenter stated that the requirements would be inconsistent with the goal of fostering liquidity.[151]

Although commenters stated that pre-trade documentation for long sales would be inconsistent with the goal of fostering liquidity, would unnecessarily impair efficiency, and would add substantial cost, we believe that such costs, to the extent that there are any, would be justified by the benefits of a documentation requirement, as discussed above.

In addition, we note that under former NASD Rule 3370(b), NASD member firms making an affirmative determination that a customer was long were required to make a notation on the order ticket at the time an order was taken which reflected the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days.[152] Thus, many broker-dealers should already be familiar with a documentation requirement and one method that could be used to comply with such a requirement. Such familiarity should help reduce any costs associated with implementing the proposed documentation requirement. In addition, unlike with former NASD Rule 3370(b), the proposed amendment would not specify the format or methodology of the proposed documentation requirement. The absence of such specifications should help reduce costs to broker-dealers that would have to comply with this proposal because broker-dealers would be able to determine the most cost effective format and methodology for meeting the proposed documentation requirement.

We believe that any costs that would arise from the proposed requirement that a broker-dealer must document the present location of securities being sold long when making the determination that a customer is deemed to own the securities being sold would be minimal because Rule 200(g)(1) currently requires that broker-dealers must ascertain whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' [153] Today's proposed amendment would require that the broker-dealer take the additional step of documenting the present location of the securities being sold. Broker-dealers could, however, need to put mechanisms in place to facilitate efficient documenting of the

[145] *See* 17 CFR 242.200(g).

[146] *See id.*

[147] *See supra,* note 92.

[148] *See supra,* note 93.

[149] *See* letters from MFA, *supra* note 75; UBS, *supra* note 31; Knight, *supra* note 75.

[150] *See* letter from SIA, *supra* note 31.

[151] *See* letter from Millennium, *supra* note 75.

[152] Brokers and dealers that were members of the NASD were obligated to comply with former NASD Rule 3370(b) prior to the adoption of Regulation SHO.

[153] *See* 17 CFR 242.200(g)(1).

information required by the proposed amendment.

As discussed above in Section VI.D.ii., the paperwork burden is estimated at approximately 49 burden hours for each broker-dealer registered with the Commission, if the documentation process were automated. To the extent that broker-dealers need to automate the documentation process, we anticipate that such broker-dealers would spend varying amounts of time reprogramming systems, integrating systems, and potentially updating front-end software. Some broker-dealers may spend very little time automating the documentation process, while changes at other broker-dealers might be more involved. On average, we estimate that reprogramming burdens at a broker-dealer would be approximately 16 hours (or two days) with one programmer. This would cost $1,072 per broker-dealer (16 hours @ $67 per hour) or an aggregate of $6,226,176 across all broker-dealers.[154]

The Commission does not believe there are any additional costs to this proposal; however we seek any data supporting any additional costs not mentioned. In addition, we request specific comment on any systems changes to computer hardware and software, or surveillance costs that might be necessary to implement the proposed amendment. Specifically:

- What would be the costs and benefits of the proposed documentation requirement?
- Would the proposed amendment create any costs, such as costs associated with systems, surveillance, or recordkeeping modifications that may be needed for broker-dealers to document the present location of shares being sold? If there were any costs associated with the proposed documentation requirement would these costs justify the benefits of better ensuring compliance with federal securities laws?
- How much would the proposed amendment affect compliance costs for small, medium, and large broker-dealers (*e.g.*, personnel or system changes)? We seek comment on the costs of compliance that may arise. For instance, to document the location of shares being sold, would these entities be required to:
- Purchase new systems or implement changes to existing systems? Would changes to existing systems be significant? What would be the costs associated with acquiring new systems or making changes to existing systems? How much time would be required to fully implement any new or changed systems?
- Change existing records? What changes would need to be made? What would be the costs associated with any changes? How much time would be required to make any changes?
- Increase staffing and associated overhead costs? Would entities subject to the proposed amendment have to hire more staff? How many, and at what experience and salary level? Could existing staff be retrained? What would be the costs associated with hiring new staff or retraining existing staff? If retraining were required, what other costs could be incurred, *e.g.*, would retrained staff be unable to perform existing duties in order to comply with the proposed amendment? Would other resources need to be re-dedicated to comply with the proposed amendment?
- Implement, enhance or modify surveillance systems and procedures? Please describe what would be needed, and what costs would be incurred.
- Establish and implement new supervisory or compliance procedures, or modify existing procedures? What would be the costs associated with such changes? Would new compliance or supervisory personnel be needed? What would be the costs of obtaining such staff?

VIII. Consideration of Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.[155] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[156] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We believe the proposed amendments, including the proposed alternatives, would have minimal impact on the promotion of price efficiency. In the 2006 Proposing Release we sought comment on whether the proposals would promote price efficiency, including whether the proposals might impact liquidity and the potential for manipulative short squeezes. One commenter stated that the Commission's concern over potential short squeezes is ''misplaced,'' as this is a risk short sellers assume when they sell short.[157] Other commenters stated, however, that the proposed amendment to the options market maker exception would disrupt the markets because they would not provide sufficient flexibility to permit efficient hedging by options market makers, would unnecessarily increase risks and costs to hedge, and would adversely impact liquidity and result in higher costs to customers.[158] These commenters stated that they believe the proposed amendments would likely discourage options market makers from making markets in illiquid securities since the risk associated in maintaining the hedges in these option positions would be too great.[159] Moreover, these commenters stated that the reluctance of options market makers to make markets in threshold securities would result in wider spreads in such securities to account for the increased costs of hedging, to the detriment of investors.[160]

Although we recognize commenters' concerns that a mandatory close-out requirement for fails to deliver in threshold securities underlying options positions could potentially impact options market makers' willingness to provide liquidity in threshold securities, make it more costly for options market makers to accommodate customer orders, or result in wider bid-ask spreads or less depth,[161] we believe that the proposed elimination of the options market maker exceptions, and the mandatory close-out requirements of the proposed alternatives, would minimally impact, if at all, liquidity, hedging costs, spreads, or depth in the securities subject to these proposals, or the willingness of options market makers to make markets in such securities.

We believe that these potential effects of the elimination of the options market maker exception, or the proposed close-out requirements of the proposed alternatives would be minimal, if any, because the number of securities that would be impacted by these proposals

[154] The $67/hour figure for a computer programmer is based on the salary for a Senior Computer Operator from the SIA *Report on Office Salaries in the Securities Industry 2006,* modified to account for an 1800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[155] 15 U.S.C. 78c(f).

[156] 15 U.S.C. 78w(a)(2).

[157] *See* letter from H. Glenn Bagwell, Jr., dated Sept. 19, 2006.

[158] *See, e.g.*, letter from CBOE, *supra* note 31.

[159] *See id.*

[160] *See* letter from Citigroup, *supra* note 31.

[161] *See, e.g.*, letters from CBOE, *supra* note 31; Citigroup, *supra* note 31.

would be relatively small. The proposal would apply only to those threshold securities with listed options[162] and would only impact fails to deliver in those securities that resulted from short sales by registered options market makers to hedge options series (or options positions in the case of the proposed elimination of the current options market maker exception) that were created before, rather than after, the security became a threshold security because all other fails to deliver in threshold securities are currently subject to Regulation SHO's mandatory 13 consecutive settlement day close-out requirement.

In addition, as discussed above in connection with the proposed amendment to eliminate the options market maker exception, we believe that even a 13 consecutive settlement day close-out requirement would result in minimal impact on the willingness of options market makers to make markets, liquidity, hedging costs, depth, and spreads of a mandatory close-out requirement because it would allow options market makers flexibility in conducting their hedging activities by permitting fails to deliver to remain open for an extended period of time (*i.e.*, 13 consecutive settlement days) rather than, for example, requiring that such fails to deliver be closed out immediately, or even within the standard 3-day settlement period. The close-out requirements of the proposed alternatives would provide options market makers with even greater flexibility in conducting their hedging activities because they would each allow even longer periods of time than the 13 consecutive settlement days allowed by current Rule 203(b)(3) of Regulation SHO (*i.e.*, 35 consecutive settlement days for purposes of proposed Alternative 1, and 13 or 35 consecutive settlement days for purposes of proposed Alternative 2) within which to close out all fails to deliver in threshold securities.

In addition, we believe the proposed 35 consecutive settlement day phase-in period for each of the proposals should not result in market disruption, such as increased volatility or short squeezes, because it would provide time for participants of a registered clearing agency to close out previously-excepted fail to deliver positions in an orderly manner, particularly because participants could begin closing out previously-excepted fail to deliver positions at any time before the proposed 35 day phase-in period.

To the extent that a mandatory close-out requirement could potentially impact liquidity, hedging costs, depth, or spreads, or impact the willingness of options market makers to make markets in securities subject to such a requirement, we believe such effects are justified by our belief that fails to deliver resulting from hedging activities by options market makers should be treated similarly to fails to deliver resulting from sales in the equities markets so that market participants trading threshold securities in the options markets do not receive an advantage over those trading such securities in the equities markets. In addition, we believe that such potential costs would be justified by the benefits, as discussed below, of requiring that all fails to deliver be closed out within specific time-frames rather than being allowed to continue indefinitely.

The proposed amendment to Rule 200(g) of Regulation SHO to require broker-dealers to document the present location of securities being sold in connection with an order marked ''long'' would promote price efficiency by reducing non-compliance with short sale-related regulations, such as Rule 105 of Regulation M, that we believe are beneficial to pricing efficiency.

In addition, we believe that the proposed amendments, including the alternative proposals, would have minimal impact on the promotion of capital formation. Large and persistent fails to deliver can deprive shareholders of the benefits of ownership, such as voting and lending. They can also be indicative of potentially manipulative conduct, such as abusive ''naked'' short selling. The deprivation of the benefits of ownership, as well as the perception that abusive ''naked'' short selling is occurring in certain securities, can undermine the confidence of investors. These investors, in turn, may be reluctant to commit capital to an issuer they believe to be subject to such manipulative conduct. In the 2006 Proposing Release, we sought comment on whether the proposed amendments would promote capital formation, including whether the proposed increased short sale restrictions would affect investors' decisions to invest in certain equity securities. Commenters expressed concern about the potential impact of ''naked'' short selling on capital formation claiming that ''naked'' short selling causes a drop in an issuer's stock price that may limit the issuer's ability to access the capital markets.[163] Another commenter submitted a theoretical economic study concluding that ''naked'' short selling is economically similar to other short selling.[164]

By requiring that all fails to deliver in threshold securities be closed out within specific time-frames rather than allowing them to continue indefinitely, we believe that there would be a decrease in the number of threshold securities with persistent and high levels of fails to deliver. If persistence on the threshold securities lists leads to an unwarranted decline in investor confidence about the security, the proposed amendments should improve investor confidence about the security. We also believe that the proposed amendments should lead to greater certainty in the settlement of securities which should strengthen investor confidence in the settlement process. The reduction in fails to deliver and the resulting reduction in the number of securities on the threshold securities lists could result in increased investor confidence.

The proposed amendment to eliminate the options market maker exception and the proposed alternatives also would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. By eliminating the options market maker exception, or, alternatively, adopting a limited options market maker exception, the Commission believes the proposals would promote competition by requiring similarly situated participants of a registered clearing agency, or options market makers for which they clear transactions, to close out fails to deliver in threshold securities within similar time-frames.

The Commission requests comment on whether the proposed amendment to eliminate the options market maker exception, the proposed alternatives, and the proposed amendment to Rule 200(g) of Regulation SHO, would promote efficiency, competition, and capital formation.

IX. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [165] we must advise the Office of Management and Budget as to whether the proposed regulation constitutes a ''major'' rule. Under

[162] *See* letter from Options Exchanges, *supra* note 49 (discussing the number of threshold securities with listed options).

[163] *See, e.g.*, letter from Feeney, *supra* note 10.

[164] *See* comment letter from J.B. Heaton, Bartlit Beck Herman Palenchar & Scott LLP, dated May 1, 2007.

[165] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effect on competition, investment or innovation.

If a rule is ''major,'' its effectiveness will generally be delayed for 60 days pending Congressional review. We request comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

X. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (''IRFA''), in accordance with the provisions of the Regulatory Flexibility Act (''RFA''),[166] regarding the proposed amendments to Rules 200 and 203 of Regulation SHO under the Exchange Act.

A. Reasons for the Proposed Action

On July 14, 2006, the Commission published proposed amendments to the options market maker exception contained in Regulation SHO to limit the duration of the exception.[167] We proposed to narrow the options market maker exception at that time because we have observed a small number of threshold securities with substantial and persistent fail to deliver positions that are not being closed out under existing delivery and settlement requirements, and we believe that these persistent fail to deliver positions are attributable, in part, to the current options market maker exception in Regulation SHO.[168]

As a result of the comment process, however, we learned that the amendment, as proposed, could be very costly and difficult to implement or possibly unworkable because options market makers typically use hedges to manage the risk of an entire inventory, not just a specific options position. In addition, some commenters' statements indicated to us that options market makers may be interpreting the current options market maker exception more broadly than the Commission intended and possibly in violation of the exception. We also remain concerned that large and persistent fails to deliver may have a negative effect on the market in these securities. Although high fails levels exist only for a small percentage of securities, these fails to deliver could potentially impede the orderly functioning of the market for such securities, particularly less liquid securities. For example, a significant level of fails to deliver in a security may have adverse consequences for shareholders who may be relying on delivery of those shares for voting and lending purposes, or may otherwise affect an investor's decision to invest in that particular security. In addition, a seller that fails to deliver securities on settlement date effectively unilaterally converts a securities contract into an undated futures-type contract, to which the buyer might not have agreed, or that might have been priced differently.

Thus, we determined to re-propose amendments to the options market maker exception that would eliminate the exception. In addition, we are requesting comment regarding two specific alternatives to our proposal to eliminate the options market maker exception that would require fails to deliver in threshold securities underlying options to be closed out within specific time-frames. By re-proposing amendments to the options market maker exception we seek additional information regarding the options markets that might assist us in determining whether or not to eliminate the options market maker exception.

We are also proposing an amendment to the long sale marking provisions of Rule 200(g)(1) of Regulation SHO that would require that broker-dealers marking orders to sell ''long'' document the present location of the securities. We believe that such a proposed documentation requirement would aid in ensuring the correct marking of sell orders. To the extent that the seller is unable to provide the present location of the securities being sold, the broker-dealer would have reason to believe that the seller is not ''deemed to own'' the securities being sold and that the securities would not be in its physical possession or control no later than settlement of the transaction and, therefore, that the broker-dealer would be required to mark the sale ''short'' rather than ''long.'' [169] We believe that this proposed documentation requirement could also reduce the number of fails to deliver because, after making the inquiry into the present location of the securities being sold, a broker-dealer would know whether or not it needed to obtain securities for delivery.

We are concerned that broker-dealers marking orders ''long'' may not be making a determination prior to marking the order that the seller is ''deemed to own'' the security being sold. Rule 200(g)(1) currently requires that broker-dealers ascertain whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' [170] Thus, we believe that the proposed documentation requirement would help ensure that the broker-dealer marking the sale ''long'' has inquired into, and determined that, the seller is ''deemed to own'' the securities being sold because the broker-dealer would be required to document the present location of the securities being sold.

We also believe that the proposed documentation requirement would enable the Commission and SROs to more easily examine for compliance with the long sale marking provisions of Rule 200(g) more effectively because this proposed documentation requirement would provide a record that the seller is ''deemed to own'' the securities being sold in compliance with that rule. We also believe that the proposed documentation requirement would aid the Commission and SROs in reviewing for mismarking designed to avoid compliance with other rules and regulations of the federal securities laws, such as the ''locate'' requirement of Regulation SHO,[171] and Rule 105 of Regulation M.[172]

B. Objectives

Our proposals regarding the options market maker exception are intended to further reduce the number of persistent fails to deliver in threshold securities. The proposed amendment to eliminate the options market maker exception, and the alternative proposals, are designed to help reduce persistent and large fail to deliver positions which may have a negative effect on the market in these securities and also could be used to facilitate manipulative trading strategies.

Although high fails levels exist only for a small percentage of issuers,[173] they could impede the orderly functioning of the market for such issuers, particularly issuers of less liquid securities. For example, a significant level of fails to deliver in a security may have adverse consequences for shareholders who may be relying on delivery of those shares for

[166] 5 U.S.C. 603.

[167] 2006 Proposing Release, 71 FR 41710.

[168] *See id.* at 41712; Regulation SHO Re-Opening Release, 72 FR at 15079–15080.

[169] *See* 17 CFR 242.200(g).

[170] *See id.*

[171] *See supra*, note 92.

[172] *See supra*, note 93.

[173] *See supra* note 7.

voting and lending purposes, or may otherwise affect an investor's decision to invest in that particular security. In addition, a seller that fails to deliver securities on settlement date effectively unilaterally converts a securities contract into an undated futures-type contract, to which the buyer might not have agreed, or that would have been priced differently.

To allow market participants sufficient time to comply with the new close-out requirements, the proposed amendment to eliminate the options market maker exception and the proposed alternatives would include a one-time 35 consecutive settlement day phase-in period following the effective date of the amendment. The phase-in period would provide participants flexibility in closing out previously-excepted fail to deliver positions.

By proposing an amendment to Rule 200(g)(1) of Regulation SHO that would require broker-dealers to document the present location of securities a customer is deemed to own, we intend to aid surveillance for compliance with the marking requirements of Rule 200(g). In addition, such a requirement would help to ensure that broker-dealers only mark orders ''long'' after making a determination that a customer actually owns the securities being sold.

C. Legal Basis

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 9(h), 10(a), 11A, 15, 17(a), 19, 23(a) thereof, 15 U.S.C. 78b, 78c, 78i, 78j, 78k–l, 78o, 78q, 78s, 78w(a), the Commission is proposing amendments to §§ 242.200 and 242.203 of Regulation SHO.

D. Small Entities Subject to the Rule

The entities covered by these proposals would include small entities that are participants of a registered clearing agency, including small registered options market makers for which the participant clears trades or for which it is responsible for settlement. In addition, the entities covered by these proposals would include small entities that are market participants that effect sales subject to the requirements of Regulation SHO. Most small entities subject to the proposed amendments, including the proposed alternatives, would be registered broker-dealers. Although it is impossible to quantify every type of small entity covered by these proposals, Paragraph (c)(1) of Rule 0–10 [174] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2006, the Commission estimates that there were approximately 894 registered broker-dealers that qualified as small entities as defined above.[175]

As noted above, the entities covered by these amendments will include small entities that are participants of a registered clearing agency. As of May 2007, approximately 90% of participants of the NSCC, the primary registered clearing agency responsible for clearing U.S. transactions, were registered as broker-dealers. Participants not registered as broker-dealers include such entities as banks, U.S.-registered exchanges, and clearing agencies. Although these entities are participants of a registered clearing agency, generally these entities do not engage in the types of activities that would implicate the close-out requirements of Regulation SHO. Such activities of these entities include creating and redeeming Exchange Traded Funds, trading in municipal securities, and using NSCC's Envelope Settlement Service or Inter-city Envelope Settlement Service. These activities rarely lead to fails to deliver and, if fails to deliver do occur, they are small in number and are usually cleaned up within a day. Thus, such fails to deliver would not trigger the close-out provisions of Regulation SHO.

The federal securities laws do not define what is a ''small business'' or ''small organization'' when referring to a bank. The Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[176] As of May, 2007 no bank that was a participant of the NSCC was a small entity because none met this criteria.

Paragraph (e) of Rule 0–10 under the Exchange Act [177] states that the term ''small business'' or ''small organization,'' when referring to an exchange, means any exchange that: (1) Has been exempted from the reporting requirements of Rule 11Aa3–1 under the Exchange Act; and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10. No U.S. registered exchange is a small entity because none meets these criteria. There is one national securities association (NASD) that is subject to these amendments. NASD is not a small entity as defined by 13 CFR 121.201.

Paragraph (d) of Rule 0–10 under the Exchange Act [178] states that the term ''small business'' or ''small organization,'' when referring to a clearing agency, means a clearing agency that: (1) Compared, cleared and settled less than $500 million in securities transactions during the preceding fiscal year (or in the time that it has been in business, if shorter); (2) had less than $200 million in funds and securities in its custody or control at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); and (3) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined by Rule 0–10. No clearing agency that is subject to the requirements of Regulation SHO is a small entity because none meets these criteria.

E. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed amendment to eliminate the options market maker exception, and the proposed alternatives, would impose some new or additional reporting, recordkeeping, or compliance costs on broker-dealers that are small entities. In order to comply with Regulation SHO when it became effective in January, 2005, entities needed to modify their systems and surveillance mechanisms. Thus, the infrastructure necessary to comply with the proposed amendments regarding elimination of the options market maker exception should already be in place. Any additional changes to the infrastructure should be minimal. In addition, entities that would be subject to the mandatory 13 consecutive settlement day close-out requirement of Rule 203(b)(3) of Regulation SHO should already have systems in place to close out non-excepted fails to deliver as required by Regulation SHO. These entities, however, could be required to modify their systems and surveillance mechanisms to ensure compliance with the proposed alternatives to eliminating the options market maker exception.

These entities could also be required to put in place mechanisms to facilitate communications between participants

[174] 17 CFR 240.0–10(c)(1).

[175] These numbers are based on the Commission's Office of Economic Analysis's review of 2006 FOCUS Report filings reflecting registered broker dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[176] *See* 13 CFR 121.201.

[177] 17 CFR 240.0–10(e).

[178] 17 CFR 240.0–10(d).

of a registered clearing agency and options market makers to meet the documentation requirements of the proposed alternatives. We solicit comment on what new recordkeeping, reporting or compliance requirements could arise as a result of the proposed amendment to eliminate the options market maker exception and the proposed alternatives to elimination that would require fails to deliver in threshold securities underlying options to be closed out within specific time-frames.

The proposed amendment to Rule 200(g)(1) that would require that broker-dealers document the present location of securities a customer is deemed to own prior to marking an order to sell ''long'' could impose some new or additional reporting, recordkeeping, or compliance costs on broker-dealers that are small entities. We believe, however, that such costs should be minimal. Rule 200(g)(1) currently requires that broker-dealers must determine whether the customer is ''deemed to own'' the securities being sold before marking a sell order ''long.'' Today's proposed amendment would require that the broker-dealer take the additional step of documenting the present location of the securities being sold. Broker-dealers may, however, need to put mechanisms in place to facilitate efficient documenting of the information that would be required by the proposed amendment.

Moreover, we note that under former NASD Rule 3370(b), NASD member firms making an affirmative determination that a customer was long were required to make a notation on the order ticket at the time an order was taken which reflected the conversation with the customer as to the present location of the securities, whether they were in good deliverable form, and the customer's ability to deliver them to the member within three business days. Thus, many broker-dealers that are small entities should already be familiar with a documentation requirement and with one method that could be used to comply with such a requirement. We solicit comment, however, on what new recordkeeping, reporting or compliance requirements may arise as a result of the proposed amendment to Rule 200(g)(1) of Regulation SHO.

F. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap, or conflict with the proposed amendments.

G. Significant Alternatives

The RFA directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small issuers and broker-dealers. Pursuant to Section 3(a) of the RFA,[179] the Commission must consider the following types of alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.

A primary goal of the proposed amendment to eliminate the options market maker exception, and the proposed alternatives, is to reduce the number of persistent fails to deliver in threshold securities. As such, we believe that imposing different compliance requirements, and possibly a different timetable for implementing compliance requirements, for small entities would undermine the goal of reducing fails to deliver. In addition, we have concluded similarly that it would not be consistent with the primary goal of the proposals to further clarify, consolidate or simplify the proposals for small entities. Finally, the proposals would impose performance standards rather than design standards.

H. Request for Comments

The Commission encourages the submission of written comments with respect to any aspect of the IRFA. In particular, the Commission seeks comment on: (i) The number of small entities that would be affected by the proposed amendments; and (ii) the existence or nature of the potential impact of the proposed amendments on small entities. Those comments should specify costs of compliance with the proposed amendments, and suggest alternatives that would accomplish the objective of the proposed amendments.

XI. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 9(h), 10, 11A, 15, 17(a), 17A, and 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78i(h), 78j, 78k–1, 78o, 78q(a), 78q–1, 78w(a), the Commission is proposing amendments to §§ 242.200 and 242.203.

[179] 5 U.S.C. 603(c).

Text of the Proposed Amendments to Regulation SHO

List of Subjects 17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, Title 17, Chapter II, part 242, of the Code of Federal Regulations is proposed to be amended as follows.

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l*, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

* * * * *

2. Section 242.200 is proposed to be amended by adding new paragraph (g)(2) to read as follows:

§ 242.200 Definition of ''short sale'' and marking requirements.

* * * * *

(g) * * *

(2) For purposes of paragraph (g)(1) of this section, in determining whether the seller is ''deemed to own'' the security being sold, the broker or dealer must document the present location of the security being sold.

3. Section 242.203 is proposed to be amended by:

a. Revising paragraph (b)(3)(iii);

b. Redesignating paragraphs (b)(3)(vi) and (b)(3)(vii) as paragraphs (b)(3)(vii) and (b)(3)(viii);

c. Adding new paragraph (b)(3)(vi);

d. Removing the word ''and'' at the end of paragraph (b)(3)(vi); and

e. Amending newly designated paragraph (b)(3)(vii) by adding the word ''and'' after the semi-colon at the end of the paragraph.

The revisions and additions read as follows:

§ 242.203 Borrowing and delivery requirements.

* * * * *

(b) * * *

(3) * * *

(iii) *Provided, however,* that a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment and which, prior to the effective date of this amendment, had been previously excepted from the close-out requirement in paragraph (b)(3) of this section (*i.e.*, because the participant of a registered clearing

agency had a fail to deliver position in the threshold security that is attributed to short sales effected by a registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security), shall immediately close out that fail to deliver position, including any adjustments to the fail to deliver position, within 35 consecutive settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

* * * * *

(vi) If a participant of a registered clearing agency entitled to rely on the 35 consecutive settlement day close-out requirement contained in paragraph (b)(3)(iii) of this section has a fail to deliver position at a registered clearing agency in the threshold security for 35 consecutive settlement days from the effective date of the amendment, the participant and any broker or dealer for which it clears transactions, including any market maker, that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

4. Alternative 1: Alternatively, Section 242.203 is proposed to be amended by:

a. Revising paragraph (b)(3)(iii);

b. Redesignating paragraphs (b)(3)(vi) and (b)(3)(vii) as paragraphs (b)(3)(vii) and (b)(3)(viii);

c. Adding new paragraphs (b)(3)(vi) and (b)(3)(ix);

d. Removing the word ''and'' at the end of paragraph (b)(3)(vi); and

e. Amending newly designated paragraph (b)(3)(viii) by adding the word ''and'' after the semi-colon at the end of the paragraph.

The revisions and additions read as follows:

§ 242.203 Borrowing and delivery requirements.

* * * * *

(b) * * *

(3) * * *

(iii) The provisions of paragraph (b)(3) of this section shall not apply to the amount of the fail to deliver position in the threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on any options series in a portfolio that were created before the security became a threshold security;

(A) *Provided, however,* that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on options series that were created before the security became a threshold security, the participant shall close out the fail to deliver position, including any adjustments to the fail to deliver position, within 35 consecutive settlement days from the date on which the security became a threshold security by purchasing securities of like kind and quantity;

(B) *Provided, however,* that a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment which, prior to the effective date of this amendment, had been previously excepted from the close-out requirement in paragraph (b)(3) of this section (*i.e.*, because the participant of a registered clearing agency had a fail to deliver position in the threshold security that is attributed to short sales effected by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security), shall immediately close out that fail to deliver position, including any adjustments to the fail to deliver position, within 35 consecutive settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

* * * * *

(vi) If a participant of a registered clearing agency entitled to rely on the 35 consecutive settlement day close-out requirement contained in paragraph (b)(3)(iii) of this section has a fail to deliver position at a registered clearing agency in the threshold security for 35 consecutive settlement days, the participant and any broker or dealer for which it clears transactions, including any market maker, that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

* * * * *

(ix) To the extent that an amount of a fail to deliver position in a threshold security is attributed to short sales by a registered options market maker in accordance with paragraph (b)(3)(ii) of this section, a participant of a registered clearing agency and registered options market maker must document that the fail to deliver position resulted from short sales effected to establish or maintain a hedge on options series that were created before the security became a threshold security.

5. Alternative 2: Alternatively, Section 242.203 is proposed to be amended by:

a. Revising paragraph (b)(3)(iii);

b. Redesignating paragraphs (b)(3)(vi) and (b)(3)(vii) as paragraphs (b)(3)(viii)and (b)(3)(ix);

c. Adding new paragraphs (b)(3)(vi), (b)(3)(vii) and (b)(3)(x);

d. Removing the word ''and'' at the end of paragraph (b)(3)(vi); and

e. Amending newly designated paragraph (b)(3)(ix) by adding the word ''and'' after the semi-colon at the end of the paragraph.

The revisions and additions read as follows:

§ 242.203 Borrowing and delivery requirements.

* * * * *

(b) * * *

(3) * * *

(iii) The provisions of paragraph (b)(3) of this section shall not apply to the amount of the fail to deliver position in the threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on any options series in a portfolio that were created before the security became a threshold security;

(A) *Provided, however,* that if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on options series that were created before the security became a threshold security,

the participant shall close out the fail to deliver position, including any adjustments to the fail to deliver position, by purchasing securities of like kind and quantity within the earlier of: 35 Consecutive settlement days from the date on which the security became a threshold security, or 13 consecutive settlement days from the last date on which all options series within the portfolio that were created before the underlying security became a threshold security expire or are liquidated;

(B) *Provided, however,* that a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in a threshold security on the effective date of this amendment which, prior to the effective date of this amendment, had been previously excepted from the close-out requirement in paragraph (b)(3) of this section (*i.e.*, because the participant of a registered clearing agency had a fail to deliver position in the threshold security that is attributed to short sales by a registered options market maker, if and to the extent that the short sales are effected by the registered options market maker to establish or maintain a hedge on options positions that were created before the security became a threshold security), shall immediately close out that fail to deliver position, including any adjustments to the fail to deliver position, within 35 consecutive settlement days of the effective date of this amendment by purchasing securities of like kind and quantity;

* * * * *

(vi) If a participant of a registered clearing agency entitled to rely on the exception to the close-out requirement contained in paragraph (b)(3)(iii)(A) of this section has a fail to deliver position at a registered clearing agency in a threshold security for longer than the earlier of: 35 Consecutive settlement days from the date on which the security became a threshold security, or 13 consecutive settlement days from the last date on which all options series within the portfolio that were created before the security became a threshold security expire or are liquidated, the participant and any broker or dealer for which it clears transactions, including any market maker that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

(vii) If a participant of a registered clearing agency entitled to rely on the 35 consecutive settlement day close-out requirement contained in paragraph (b)(3)(iii)(B) of this section has a fail to deliver position at a registered clearing agency in the threshold security for 35 consecutive settlement days from the effective date of the amendment, the participant and any broker or dealer for which it clears transactions, including any market maker, that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(ii) of this section, may not accept a short sale order in the threshold security from another person, or effect a short sale in the threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity;

* * * * *

(x) To the extent that an amount of a fail to deliver position in a threshold security is attributed to short sales by a registered options market maker in accordance with paragraph (b)(3)(iii) of this section, a participant of a registered clearing agency and registered options market maker must document that the fail to deliver position resulted from short sales effected to establish or maintain a hedge on options series that were created before the security became a threshold security.

* * * * *

By the Commission.

Dated: August 7, 2007.

Nancy M. Morris,

Secretary.

[FR Doc. E7–15709 Filed 8–13–07; 8:45 am]

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Federal Register

Tuesday,
August 14, 2007

Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 740, 905, 910 et al.
Permit Application Packages; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 740, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947

RIN 1029–AC51

Permit Application Packages

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are proposing to reduce the number of copies of a permit application package that a person must submit. The proposed revisions would conform our regulations to those of the Office of Management and Budget (OMB) regulations implementing the Paperwork Reduction Act.

DATES: *Electronic or written comments:* Comments on the proposed rule must be received on or before October 15, 2007 to ensure our consideration.

Public hearings: You may submit a request for a public hearing orally or in writing to the person and address specified under **FOR FURTHER INFORMATION CONTACT**. The address, date and time for any public hearing will be announced before the hearing. Any disabled individual who requires reasonable accommodation to attend a public hearing should also contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal e-rulemaking Portal: http://www.regulations.gov.* The rule is listed under the agency name ''OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT.'' Once there follow the instructions for submitting comments.
- *Mail/Hand-Delivery/Courier:* Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252–SIB, 1951 Constitution Avenue, NW., Washington, DC 20240. Please include the rule identification number (RIN 1029–AC51) with your comment.

For detailed instructions on submitting comments and additional information on the rulemaking process, see ''III. How should I prepare and submit comments on the proposed rule?'' in the **SUPPLEMENTARY INFORMATION** section of this document.

If you wish to comment on the information collection aspects of this proposed rule, you may submit your comments to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to *OIRA_DOCKET@omb.eop.gov*, or via facsimile to 202–365–6566. Please refer to OMB control number 1029–0027 in your correspondence.

FOR FURTHER INFORMATION CONTACT: John A. Trelease, Office of Surface Mining Reclamation and Enforcement, Room 202, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202–208–2783. E-mail address: *JTrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

OMB is responsible for implementing provisions of the Paperwork Reduction Act of 1980, as amended in 1986 and 1995. 44 U.S.C. Chapter 35. This law was enacted to minimize the paperwork burden for individuals, businesses, and State, local and Tribal governments resulting from the collection of information by or for the Federal government. 44 U.S.C. 3501. The Paperwork Reduction Act gives OMB the authority to review and approve current and proposed Federal agency collections of information to minimize the information collection burden placed on members of the public. 44 U.S.C. 3504. On August 29, 1995, OMB published its current regulations for controlling paperwork burdens on the public. 60 FR 44978. Those regulations, codified at 5 CFR part 1320, require that Federal agencies submit information collection requests periodically (normally, every three years) to OMB for the review and approval of existing collection activities. The regulations at 5 CFR 1320.5(d)(2) and (d)(2)(iii) collectively state that:

> Unless the agency is able to demonstrate, in its submission for OMB clearance, that such characteristic of the collection of information is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection of information * * * [r]equiring respondents to submit more than an original and two copies of any document.

Our current regulations at 30 CFR 740.13(b)(2), which govern the permit application package requirements for surface coal mining and reclamation operations on Federal lands, generally require a permit applicant to submit seven copies of its application package to the regulatory authority.

In a recent OMB clearance of our request for approval to collect information for 30 CFR part 740, OMB stated that ''(u)pon the next request for approval, OSM shall undertake efforts to reduce the number of copies required to be submitted by applicants to no more than one original and two copies as specified in 5 CFR part 1320.5(d)(2)(iii).''

II. How are we proposing to change our rules?

Permit Application Packages for Surface Coal Mining and Reclamation Operations on Federal Lands

In response to the OMB statement concerning our information collection requirements at 30 CFR 740.13(b)(2), we are proposing to revise the current language, which specifies that ''[u]nless specified otherwise by the regulatory authority, seven copies of the complete permit application package shall be filed with the regulatory authority.'' The new language would provide that, ''[w]hen OSM is the regulatory authority, one complete permit application package shall be filed with the appropriate OSM office in the format specified by that office. When a State is the regulatory authority under a State-Federal cooperative agreement, the appropriate State office shall specify the format and number of copies of each complete permit application package to be filed with that office, so long as the State office does not require more than one original and two copies of the complete application package.''

The reference to a State regulatory authority under an approved State-Federal cooperative agreement addresses the fact that either OSM or a State under a part 745 State-Federal cooperative agreement may be the regulatory authority for surface coal mining and reclamation operations on Federal lands. Thus, the proposed requirements would reduce the number of copies that a permit applicant must submit regardless of whether OSM or the State is the regulatory authority. This change will also satisfy our requirements under the Paperwork Reduction Act and OMB's instructions.

While we are proposing changes to the number of permit application copies required for Federal lands at 30 CFR part 740, we are not proposing to make similar changes to our regulations at 30 CFR part 745. Those regulations allow a State regulatory authority under a State-Federal cooperative agreement to

regulate surface coal mining and reclamation operations on Federal lands. Part 745 will not be changed because it does not address the number of copies of each permit application that the applicant must submit.

However, fourteen States have individual State-Federal cooperative agreements under Part 745. These cooperative agreements are codified at 30 CFR parts 901–950 and require that a permit applicant proposing to conduct surface coal mining and reclamation operations on Federal lands submit an ''appropriate number of copies'' of each permit application package to the State regulatory authority. For example, the Wyoming cooperative agreement requires that ''an applicant proposing to conduct surface coal mining and reclamation operations on lands subject to the Federal lands program * * * submit a permit application package (PAP) in an appropriate number of copies * * *'' 30 CFR 950.20, Article V.6. We propose to interpret this ''appropriate number of copies'' language in a manner consistent with the language of proposed § 740.13(b)(2) which would require the State to decide ''the format and number of copies of each complete permit application package to be filed with that office, so long as the State office does not require more than one original and two copies of the complete application package.''

We understand that under State-Federal cooperative agreements, State regulatory authorities often require the permit applicant to file more than one original and two copies of the permit application. This usually happens when multiple Federal land management agencies must review and provide recommendations or concurrences on the permit application. Thus, the reduction in the number of copies that permit applicants are required to submit for operations on Federal lands under the proposed rule would shift the burden of making additional copies of the permit application packages to the Federal government or the State regulatory authority with a cooperative agreement under 30 CFR part 745. This shift is consistent with the purposes of the Paperwork Reduction Act which is to reduce information collection burdens imposed on the public by the Federal government and, as discussed above, is needed to comply with OMB's requirement to ''reduce the number of copies required to be submitted by applicants to no more than one original and two copies as specified in 5 CFR 1320.5(d)(2)(iii).''

In addition, in our proposed revisions to 30 CFR 740.13(b)(2) and the regulations for the eleven Federal program States, discussed below, we have added a requirement that the appropriate regulatory authority specify a format for the complete application package. This change was made so that regulatory authorities may allow permit application packages to be submitted electronically.

Finally, with respect to the information collection for surface coal mining and reclamation on Federal land, we are revising *§ 740.10 Information collection* to conform that section with general OMB guidelines. Specifically, the estimated burden hours and cost information contained in subsection (b) of the current rule is being removed from the regulations and added to the ''Procedural Matters'' section of this rulemaking. This change is being made because this information may change with every approved clearance by OMB. In this way, § 740.10 will not become outdated when there is a reestimate or when there is an address change.

Permit Application Packages for Surface Coal Mining and Reclamation Operations in States Where OSM Is the Regulatory Authority

We are also proposing to make similar changes to the regulations for the Federal programs for the eleven States where OSM is the regulatory authority. These regulations currently require that the applicant file five copies of the permit application package. Under the proposed rule, applicants would only be required to file one complete permit application package in the format specified by the appropriate OSM office. The proposed revisions to the individual program rules would be made at 30 CFR 905.773(d)(1) for California, § 910.773(b)(1) for Georgia, § 912.773(b)(1) for Idaho, § 921.773(b)(1) for Massachusetts, § 922.773(b)(1) for Michigan, § 933.773(b)(1) for North Carolina, § 937.773(b)(1) for Oregon, § 939.773(b)(1) for Rhode Island, § 941.773(b)(1) for South Dakota, § 942.773(b)(1) for Tennessee, and § 947.773(b)(1) for Washington.

Because this change will reduce the number of copies of complete permit application packages that applicants are required to submit for operations in the eleven Federal program States, the burden to make additional copies will shift to the Federal government, an estimated annual cost savings of $260.

However, this burden will be limited because out of the eleven Federal program States, surface coal mining and reclamation operations are currently only conducted in Tennessee and Washington, and we do not anticipate receiving any permit application packages in the remaining nine Federal program States. In addition, in the State of Washington, where there is only one permittee, we typically allow that permittee to submit one permit application package in electronic format in lieu of the five copies required by 30 CFR 947.773(b)(1).

Therefore, while there may be some shift in the collection burden from industry to OSM in Tennessee, there will be no shift in the State of Washington because our practice is already in compliance with OMB regulations. Furthermore, any shift in the burden of making copies is consistent with the purposes of the Paperwork Reduction Act as explained above.

III. How should I prepare and submit comments on the proposed rule?

Electronic or Written Comments

If you submit written comments, they should be specific, confined to issues pertinent to the proposed rule, and explain the reason for any recommended change(s). We appreciate any and all comments, but those most useful and likely to influence decisions on a final rule will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, or other pertinent State or Federal laws or regulations.

We will make every attempt to log all comments into the administrative record; however, we cannot ensure that comments received after the close of the comment period (see **DATES**) or at locations other than those listed above (see **ADDRESSES**) will be included in the Administrative Record and considered.

Public Availability of Comments: Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public hearings: We will hold a public hearing on the proposed rule upon request only. The time, date, and address for any hearing will be announced in the **Federal Register** at least 7 days prior to the hearing.

Any person interested in participating in a hearing should inform Mr. John Trelease (see **FOR FURTHER INFORMATION CONTACT**), either orally or in writing by 4:30 p.m., Eastern Time, on September

4, 2007. If no one has contacted Mr. Trelease to express an interest in participating in a hearing by that date, a hearing will not be held.

If a public hearing is conducted, it will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

Public meeting: If there is only limited interest in a hearing at a particular location, a public meeting or teleconference, rather than a public hearing, may be held. People wishing to meet with us to discuss the proposed rule may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public and, if possible, notice of the meetings will be posted at the appropriate locations listed under **ADDRESSES**. A written summary of each public meeting will be made a part of the administrative record of this rulemaking.

IV. Procedural Matters and Required Determinations

A. Executive Order 12866—Regulatory Planning and Review

This proposed rule is not a ''significant regulatory action'' under Executive Order 12866 for the following reasons:

a. This rule would not have an annual effect of $100 million or more on the economy. It would not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities. As previously stated, the revisions contained in the rule are intended to conform to the OMB requirements limiting the number of copies of each permit application package submitted. Any additional costs to States with State-Federal cooperative agreements resulting from the State's need to make additional copies required for review would be covered by Federal grants as authorized under 30 CFR 735.16(c). The additional costs to the Federal government should result in an equivalent cost savings to the regulated industry.

b. This rule would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule would not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

d. This rule would reduce existing information collection requirements and does not raise novel legal or policy issues.

B. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not considered a significant energy action under Executive Order 13211. The administrative revisions contained in this rule would not have a significant effect on the supply, distribution, or use of energy.

C. Regulatory Flexibility Act

The Department of the Interior certifies that this rule would 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.*). For the reasons previously stated, the revisions are not expected to have an adverse economic impact on the regulated industry including small entities. Further, the rule would produce no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

D. Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule, for the reasons previously stated:

a. Would not have an annual effect on the economy of $100 million or more.

b. Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

E. Unfunded Mandates

This rule would not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on State, Tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1534) is not required.

F. Executive Order 12630—Takings

In accordance with Executive Order 12630, the rule does not have significant takings implications.

G. Executive Order 13132—Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism implications to warrant the preparation of a Federalism Assessment for the reasons discussed above.

H. Executive Order 12988—Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

I. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally recognized Indian tribes and have determined that the proposed revisions pertaining to the number of copies of permit application packages submitted to OSM would not have substantial direct effects 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.

J. Paperwork Reduction Act

In accordance with 44 U.S.C. 3507(d), OSM has submitted the information collection and record keeping requirements of 30 CFR part 740 to the Office of Management and Budget for review and approval.

30 CFR Part 740

Title: Surface Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan.

OMB Control Number: 1029–0027.

Summary: Permit application requirements in sections 507(b), 508(a), 510(b), 515(b) and (d), and 522 of Public Law 95–87 require the applicant to submit the operations and reclamation plan for coal mining activities. Information collection is needed to determine whether the mining and reclamation plan will achieve the reclamation and environmental

protections pursuant to the Surface Mining Control and Reclamation Act. Without this information, Federal and State regulatory authorities cannot review and approve permit application requests.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Applicants for surface coal mine permits on Federal lands and the State regulatory authorities who review the applications.

Total Annual Responses: 42.

Total Annual Burden Hours: 3,402.

Comments are invited on:

(a) Whether the proposed collection of information is necessary for the proper performance of OSM and State regulatory authorities, including whether the information will have practical utility;

(b) The accuracy of OSM's estimate of the burden of the proposed collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of collection on the respondents.

Under the Paperwork Reduction Act, OSM must obtain OMB approval of all information and recordkeeping requirements. No person is required to respond to an information collection request unless the form or regulation requesting the information has a currently valid OMB control (clearance) number. This number appears in section 740.10. To obtain a copy of OSM's information collection clearance request contact John A. Trelease at (202) 208–2783 or by e-mail at *jtrelease@osmre.gov.*

By law, OMB must respond to OSM within 60 days of publication of this proposed rule, but may respond as soon as 30 days after publication. Therefore, to ensure consideration by OMB, you must send comments to OMB regarding these burden estimates or any other aspect of this information collection and recordkeeping requirement by September 13, 2007. Please send your comments on the information collection aspects of this proposed rule to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Interior Desk Officer, via e-mail to *OIRA_DOCKET@omb.eop.gov*, or via facsimile to (202) 395–6566. Also, send a copy of your comments to John A. Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave., NW., Room 202—SIB, Washington, DC 20240, or electronically to *jtrelease@osmre.gov.* Please note that you may still send comments to OSM on the proposed rulemaking until 4:30 p.m., Eastern Time, on October 15, 2007.

K. National Environmental Policy Act

OSM has determined that this rulemaking action is categorically excluded from the requirement to prepare an environmental document under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4332 *et seq.* In addition, we have determined that none of the ''extraordinary circumstances'' exceptions to the categorical exclusion applies. This determination was made in accordance with the Departmental Manual (516 DM 2, Appendixes 1.10 and 2).

L. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections (A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, § 740.13 Permits. (5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** section of this preamble helpful in understanding the proposed rule? (6) What else could we do to make the proposed rule easier to understand? Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov.*

List of Subjects

30 CFR Part 740

Federal lands, Reporting and recordkeeping requirements, Surface mining.

30 CFR Part 905

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 910

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 912

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 921

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 922

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 933

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 937

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 939

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 941

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 942

Intergovernmental relations, Surface mining, Underground mining.

30 CFR Part 947

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 11, 2007.

C. Stephen Allred,

Assistant Secretary, Land and Minerals Management.

Accordingly, we propose amending 30 CFR parts 740, 905, 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 as set forth below.

PART 740—GENERAL REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON FEDERAL LANDS

1. The authority citation for part 740 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.* and 30 U.S.C. 181 *et seq.*

2. Section 740.10 is revised to read as follows:

§ 740.10 Information collection.

In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB control number is 1029–0027. This information is needed to implement section 523 of the Act, which governs surface coal mining operations on Federal lands. Persons intending to conduct such operations must respond to obtain a benefit. A Federal agency may not conduct or

sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

3. In § 740.13, revise paragraph (b)(2) to read as follows:

§ 740.13 Permits.

* * * * *

(b) * * *

(2) When OSM is the regulatory authority, one complete permit application package shall be filed with the appropriate OSM office in the format specified by that office. When a State is the regulatory authority under a State-Federal cooperative agreement, the appropriate State office shall specify the format and number of copies of each complete permit application package to be filed with that office, so long as the State office does not require more than one original and two copies of the complete application package.

* * * * *

PART 905—CALIFORNIA

4. The authority citation for part 905 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

5. In § 905.773, revise paragraph (d)(1) to read as follows:

§ 905.773 Requirements for permits and permit processing.

* * * * *

(d) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 910—GEORGIA

6. The authority citation for part 910 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

7. In § 910.773, revise paragraph (b)(1) to read as follows:

§ 910.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 912—IDAHO

8. The authority citation for part 912 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

9. In § 912.773, revise paragraph (b)(1) to read as follows:

§ 912.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 921—MASSACHUSETTS

10. The authority citation for part 921 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

11. In § 921.773, revise paragraph (b)(1) to read as follows:

§ 921.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 922—MICHIGAN

12. The authority citation for part 922 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

13. In § 922.773, revise paragraph (b)(1) to read as follows:

§ 922.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 933—NORTH CAROLINA

14. The authority citation for part 933 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

15. In § 933.773, revise paragraph (b)(1) to read as follows:

§ 933.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 937—OREGON

16. The authority citation for part 937 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

17. In § 937.773, revise paragraph (b)(1) to read as follows:

§ 937.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 939—RHODE ISLAND

18. The authority citation for part 939 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

19. In § 939.773, revise paragraph (b)(1) to read as follows:

§ 939.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 941—SOUTH DAKOTA

20. The authority citation for part 941 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

21. In § 941.773, revise paragraph (b)(1) to read as follows:

§ 941.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 942—TENNESSEE

22. The authority citation for part 942 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

23. In § 942.773, revise paragraph (b)(1) to read as follows:

§ 942.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

PART 947—WASHINGTON

24. The authority citation for part 947 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

25. In § 947.773, revise paragraph (b)(1) to read as follows:

§ 947.773 Requirements for permits and permit processing.

* * * * *

(b) * * *

(1) Any person applying for a permit shall submit an application in the format specified by the Office.

* * * * *

[FR Doc. E7–15930 Filed 8–13–07; 8:45 am]

BILLING CODE 4310–05–P

Federal Register

Tuesday,
August 14, 2007

Part V

Securities and Exchange Commission

17 CFR Parts 210, 228, 229 et al.
Concept Release on Allowing U.S. Issuers To Prepare Financial Statements in Accordance With International Financial Reporting Standards; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210, 228, 229, 230, 239, 240 and 249

[Release No. 33–8831; 34–56217; IC–27924; File No. S7–20–07]

RIN 3235–AJ93

Concept Release on Allowing U.S. Issuers To Prepare Financial Statements in Accordance With International Financial Reporting Standards

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comment.

SUMMARY: The Commission is publishing this Concept Release to obtain information about the extent and nature of the public's interest in allowing U.S. issuers, including investment companies subject to the Investment Company Act of 1940, to prepare financial statements in accordance with International Financial Reporting Standards as published by the International Accounting Standards Board for purposes of complying with the rules and regulations of the Commission. U.S. issuers presently prepare their financial statements in accordance with generally accepted accounting principles as used in the United States, referred to as U.S. GAAP.

DATES: Comments should be submitted on or before November 13, 2007.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's *Internet comment form* (*http://www.sec.gov/concept.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–20–07 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper submissions in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–20–07. The file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/concepts.shtml*). Comments also are available for public 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Questions on this Concept Release should be directed to Gina L. Even, Business Associate, or Katrina A. Kimpel, Professional Accounting Fellow, Office of the Chief Accountant at (202) 551–5300; Sondra L. Stokes, Associate Chief Accountant, Division of Corporation Finance at (202) 551–3400; or Richard F. Sennett, Chief Accountant, Division of Investment Management at (202) 551–6918; U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission has long advocated reducing disparity between the accounting and disclosure practices of the United States and other countries as a means to facilitate cross-border capital formation while providing adequate disclosure for the protection of investors and the promotion of fair, orderly and efficient markets. The Commission also has encouraged the efforts of standard setters and other market participants to do the same.[1] To those ends, as part of a 1988 Policy Statement, the Commission explicitly supported the establishment of mutually acceptable international accounting standards as a critical goal to reduce regulatory impediments that result from disparate national accounting standards without compromising investor protection.[2]

Further, in 1997, the Commission noted that for issuers wishing to raise capital in more than one country, preparing more than one set of financial statements to comply with differing jurisdictional accounting requirements increased compliance costs and created inefficiencies.[3] In the study prepared pursuant to a mandate from Congress, the Commission encouraged the efforts of the International Accounting Standards Committee (''IASC''), the international accounting standard setting body at the time, to develop a core set of accounting standards that could serve as a framework for financial reporting in cross-border offerings, and indicated the Commission's intent to remain active in the development of those standards. These standards are now known as International Financial Reporting Standards (''IFRS'').

In 2000, the Commission issued a Concept Release seeking input on convergence to a high quality global financial reporting framework while upholding the quality of financial reporting domestically.[4] The 2000 Concept Release sought comments as to the conditions under which the Commission should accept financial statements of foreign private issuers that are prepared using IFRS, and the use of the U.S. GAAP reconciliation of IFRS financial statements.[5] The Commission

[1] *See* ''Integrated Disclosure System for Foreign Private Issuers'' Securities Act Release No. 33–6360 (November 20, 1981) (the 1981 Proposing Release).

[2] *See* ''Regulation of the International Securities Markets'' Securities Act Release No. 33–6807 (November 14, 1988) (the 1988 Policy Statement).

[3] *See* ''Pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996 Report on Promoting Global Preeminance of American Securities Markets'' (October 1997) available at *http://www.sec.gov/news/studies/acctgsp.htm.*

[4] *See* SEC Concept Release ''International Accounting Standards,'' Release No. 33–7801 (February 16, 2000) (the 2000 Concept Release) available at *http://www.sec.gov/rules/concept/34-42430.htm.*

[5] The term ''foreign private issuer'' is defined in Exchange Act Rule 3b–4(c) [17 CFR 240.3b–4(c)]. A foreign private issuer means any foreign issuer other than a foreign government except an issuer that meets the following conditions: (1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and (2) any of the following: (i) The majority of the executive officers or directors are United States citizens or residents; (ii) more than 50 percent of the assets of the issuer are located in the United States; or (iii) the business

has continued to monitor the international developments that were discussed in the 2000 Concept Release.

In October 2002, the Commission supported the announcement by the Financial Accounting Standards Board (''FASB'') and the International Accounting Standards Board (''IASB''), the successor of the IASC, of a Memorandum of Understanding, referred to as the Norwalk Agreement, to formalize their commitment to the convergence of U.S. and international accounting standards.[6] In this agreement, the two standard-setting bodies acknowledged their joint commitment and pledged to use their best efforts to the development, ''as soon as practicable,'' of high quality, compatible accounting standards that could be used for both domestic and cross-border financial reporting.[7] In addition to supporting the convergence efforts of the IASB and the FASB, we have long worked with each board on the development of their respective standards; however, the nature of our relationship with each board differs.

In 2005, the Commission adopted an accommodation to allow foreign private issuers that are first-time adopters of IFRS to file two years rather than three years of IFRS financial statements in their Commission filings.[8] Most recently, on June 20, 2007, the Commission approved for public comment a proposal to accept from foreign private issuers financial statements prepared in accordance with the English language version of IFRS as published by the IASB without the currently required accompanying reconciliation to U.S. GAAP.[9]

Almost 100 countries now either require or allow the use of IFRS for the preparation of financial statements by listed companies, and other countries are moving to do the same. This recent movement to IFRS outside the United States has resulted in an increase, from a relative few in 2005 to approximately 110 in 2006, of filings with the Commission of foreign private issuers that represent in the footnotes to their financial statements that their financial statements comply with IFRS as published by the IASB.[10] The Commission expects to see this number continue to increase in the future, particularly pursuant to Canada's announced move to IFRS, as there currently are approximately 500 foreign private issuers from Canada.[11]

This movement to IFRS also has begun to affect U.S. issuers, in particular those with a significant global footprint.[12] For instance, certain U.S. issuers may compete for capital globally in industry sectors in which a critical mass of non-U.S. companies report under IFRS. Also, U.S. issuers with subsidiaries located in jurisdictions that have moved to IFRS may prepare those subsidiaries' financial statements in IFRS for purposes of local regulatory or statutory filings.

In light of the ongoing convergence efforts of the IASB and the FASB and the movement outside the United States towards accepting financial statements prepared in accordance with IFRS, the Commission is seeking input in this Concept Release regarding the role of IFRS as published by the IASB as a basis of financial reporting in the U.S. public capital market by U.S. issuers. Specifically, the Commission is seeking input to better understand the nature and extent of the public's interest in giving U.S. issuers, including investment companies, the option to file with the Commission financial statements prepared in accordance with IFRS as published by the IASB.[13]

We appreciate that the U.S. public capital market has not experienced the co-existence of two sets of accounting standards for use by U.S. issuers. The Commission is issuing this Concept Release to gather input on the potential significance and effect of any such change to investors, issuers and market participants as well as to the accounting profession in general. Given the potential significance and complexity of permitting U.S. issuers to prepare financial statements in accordance with IFRS as published by the IASB for purposes of complying with the rules and regulations of the Commission, as contemplated in this Concept Release, we encourage all interested parties to provide comments.

II. The Effect of IFRS on the U.S. Public Capital Market

A. Financial Reporting in the United States

The mission of the Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[14] In carrying out this mission, the Commission historically has looked to private-sector bodies to provide standards for financial reporting by issuers in the U.S. public capital market. Since 1973, those standards have been set by the FASB, which is the independent, private-sector body whose pronouncements the Commission has recognized as ''authoritative'' and ''generally accepted'' for purposes of the federal securities laws, absent any contrary determination by the Commission.[15] Over time, this body of standards has commonly come to be referred to as U.S. GAAP.

The FASB is overseen by the Financial Accounting Foundation (''FAF''), which has responsibility for selecting the seven full-time FASB

of the issuer is administered principally in the United States.

[6] *See* Financial Accounting Standards Board and International Accounting Standards Board, Memorandum of Understanding, ''The Norwalk Agreement,'' (September 18, 2002) (the Norwalk Agreement) available at *http://www.fasb.org/news/memorandum.pdf.*

[7] *Id.*

[8] *See* ''First-time Application of International Financial Reporting Standards'' Securities Act Release No. 33–8567 (April 12, 2005) (the 2005 Adopting Release) available at *http://www.sec.gov/rules/final/33-8567.pdf.*

[9] *See* ''Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Reporting Standards without Reconciliation to U.S. GAAP'' Securities Act Release No. 33–8818 (July 2, 2007) (the 2007 Proposing Release) available at *http://www.sec.gov/rules/proposed/2007/33-8818.pdf.*

[10] Another approximately 70 foreign private issuers filed financial statements that they stated were prepared in accordance with solely a jurisdictional variation of IFRS. Approximately 50 additional foreign private issuers that are incorporated in jurisdictions that have moved to IFRS included in their filings financial statements prepared in accordance with U.S. GAAP.

[11] *See* ''Implementation Plan for Incorporating International Financial Reporting Standards into Canadian GAAP,'' available at *http://www.acsbcanada.org/client_asset/document/3/2/7/3/5/document_8B452E12-FAF5-7113-C4CB8F89B38BC6F8.pdf?sfgdata=4.*

[12] For purposes of this Concept Release, the term U.S. issuer encompasses any issuer other than a foreign private issuer reporting on Form 20–F or Form 40–F or filing a registration statement based on Form 20–F or Form 40–F. Form 20–F is the combined registration statement and annual report form for foreign private issuers under the Securities Exchange Act of 1934. It also sets forth disclosure requirements for registration statements filed by foreign private issuers under the Securities Act of 1933. Form 40–F is the combined registration statement and annual report form under the Exchange Act for Canadian foreign private issuers that file under the Multijurisdictional Disclosure System.

[13] The term ''investment company'' is defined in Section 3 of the Investment Company Act of 1940 [15 U.S.C. 80a–3].

[14] *See* U.S. Securities and Exchange Commission 2006 Performance and Accountability Report available at *http://www.sec.gov/about/secpar/secpar2006.pdf#sec1.*

[15] *See* ''Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards,'' Accounting Series Release No. 150 (December 20, 1973) (expressing the Commission's intent to continue to look to the private sector for leadership in establishing and improving accounting principles and standards through the FASB) and ''Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter,'' Securities Act Release No. 33–8221 (April 25, 2003) (the 2003 Policy Statement) available at *http://www.sec.gov/rules/policy/33-8221.htm.*

members.[16] The FAF is an independent, non-profit organization that is run by a sixteen-member Board of Trustees. The FASB derives its funding from fees paid by issuers and has oversight of the Emerging Issues Task Force (''EITF''), which is the interpretive body for U.S. GAAP. The FASB also is supported by the Financial Accounting Standards Advisory Council (''FASAC''), which is responsible for consulting with the FASB as to technical issues on the FASB's agenda and project priorities.

Consistent with the FASB's objective to increase international comparability and the quality of standards used in the United States, the FASB participates in international accounting standard setting activities. This goal is consistent with the FASB's obligation to its domestic constituents, who benefit from comparability of information across national borders.[17] The FASB pursues this objective in cooperation with the IASB, as discussed in more detail below, and with national accounting standard setters.

While the Commission consistently has looked to the private sector to set accounting standards, the federal securities laws, including the Sarbanes-Oxley Act of 2002,[18] provide the Commission with the authority to set accounting standards for public companies and other entities that file financial statements with the Commission.[19] The Commission oversees the activities of the FASB as part of its responsibilities under the securities laws. These oversight responsibilities include the Commission reviewing the FAF's and the FASB's annual budget and the FASB's accounting support fee, providing views regarding the selection of FASB members, and, in certain circumstances, referring issues relating to accounting standards to the FASB or the EITF. The Commission and its staff do not, however, prohibit the FASB from addressing topics of its choosing and do not dictate the outcome of specific FASB projects, so long as the FASB's conclusions are in the interest of investor protection.[20]

B. Financial Reporting Outside the United States

Almost 100 countries now either require or allow the use of IFRS for the preparation of financial statements by listed companies. Countries that require or allow the use of IFRS by listed companies also may allow the use of IFRS for local regulatory or statutory financial reporting by non-listed companies. The European Union (''EU''), for example, has, under a regulation adopted in 2002, required companies incorporated in its Member States and whose securities are listed on an EU-regulated market to report their consolidated financial statements using endorsed IFRS beginning in 2005.[21] Other countries, including Australia[22] and New Zealand,[23] have adopted similar requirements mandating the use of IFRS by public companies. More countries have plans to adopt IFRS as their national accounting standards in the future, including Canada[24] and Israel.[25]

The Commission is aware of the transitions made by other countries to IFRS. For example, the vast majority of listed EU companies, including banks and insurance companies, moved to IFRS in 2005 with the remainder transitioning in 2007. Australian-listed companies also moved to IFRS in 2005. Under these transition approaches, in essence all or almost all of the listed companies transitioned to IFRS at the same time. Some foreign regulators have published reports relating to the implementation of IFRS in their country. For example, the U.K. Financial Reporting Review Panel and the Autorité des Marchés Financiers of France have both published reports making observations on IFRS as applied in their jurisdictions.[26]

The actual process of adopting the evolving body of IFRS as published by the IASB in any country may be subject to a clearance process, which, in some instances, may involve regulatory or legislative approval. In some jurisdictions, the decision of policy makers has resulted in some requirements of IFRS as published by the IASB becoming optional. This results in a choice for issuers in these jurisdictions to use either their jurisdictional version of IFRS (e.g., titled ''IFRS as adopted in Jurisdiction X'') or IFRS as published by the IASB; however, the two may not be mutually exclusive. In addition to adopting IFRS, policy makers also may choose to retain their national accounting standard setter to, among other things, establish standards for their local private capital market and to contribute to the IFRS standard setting work.

Other countries have chosen to continue to have their own national accounting standard setter establish accounting standards applicable to entities in their jurisdiction. The national accounting standard setter also may monitor and consider the standard setting work of the IASB and, as it considers appropriate, adapt national standards so as to conform to some portions or all of IFRS as published by the IASB. For example, in the United States, the FASB and the IASB have adopted a best efforts convergence approach,[27] while Japan's accounting standard setter and the IASB have ''* * * a joint project to reduce differences between International Financial Reporting Standards (IFRS) and Japanese accounting standards. * * * ''[28]

C. The Possible Use of IFRS by U.S. Issuers

The Commission's recent proposal to accept from foreign private issuers financial statements prepared in

[16] *See http://www.fasb.org/facts/bd_members.shtml.*

[17] *See http://www.fasb.org/intl/.*

[18] *See* Public Company Accounting Reform and Protection (Sarbanes-Oxley Act), Pub L. No. 107–204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act) available at *http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h3763enr.tst.pdf.*

[19] *See* for example, Section 108(c) of the Sarbanes-Oxley Act, which states, ''Nothing in this Act, including this section* * *shall be construed to impair or limit the authority of the Commission to establish accounting principles or standards for purposes of enforcement of the securities laws.''

[20] *See* the 2003 Policy Statement, *supra* note 15.

[21] *See* Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, Official Journal L. 243, 11/09/2002 P. 0001–0004 available at *http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_243/l_24320020911en00010004.pdf.*

[22] *See* Australia Financial Reporting Council, Bulletin 2002/4 (July 3, 2002) available at *http://www.frc.gov.au/bulletins/2002/04.asp;* Australia Financial Reporting Council, Bulletin 2004/3 (April 2004) available at *http://www.frc.gov.au/bulletins/2004/03.asp.*

[23] *See* Accounting Standards Review Board News Release ''Stable Platform of Financial Standards Announced: NZ aligns with UK, Europe and Australia'' available at *http://www.asrb.co.nz/documents/24Nov2004.doc.*

[24] *See* ''Implementation Plan for Incorporating International Financial Reporting Standards into Canadian GAAP,'' *supra* note 11.

[25] *See* Israel Accounting Standard No. 29 ''Adoption of International Financial Reporting Standards,'' stipulating that Israeli public companies that prepare their primary financial statements in accordance with Israeli GAAP are obliged to adopt IFRS unreservedly for years starting on January 1, 2008.

[26] For the report of the U.K Financial Reporting Review Panel, see ''Preliminary Report: IFRS Implementation'' available at *http://www.frc.org.uk/images/uploaded/documents/IFRS%20Implementation%20-%20preliminary.pdf.* For the report of the AMF, see ''Recommendations on accounting information reported in financial statements for 2006,'' dated December 19, 2006, available at *http://www.amf-france.org/documents/general/7565_1.pdf.*

[27] *See* the Norwalk Agreement, *supra* note 6.

[28] Press Release, International Accounting Standards Board, ''IASB and Accounting Standards Board of Japan Agree to Next Steps in Launching Joint Project for Convergence'' (Jan. 21, 2005), available at *http://www.iasb.org/news.*

accordance with the English language version of IFRS as published by the IASB without a U.S. GAAP reconciliation raises the question of whether the Commission also should accept financial statements prepared in accordance with IFRS as published by the IASB from U.S. issuers. The Commission has identified at least two market forces that may provide incentives for some market participants to request in the future that the Commission accept financial statements prepared in accordance with IFRS as published by the IASB from U.S. issuers.

First, as a growing number of jurisdictions move to IFRS, more non-U.S. companies will report their financial results in accordance with IFRS. If a critical mass of non-U.S. companies in a certain industry sector or market reports in accordance with IFRS, then there may be pressure for U.S. issuers in that industry sector or market to likewise report in accordance with IFRS to enable investors to compare U.S. issuers' financial results more efficiently with those of their competitors.

Second, as more jurisdictions accept financial statements prepared in accordance with IFRS for local regulatory or statutory filing purposes, U.S issuers' subsidiaries based in these jurisdictions may be preparing and filing their local financial statements using IFRS as their basis of accounting. If U.S. issuers have a large number of subsidiaries reporting in this manner, then these U.S. issuers—most likely large, multinational corporations—may incur lower costs in preparing their consolidated financial statements using IFRS rather than U.S. GAAP. If an issuer can and does reallocate any financial statement preparation cost savings to higher earning opportunities and does not suffer a relatively greater increase in the cost of its capital as a result of using IFRS, investors will benefit in terms of a better rate of return.

The Commission anticipates that not all U.S. issuers will have incentives to use IFRS. For example, U.S. issuers without significant customers or operations outside the United States—which may tend to be smaller public companies—may not have the market incentives to prepare IFRS financial statements for the foreseeable future. Additionally, the Commission recognizes that there may be significant consequences to allowing U.S. issuers to prepare their financial statements in accordance with IFRS as published by the IASB. If the Commission were to accept financial statements prepared in accordance with IFRS as published by the IASB from U.S. issuers, then investors and market participants would have to be able to understand and work with both IFRS and U.S. GAAP when comparing among U.S. issuers because not all U.S. issuers are likely to elect to prepare IFRS financial statements. On a more practical level, a U.S. issuer may have contracts such as loan agreements that include covenants based upon U.S. GAAP financial measures or leases for which rental payments are a function of revenue as determined under U.S. GAAP. Similarly, U.S. issuers may use their financial statements as the basis for filings with other regulators and authorities (*e.g.*, local and federal tax authorities, supervisory regulators) that may require U.S. GAAP financial information.

Questions

1. Do investors, U.S. issuers, and market participants believe the Commission should allow U.S. issuers to prepare financial statements in accordance with IFRS as published by the IASB?

2. What would be the effects on the U.S. public capital market of some U.S. issuers reporting in accordance with IFRS and others in accordance with U.S. GAAP? Specifically, what would be the resulting consequences and opportunities, and for whom? For example, would capital formation in the U.S. public capital market be better facilitated? Would the cost of capital be reduced? Would comparative advantages be conferred upon those U.S. issuers who move to IFRS versus those U.S. issuers who do not (or feel they can not)? Would comparative advantages be conferred upon those investors who have the resources to learn two sets of accounting principles (IFRS and U.S. GAAP) as compared to those who do not?

3. What would be the effects on the U.S. public capital market of not affording the opportunity for U.S. issuers to report in accordance with either IFRS or U.S. GAAP? Specifically, what would be the resulting consequences and opportunities, and for whom? Would capital formation in the U.S. public capital market be better facilitated? Would the cost of capital be reduced? Alternatively, are there certain types of U.S. issuers for which the Commission should not afford this opportunity?

4. To what degree would investors and other market participants desire to and be able to understand and use financial statements of U.S. issuers prepared in accordance with IFRS? Would the desire and ability of an investor to understand and use such financial statements vary with factors such as the size and nature of the investor, the value of the investment, the market capitalization of the U.S issuer, the industry to which it belongs, the trading volume of its securities, or any other factors?

5. What immediate, short-term or long-term incentives would a U.S. issuer have to prepare IFRS financial statements? Would the incentives differ by industry segment, geographic location of operations, where capital is raised, other demographic factors, or the aspect of the Commission's filing requirements to which the U.S. issuer is subject?

6. What immediate, short-term or long-term barriers would a U.S. issuer encounter in seeking to prepare IFRS financial statements? For example, would the U.S. issuer's other regulatory (*e.g.*, banking, insurance, taxation) or contractual (*e.g.*, loan covenants) financial reporting requirements present a barrier to moving to IFRS, and if so, to what degree?

7. Are there additional market forces that would provide incentives for market participants to want U.S. issuers to prepare IFRS financial statements?

8. Are there issues unique to whether investment companies should be given the choice of preparing financial statements in accordance with IFRS? What would the consequences be to investors and other market participants of providing investment companies with that choice?

9. Would giving U.S. issuers the opportunity to report in accordance with IFRS affect the standard setting role of the FASB? If so, why? If not, why not? What effect might there be on the development of U.S. GAAP?

D. Convergence of IFRS and U.S. GAAP

In October 2002, the FASB and the IASB announced the Norwalk Agreement, which formalized their commitment to the convergence of U.S. and international accounting standards.[29] In the Norwalk Agreement, the two bodies acknowledged their ''best efforts'' commitment to the development, ''as soon as practicable,'' of high quality, compatible accounting standards that could be used for both domestic and cross-border financial reporting and to the coordination of their future work programs to ensure that, once achieved, compatibility is maintained. In a 2006 Memorandum of Understanding, the FASB and the IASB indicated that a common set of high quality global standards remains the long-term strategic priority of both the

[29] *See* the Norwalk Agreement, *supra* note 6.

FASB and the IASB and set out a work plan covering the next two years for convergence with specific long- and short-term projects.[30] Thus, convergence is the approach that for the last five years has been at work to align the financial reporting of U.S. issuers under U.S. GAAP with that of companies using IFRS. If there is a robust and active process in place for converging IFRS and U.S. GAAP, then it is likely that the current differences between them will be minimized in due course.

As part of their commitment to convergence, both the IASB and the FASB are working together on several major projects and have coordinated agendas so that major projects that one board takes up also may be taken up by the other board. Also, both boards have been working on ''short-term convergence,'' under which convergence will occur quickly in certain areas. This process allows for incremental improvements and the opportunity to eliminate differences without rethinking an issue entirely. If the IASB and the FASB conclude that a short-term convergence project is not sufficient, they will consider a broader standard setting project. The Commission fully supports continued progress on convergence.

If U.S. issuers were permitted to prepare IFRS financial statements, then some could conclude that the convergence process would no longer be warranted because those U.S. issuers that see a benefit to reporting under IFRS would be free to do so. Consequently, there is a risk that constituents of the two boards may not continue to support convergence efforts if financial statements prepared by U.S. issuers in accordance with IFRS as published by the IASB are accepted by the Commission. If convergence does not occur, the future work of the IASB and the FASB may result in standards that are significantly different or that are not timely in their development.

Questions

10. What are investors', issuers' and other market participants' opinions on the effectiveness of the processes of the IASB and the FASB for convergence? Are investors and other market participants satisfied with the convergence progress to date, and the robustness of the ongoing process for convergence?

11. How would the convergence work of the IASB and the FASB be affected, if at all, if the Commission were to accept IFRS financial statements from U.S. issuers? If the Commission were to accept IFRS financial statements from U.S. issuers, would market participants still have an incentive to support convergence work?

12. If IFRS financial statements were to be accepted from U.S. issuers and subsequently the IASB and the FASB were to reach substantially different conclusions in the convergence projects, what actions, if any, would the Commission need to take?

III. Global Accounting Standards

A. The Case for a Single Set of Globally Accepted Accounting Standards

The Commission recognizes that having a widely used single set of high quality globally accepted accounting standards accepted and in place could benefit both the global capital markets and investors. To date, the efforts in the United States have encompassed convergence, which involves the content of IFRS and U.S. GAAP coming together.

Key forces favoring a single set of globally accepted accounting standards include, but are not limited to, the continued expansion of the capital markets across national borders, and the desire by countries to achieve strong, stable and liquid capital markets to fuel economic growth. A thriving capital market requires, among other things, a high degree of investor understanding and confidence. Converging towards or embracing a single set of high quality accounting standards could contribute to investor understanding and confidence.

The use of a single set of accounting standards in the preparation of financial statements could help investors understand investment opportunities better than the use of multiple differing sets of national accounting standards. Without a single set of accounting standards, global investors must incur time, costs and effort to understand companies' financial statements so that they can adequately compare investment opportunities. In addition, presenting investors with financial information that varies substantially depending on which set of accounting standards is employed can cause confusion about the actual financial results of a company and result in a correspondingly adverse effect on investor confidence and cost of capital. Investor confidence in financial reporting also is likely to be stronger if the accounting standards used have been subject to appropriate due process and have gained wide acceptance in practice.

Embracing a common set of accounting standards also can lower costs for issuers. When companies access capital markets beyond their home jurisdiction, they incur additional costs if they must prepare financial statements using different sets of accounting standards. These include the costs for company personnel and auditors to learn, keep current with and comply with the requirements of multiple jurisdictions. In addition to issuers facing lower costs, standard setters collectively worldwide also may incur lower costs because the use of resources dedicated to standards writing can potentially be reduced if fewer separate accounting models are pursued.

Question

13. Do investors, issuers and other market participants believe giving U.S. issuers the choice to prepare financial statements in accordance with IFRS as published by the IASB furthers the development of a single set of globally accepted accounting standards? Why or why not, and if so, how?

B. The International Accounting Standard Setter

The sustainability, governance and continued operation of the IASB are important factors for the development of a set of high quality, globally accepted accounting standards and are important factors in the Commission's consideration of the IASB's work. The IASB is based in London and is a stand-alone, privately funded accounting standard setting body established to develop global standards for financial reporting.[31] It is committed to ''developing, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require high quality, transparent and comparable information in financial statements and other financial reporting to help participants in the world's capital markets and other users make economic decisions.'' [32] The IASB assumed accounting standard setting responsibilities from the IASC in 2001 as the culmination of a reorganization of the IASC.[33] The IASC had issued 41

[30] *See* ''A Roadmap for Convergence between IFRS and U.S. GAAP—2006–2008 Memorandum of Understanding between the FASB and the IASB'', February 27, 2006 (the 2006 Memorandum of Understanding) available at *http://72.3.243.42/intl/mou_02–27–06.pdf.*

[31] For more information on the structure and operation of the IASB, *see http://www.iasb.org.*

[32] IASC Foundation Constitution, Paragraph 2a (2005) available at *http://www.iasb.org/About+Us/About+the+Foundation/Constitution.htm.*

[33] For more information on the reorganization, see *http://archive.iasb.org.uk/uploaded_files/documents/8_210_swp_rep.pdf.*

standards through December 2000. Upon its formation, the IASB recognized those standards and thus they form part of the body of IFRS.

The IASB is overseen by the International Accounting Standards Committee Foundation (''IASC Foundation''). The IASC Foundation is based in London and is a stand-alone, not-for-profit organization, incorporated in Delaware. It is responsible for the activities of the IASB and other work that centers on IFRS, such as initiatives related to translation of IFRS from the English language, education about IFRS and the development of Extensible Business Reporting Language (''XBRL'') taxonomies for IFRS. The IASC Foundation is governed by 22 trustees (''IASC Foundation Trustees'') whose backgrounds are geographically diverse.

To date, the IASC Foundation has financed IASB operations largely through voluntary contributions from companies, accounting firms, international organizations and central banks. Original commitments were made for the period 2001–2005 and have been extended for an additional two years through 2007. In June 2006, the IASC Foundation Trustees agreed on four elements that should govern the establishment of a funding approach designed to enable the IASC Foundation to remain a stand-alone, private-sector organization with the necessary resources to conduct its work in a timely fashion. The IASC Foundation Trustees determined that characteristics of the new scheme for 2008 would be:

- *Broad-based:* Fewer than 200 companies and organizations participate in the current financing system. A sustainable long-term financing system must expand the base of support to include major participants in the world's capital markets, including official institutions, in order to ensure diversification of sources.
- *Compelling:* Any system must carry with it enough pressure to make free riding very difficult. This could be accomplished through a variety of means, including official support from the relevant regulatory authorities and formal approval by the collecting organizations.
- *Open-ended:* The financial commitments should be open-ended and not contingent on any particular action that would infringe on the independence of the IASC Foundation and the International Accounting Standards Board.
- *Country-specific:* The funding burden should be shared by the major economies of the world on a proportionate basis, using Gross Domestic Product as the determining factor of measurement. Each country should meet its designated target in a manner consistent with the principles above.[34]

The IASC Foundation Trustees continue to make progress in obtaining funding that satisfies those elements.

The IASC Foundation Trustees select members of the IASB to comprise ''a group of people representing, within that group, the best available combination of technical expertise and diversity of international business and market experience in order to contribute to the development of high quality, global accounting standards.'' [35] The fourteen members of the IASB—twelve full-time and two part-time—serve five-year terms subject to one re-appointment. They are required to sever all employment relationships and positions that may give rise to economic incentives that might compromise a member's independent judgment in setting accounting standards. The IASB members come from eight countries and have a variety of backgrounds (e.g., auditors, users, preparers, and academics). In selecting IASB members, the IASC Foundation Trustees ensure that the IASB is not dominated by any particular constituency. Member selection is not based on geographic representation.

The IASB is free to choose and conduct projects necessary to promote convergence and develop high quality standards. The IASB solicits views and seeks input from the public throughout the standard setting process from selecting items for its agenda to developing and publishing a discussion paper and/or exposure draft and issuing a final standard. This input is derived from discussions at its project working group and roundtable meetings as well as written submissions from constituents. The IASB's meetings are open to public observers. Comment letters, summaries of comments received on discussion papers and exposure drafts are made publicly available on the IASB website.[36] This transparent process is intended to enable the IASB to obtain relevant views from interested parties, and at the same time to conclude on final standards based on its own deliberations, and without undue external pressure. The IASB has an advisory council—the Standards Advisory Council (''SAC'')—that is composed of approximately 40 geographically diverse individuals drawn from countries that use IFRS and also those that do not. The IASB is assisted on IFRS interpretive matters by its International Financial Reporting Interpretations Committee (''IFRIC'').

The Commission and its staff have for many years been involved in the IASB standard setting efforts and development of the interpretive guidance of IFRIC. The Commission through its staff serves as an Observer to the SAC.

The Commission staff directly participates in the development of IFRS primarily through the work of the International Organization of Securities Commissions (''IOSCO'') whose membership regulates more than 90% of the world's securities markets. IOSCO is the world's largest international cooperative forum for securities regulatory agencies.[37] IOSCO has taken and continues to take an active role in the standard setting process undertaken by the IASC and now the IASB. Through membership in IOSCO's Standing Committee on Multinational Disclosure and Accounting, the Commission staff assists in writing IOSCO comment letters on exposure drafts of standards published by the IASB and serves as one of the IOSCO representatives on several of the IASB project working groups. As one of two IOSCO representatives, the Commission staff serves as a non-voting Observer to IFRIC.

Questions

14. Are investors, U.S. issuers and other market participants confident that IFRS have been, and will continue to be, issued through a robust process by a stand-alone standard setter, resulting in high quality accounting standards? Why or why not?

15. Would it make a difference to investors, U.S. issuers and other market participants whether the Commission officially recognized the accounting principles established by the IASB?

16. What are investors', U.S. issuers' and other market participants' views on how the nature of our relationship with the IASB, a relationship that is different and less direct than our oversight role with the FASB, affects the Commission's responsibilities under the U.S. securities laws?

[34] *http://www.iasb.org/About+Us/About+the+Foundation/Future+Funding.htm.*

[35] IASC Foundation Constitution, Paragraph 19 (2005) available at *http://www.iasb.org/About+Us/About+the+Foundation/Constitution.htm.*

[36] See IASC Foundation Due Process Handbook for the IASB available at *http://www.iasb.org/NR/rdonlyres/7D97095E-96FD-4F1F-B7F2-366527CB4FA7/0/DueProcessHandbook.pdf.*

[37] For more information about IOSCO, *see http://www.iosco.org.*

C. The Commission's Previous Consideration of International Accounting Standards

For the past several decades the Commission has been actively promoting the development of a set of international accounting standards. In the 1981 Proposing Release, revisions to Form 20–F were proposed and the Commission expressed its support for the work of the IASC in formulating guidelines and international disclosure standards.[38] As part of the 1988 Policy Statement, the Commission urged ''securities regulators and members of the accounting profession throughout the world [to] continue efforts to revise and adjust international accounting standards with the aim of increasing comparability and reducing cost'' and reaffirmed its commitment to working with securities regulators around the world to achieve the goal of an efficient international securities market system.[39]

In a 1994 amendment to Form 20–F, the Commission accepted from foreign private issuers cash flow statements prepared in accordance with International Accounting Standards (''IAS'') No. 7, *Cash Flow Statements,* without reconciliation to U.S. GAAP. In proposing that amendment, the Commission noted that ''while there are differences between a cash flow statement prepared in accordance with IAS 7 and one prepared in accordance with U.S. GAAP * * * the Commission believes statements prepared in accordance with IAS 7 should provide an investor with adequate information regarding cash flows without the need for additional information or modification.'' [40]

The Commission more closely examined efforts to develop high quality, comprehensive global accounting standards in a 1997 report undertaken at the direction of Congress.[41] In that report, the Commission noted that for issuers wishing to raise capital in more than one country, compliance with differing accounting requirements to be used in the preparation of financial statements increased compliance costs and created inefficiencies. As a step towards addressing these concerns and to increase the access of U.S. investors to foreign investments in the U.S. public capital market, the Commission encouraged the IASC's efforts to develop a core set of accounting standards that could serve as a framework for financial reporting in cross-border offerings, and indicated an intent to remain active in the development of those standards. In that report, the Commission indicated that its evaluation of IASC core standards would involve an assessment of whether they constituted a comprehensive body of transparent, high quality standards that could be rigorously interpreted and applied.

In February 2000, the Commission issued a Concept Release on International Accounting Standards, seeking public comment on the elements necessary to encourage convergence towards a high quality global financial reporting framework while upholding the quality of financial reporting domestically.[42] In that release, the Commission described high quality standards as consisting of a ''comprehensive set of neutral principles that require consistent, comparable, relevant and reliable information that is useful for investors, lenders and creditors, and others who make capital allocation decisions.'' [43] The Commission also expressed the view that high quality accounting standards ''must be supported by an infrastructure that ensures that the standards are rigorously interpreted and applied.''[44]

In 2003, the Commission staff issued a study on the adoption of a principles-based accounting system, as mandated by Congress in the Sarbanes-Oxley Act.[45] The conclusion of that study was that an optimal approach to accounting standard setting would be based on a consistently applied conceptual framework and clearly stated objectives rather than solely on either rules or principles, one benefit of which would be the facilitation of greater convergence between U.S. GAAP and international accounting standards. By taking an objectives-based approach to convergence, the study noted, standard setters would be able to arrive at an agreement on a principle more quickly than would be possible for a detailed rule. The Commission staff's report to Congress interpreted convergence as a ''process of continuing discovery and opportunity to learn by both U.S. and international standard setters,'' the benefits of which include greater comparability and improved capital formation globally.[46]

In 2004, a Deputy Chief Accountant joined a team of experienced professionals within the Office of the Chief Accountant, all devoted full-time to international work. The Commission staff tracks developments in IFRS similar to the manner in which it follows the work of the FASB and the EITF.

In 2005, the Commission adopted amendments to Form 20–F to permit foreign private issuers—for their first year of reporting under IFRS as published by the IASB—to file two years rather than three years of statements of income, changes in shareholders' equity and cash flows prepared in accordance with IFRS, with appropriate related disclosure.[47] The Commission recognized that these amendments would reduce costs to foreign private issuers and encourage their continued participation in the U.S. public capital market, which would benefit investors by increasing investment possibilities and furthering the efficient allocation of capital.

In February 2006, Chairman Cox reaffirmed his commitment to the ''Roadmap'' that was first described by a former Chief Accountant of the Commission in April 2005.[48] The Roadmap sets forth the goal of achieving one set of high quality, globally accepted accounting standards and suggested several considerations that could affect the achievement of that goal. It also discusses the possibility for the co-existence of financial statements prepared pursuant to IFRS and U.S. GAAP in the U.S. public capital market.

In March 2007, the Commission staff held a Roundtable discussion to seek input on the potential effects of the co-existence of IFRS and U.S. GAAP financial statements in the U.S. public capital market.[49] In particular, the Roundtable participants discussed the potential effect on the U.S. public capital market if foreign private issuers

[38] *See* the 1981 Proposing Release, *supra* note 1.

[39] The 1988 Policy Statement, *supra* note 2.

[40] The Commission proposed these amendments in Release No. 33–7029 (November 3, 1993) and adopted them in Release No. 33–7053 (April 19, 1994) (the 1994 Adopting Release). Other examples in which the Commission amended its requirements for financial statements of foreign issuers to permit the use of certain IASC standards without reconciliation to U.S. GAAP are described in the 2000 Concept Release, *supra* note 4.

[41] *See* ''Pursuant to Section 509(5) of the National Securities Markets Improvement Act of 1996 Report on Promoting Global Preeminence of American Securities Markets,'' *supra* note 3.

[42] *See* the 2000 Concept Release, *supra* note 4.

[43] *Id.*

[44] *Id.*

[45] *See* the Study Pursuant to Section 108(d) of the Sarbanes-Oxley Act of 2002 on the Adoption by the United States Financial Reporting System of a Principles-Based Accounting System (July 25, 2003) available at *http://www.sec.gov/news/studies/principlesbasedstand.htm.*

[46] *Id.*

[47] *See* the 2005 Adopting Release, *supra* note 8.

[48] *See* SEC Press Release No. 2006–17, ''Accounting Standards: SEC Chairman Cox and EU Commissioner McCreevy Affirm Commitment to Elimination of the Need for Reconciliation Requirements'' (Feb. 8, 2006) (SEC Press Release No. 2006–17) available at *http://www.sec.gov/news/press/2006-17.htm.*

[49] The transcript of this SEC Roundtable is available at *http://www.sec.gov/spotlight/ifrsroadmap/ifrsroadmap-transcript.txt.*

have the choice to file with the Commission financial statements prepared in accordance with IFRS as published by the IASB without reconciliation to U.S. GAAP.

As previously discussed, on June 20, 2007, the Commission voted to issue a proposal to accept from foreign private issuers their financial statements prepared in accordance with IFRS as published by the IASB without reconciliation to U.S. GAAP.[50]

IV. IFRS Implementation Matters for U.S. Issuers

A move to a financial reporting environment in the U.S. public capital market in which U.S. issuers may provide investors with financial statements prepared in accordance with IFRS as published by the IASB would be a complex endeavor. There are many elements forming the infrastructure underpinning U.S. GAAP that keep it viable and functioning effectively. As is the case with U.S. GAAP, these underpinnings also would be relevant to keep IFRS viable and functioning effectively.

Although both the 2007 Proposing Release and this Concept Release relate to the use of IFRS as published by the IASB in Commission filings, our consideration of the use of IFRS by foreign private issuers and U.S. issuers gives rise to some differing issues.[51] For example, many foreign private issuers already have experience with the application of IFRS in practice because the use of IFRS is either required or permitted in their home market. Due to their experience, they are already confronting the potential difficulties that might face U.S. issuers, including for example, education and training of the accounting and auditing profession and other specialists such as actuaries and valuation experts.

A. Education and Training

The use of IFRS by U.S. issuers would create the need for effective training and education. U.S. issuers would likely use IFRS only if they and their auditors had been thoroughly trained in IFRS and if their investors and other users of their financial statements, such as analysts and rating agencies, understood IFRS. However, the education of most accountants in the United States—be it collegiate or continuing education—includes a comprehensive curriculum around U.S. GAAP but does not include a similar curriculum around IFRS. Most specialists, such as actuaries and valuation experts, who are engaged by management to assist in measuring certain assets and liabilities likely were not taught IFRS.

Consequently, all parties would likely need to undertake comprehensive training on IFRS. Professional associations and industry groups would need to integrate IFRS into their training materials, publications, testing and certification programs. Colleges and universities would need to include IFRS in their curricula. Furthermore, eventually it may be appropriate to include IFRS in the Uniform CPA Examination.

Questions

17. In what ways might the Commission be able to assist in improving investors' ability to understand and use financial statements prepared in accordance with IFRS?

18. What are the incentives and barriers to adapting the training curricula for experienced professionals to address both IFRS and U.S. GAAP? Separate from ongoing training, how long might it take for a transition to occur? How much would it cost?

19. What are the incentives and barriers relevant to the college and university education system's ability to prepare its students for a U.S. public capital market in which U.S. issuers might report under IFRS? What are the incentives and barriers relevant to changing the content of the Uniform CPA Examination? How should the Commission address these incentives and barriers, if at all?

B. Application in Practice

To provide effective financial reporting for investors, it is important that IFRS is properly applied in practice. In its considerations about the use of IFRS by foreign private issuers, the Commission has highlighted that proper application encompasses not only faithful adherence to the requirements of the standards, but also understandable standards such that across the spectrum of issuers those requirements are consistently understood and applied. As U.S. issuers do not file with us in IFRS today, in allowing U.S. issuers to do so, we would not have direct experience to assess the extent to which IFRS would be properly applied by U.S. issuers. Rather, we would make this assessment based upon the infrastructure that is in place in the United States to foster the high quality application of IFRS as well as, indirectly, the Commission's experience with the application of IFRS by foreign private issuers.

The Commission's practical experience with IFRS began with the foreign private issuers that have reported on this basis in their filings with the Commission for several years. Further, as previously discussed, during the course of 2006, approximately 110 foreign private issuers filed with the Commission annual reports on Form 20–F that contained financial statements representing that they comply with IFRS as published by the IASB. This representation may have accompanied a representation that the financial statements comply with a jurisdictional version of IFRS. The Commission staff has conducted reviews of those IFRS financial statements as part of its normal function of reviewing the periodic reports of publicly registered companies, consistent with its practice in reviewing filings from U.S. issuers and from foreign private issuers pursuant to the provisions of the Sarbanes-Oxley Act. In conducting its reviews of IFRS financial statements, the staff made a number of comments regarding the application of IFRS, which have been brought to the attention of issuers through the comment process.[52]

In certain limited areas in which the IASB has yet to develop particular industry standards or in which IFRS permits disparate options, we have noted that the level of diversity that IFRS allows has manifested itself in the reporting practices of foreign private issuers. For example, there are two industry areas that have been identified by the IASB as lacking standards: insurance contracts and extractive activities. The IASB is in the process of developing a standard for insurance contracts to supplement IFRS 4, *Insurance Contracts.* IFRS 6, *Exploration for and Evaluation of Mineral Resources,* provides only limited guidance with respect to the accounting for exploration and evaluation activities undertaken by oil and gas and mining companies. On both of these projects, the IASB continues to make progress towards developing standards. Further, the body of IFRS does not have standards on the accounting for common control mergers, recapitalizations, reorganizations, acquisitions of minority interests and similar transactions.

With respect to investment companies, there are particular differences between IFRS and U.S. GAAP that would result in different presentations in practice. For example, IFRS does not require a schedule of investments or financial highlights;

[50] *See* the 2007 Proposing Release, *supra* note 9.

[51] *Id.*

[52] *See http://www.sec.gov/divisions/corpfin/ifrs_staffobservations.htm* for a link to the comment letters the staff issued on 2005 IFRS filings as well as a report outlining some of the staff's observations about those comments.

however, U.S. GAAP requires this information in an investment company's financial statements. As another example, IFRS does not provide an exemption from consolidation of subsidiaries in an investment company, whereas U.S. GAAP provides exemptions from consolidating subsidiaries in certain areas which could result, for example, in different treatment for master-feeder funds.[53]

Questions

20. What issues would be encountered by U.S. issuers and auditors in the application of IFRS in practice within the context of the U.S. financial reporting environment?

21. How do differences between IFRS and U.S. GAAP bear on whether U.S. issuers, including investment companies, should be given the choice of preparing financial statements in accordance with IFRS?

22. What do issuers believe the cost of converting from U.S. GAAP to IFRS would be? How would one conclude that the benefits of converting justify those costs?

C. Auditing

The use of IFRS by U.S. issuers would affect the audit firms that are engaged both to audit a U.S. issuer's financial statements and to report on the effectiveness of its internal controls. The use of IFRS would arguably affect both the strategic decisions of those firms as well as the quality control systems that those firms employ to conduct their audits.

From a strategic perspective, audit firms would need to determine whether it would be economically desirable to make the initial and ongoing investment necessary to ensure that audits of financial statements prepared in accordance with IFRS would be competently delivered and adequately supervised. This may be particularly challenging for smaller audit firms, which would need to balance the cost of the investments necessary to provide these services with the effects on their reputation that might result if they are unable or unwilling to do so.

For audit firms that believe the benefits of the investment outweigh the associated costs, elements of their systems of quality control such as their practices related to hiring, assigning personnel to engagements, professional development and advancement activities would need to be adjusted. Because U.S. auditors have less experience with IFRS than with U.S. GAAP, in the short-term, audit firms may encounter challenges in establishing policies and procedures to provide them with reasonable assurance that their personnel possess knowledge appropriate to perform audits of U.S. issuers that apply IFRS. Even with appropriate systems of quality control, however, additional auditing guidance still may be necessary for auditors to appropriately address issues related to the transition to reporting on IFRS financial statements.

Additionally, for the U.S. firms that are members of global audit networks, systems of quality control need to foster the high quality and consistent application of IFRS across national borders. If U.S. issuers were to apply IFRS, the U.S. firms of these global audit networks could be affected more than they are presently by the use of IFRS by audit clients of their foreign affiliates and by U.S. subsidiaries of those clients.

Questions

23. Would audit firms be willing to provide audit services to U.S. issuers who prepare their financial statements in accordance with IFRS? How, if at all, would allowing U.S. issuers to prepare IFRS financial statements affect the current relative market shares of audit firms?

24. What factors, if any, might lead to concern about the quality of audits of IFRS financial statements of U.S. issuers?

25. Would any amendments or additions to auditing and other assurance standards be necessary if U.S. issuers were allowed to prepare IFRS financial statements?

26. How could global consistency in the application of IFRS be facilitated by auditors of U.S. issuers?

D. Regulation

The prospect of a single set of globally accepted accounting standards must occur within the reality that securities regulators all have national—as opposed to global—mandates for carrying out their work. As a result, U.S. issuers with listings in multiple securities markets could find more than one securities regulator commenting upon their IFRS financial statements, as many other securities regulators would have substantial experience in working with IFRS financial statements. Because it is likely that not everyone will apply accounting standards consistently or appropriately, securities regulators are developing infrastructure to identify and address the application of IFRS globally. This infrastructure, which starts with IOSCO, is designed to foster the consistent and faithful application of IFRS around the world. Through its work, IOSCO continues to support the implementation and consistent application of IFRS in the global financial markets. In January 2007, IOSCO's database for cataloguing and sharing securities regulators' experiences on IFRS application around the world became operational.[54]

Further, on a bilateral basis, the Commission and the European Commission (''EC'') have agreed that regulators should endeavor to avoid conflicting conclusions regarding the application and enforcement of IFRS.[55] To this end, the Commission and the Committee of European Securities Regulators (''CESR''), which the EC has charged with evaluating the implementation of IFRS in the EU, published a work plan in August 2006.[56] This work plan covers information sharing regarding IFRS implementation in regular meetings of the Commission staff and CESR–Fin, the group within CESR focused on financial reporting. The SEC–CESR work plan also contemplates the confidential exchange of issuer-specific information between CESR members and the Commission, with implementing protocols. In addition, CESR has established among its members a forum and a confidential database for participants to exchange views and share experiences with IFRS.[57] These mechanisms will allow securities regulators to endeavor to avoid conflicting decisions on IFRS application matters; nonetheless, each securities regulator retains the responsibility, and accordingly the right, to make its own final decisions.

Despite these mechanisms, a question arises as to what should be done, if anything, in circumstances where neither the IASB nor IFRIC has addressed a particular IFRS accounting issue that causes significant difficulties in practice. A securities regulator, including the Commission, may find it necessary as an interim measure to state

[53] A master-feeder fund is a two-tiered arrangement in which one or more ''feeder'' funds hold shares of a single ''master'' fund in accordance with Section 12(d)(1)(E) of the Investment Company Act of 1940.

[54] *See* IOSCO Press Release ''Regulators to Share Information on International Financial Reporting Standards'' available at *http://www.iosco.org/news/pdf/IOSCONEWS92.pdf.*

[55] *See* SEC Press Release No. 2006–17, *supra* note 48.

[56] *See* ''SEC and CESR Launch Work Plan Focused on Financial Reporting'' SEC Press Release 2006–130 (August 2, 2006) available at *http://www.sec.gov/news/press/2006/2006-130.htm.*

[57] *See* ''CESR publishes key information from its database of enforcement decisions taken by EU National Enforcers of financial information (IFRS)'' CESR/07–163 (April 2007) available at *http://www.cesr-eu.org/index.php?page=groups&mac=0&id=13.*

a view on such an accounting issue. This is not new, as securities regulators have long been involved in resolving issues related to national accounting standards. If such a view were stated, the securities regulator subsequently could refer the accounting issue to the IASB or IFRIC for resolution of the issue for all constituencies. Any view expressed by the regulator may be rescinded upon the IASB or the IFRIC establishing authoritative literature addressing the issue. As referenced in the 2007 Proposing Release, if the Commission and the staff were to state a view on such an accounting issue, we would not expect it to be inconsistent with IFRS as published by the IASB, the interpretations provided by IFRIC, or the definitions, recognition criteria and measurement concepts in the IASB's *Framework.*

Question

27. Do you think that the information sharing infrastructure among securities regulators through both multilateral and bilateral platforms will improve securities regulators' ability to identify and address inconsistent and inaccurate applications of IFRS?

E. Integration With the Commission's Existing Requirements

The Commission has contemplated the operational considerations with respect to accepting financial statements prepared in accordance with IFRS from foreign private issuers and described these considerations in the 2007 Proposing Release.[58] These operational considerations may be relevant to U.S. issuers if the Commission were to undertake rulemaking to accept financial statements prepared in accordance with IFRS as published by the IASB from U.S. issuers. However, the use of IFRS by U.S. issuers may give rise to additional issues. Additionally, the operational considerations applicable to investment companies may differ from those applicable to other entities, including foreign private issuers.

One area of consideration relating to the potential acceptance of IFRS financial statements would be how to address requirements for a foreign issuer that does not meet the definition of a foreign private issuer. A foreign issuer that is not a foreign private issuer (and is not a sovereign entity) is generally treated the same as a U.S. incorporated issuer under our rules and therefore must follow disclosure requirements applicable to U.S. issuers. If such a foreign issuer is subject to disclosure laws in another jurisdiction, it may find that it is required to prepare both IFRS financial statements for purposes of the other jurisdiction and U.S. GAAP financial statements for purposes of filings with the Commission.

Another area of consideration relates to Regulation S–X. The Commission did give consideration to the application of the provisions of Regulation S–X in the 2007 Proposing Release, and we proposed that Regulation S–X would continue to apply to filings from foreign private issuers that include financial statements prepared in accordance with IFRS with the exception of the form and content portion of its financial statement requirements. For example, under Article 11 of Regulation S–X, issuers are required to prepare unaudited pro forma financial information to give effect as if a particular transaction, such as a significant recent or probable business combination, had occurred at the beginning of the period. In the 2007 Proposing Release, a foreign private issuer using IFRS would prepare the pro forma financial information by presenting its IFRS results and converting the financial statements of the business acquired (or to be acquired) into IFRS.

Currently U.S. issuers are subject to Regulation S–X. For example, a U.S. issuer applies Article 4 and either Article 5, 6, 7 or 9 of Regulation S–X, as applicable, in determining the form and content of its financial statements. These requirements provide a substantial degree of specificity around the items to be presented on the balance sheet and income statement. IFRS does not provide specific conventions as to the format or content of the income statement.[59]

Investment company financial statements have unique disclosure requirements. For example, Regulation S–X contains specific disclosure requirements for investment companies relating to investments in unaffiliated issuers, investments in affiliates, securities sold short, open option contracts written and investments other than securities.[60] Also, Rule 6–05 of Regulation S–X permits investment companies to include a Statement of Net Assets in lieu of the balance sheet if at least 95 percent of the investment company's total assets are represented by investments in securities of unaffiliated issuers. The non-financial statement portion of an investment company's shareholder report may require disclosures that are based on financial statement information. For example, investment companies must include an expense table and a graphical representation of holdings.[61] If investment companies were to prepare IFRS financial statements, questions related to these requirements would be relevant.

Regulation S–K contains the disclosure requirements for the non-financial statement portion of filings made with the Commission. Several non-financial statement disclosure items required by Regulation S–K make reference to specific U.S. GAAP pronouncements, including Financial Accounting Standards and interpretations thereof. For example, U.S. issuers are required to provide disclosure of off-balance sheet arrangements under Item 303(a)(4) of Regulation S–K, which expressly refers to FASB Interpretations. If U.S. issuers were to prepare IFRS financial statements, the Commission would need to consider questions related to the application of these provisions of Regulation S–K.

The Commission has provided its views and interpretations with respect to financial reporting in Accounting Series Releases (''ASRs'') and Financial Reporting Releases (''FRRs''). The SEC staff has given financial reporting guidance in various forms, including Staff Accounting Bulletins (''SABs''); Industry Guides; and Staff Frequently Asked Questions Publications. If U.S. issuers were to prepare IFRS financial statements, companies may find reference to these ASRs, FRRs, SABs, Industry Guides and other forms of U.S. GAAP guidance useful in the application of IAS 8, *Accounting Policies, Changes in Accounting Estimates and Errors.*[62]

Questions

28. If the Commission were to consider rulemaking to allow U.S. issuers to prepare IFRS financial statements, are there operational issues relative to existing Commission requirements on which additional guidance would be necessary and appropriate? Would it be appropriate to have differing applicability for U.S. issuers of the form and content

[58] *See* the 2007 Proposing Release, *supra* note 9.

[59] IAS 1, *Presentation of Financial Statements,* provides guidance regarding minimum required line items and provides examples to which entities may refer.

[60] *See* Rules 12–12 through 12–14 of Regulation S–X [17 CFR 210.12–12, 12–12A, 12–12B, 12–12C, 12–13 and 12–14.]

[61] *See* Items 22(d)(1), (2) of Form N–1A.

[62] Under IAS 8, in the absence of an IFRS standard or interpretation that specifically applies to a transaction or event, management should use its judgment in developing and applying a relevant and reliable accounting policy and look to other pronouncements in applying that judgment.

provisions of Regulation S–X depending on whether they use IFRS in preparing their financial statements? Are there operational or other issues unique to investment companies? In preparing and auditing IFRS financial statements, should U.S. issuers and their auditors consider the existing guidance related to materiality and quantification of financial misstatements?

29. Should there be an accommodation for foreign issuers that are not foreign private issuers regardless of whether the Commission were to accept IFRS financial statements from U.S. issuers? Should any accommodation depend upon whether the foreign issuer is subject to the laws of another jurisdiction which requires the use of IFRS, or if the issuer had previously used IFRS financial statements in its filings with the Commission?

F. Transition and Timing

The Commission has not set out a path of the steps to any possible acceptance of financial statements from U.S. issuers prepared in accordance with IFRS as published by the IASB, nor the potential timing of any such steps. Rather, with this Concept Release, the Commission seeks input to identify what would be necessary to reach an appropriate level of acceptance and understanding if the Commission were to allow U.S. issuers to prepare their financial statements in accordance with IFRS as published by the IASB. The U.S. public capital market has experienced neither the wide co-existence of financial statements prepared under two sets of accounting standards, nor a change of a group of U.S. issuers from reporting under one set of accounting standards to another. The closest we have come is experiencing the change that occurs when amendments to U.S. GAAP necessitate that all U.S. issuers change their accounting for a particular area. However, this type of change is of a lesser magnitude as it is limited to one topical area. A U.S. issuer's change to IFRS may affect many topical areas, depending upon the degree to which financial statements prepared under IFRS differ from financial statements prepared under U.S. GAAP for that U.S. issuer's facts and circumstances. A U.S. issuer's assessment and reporting of the effectiveness of its internal controls over financial reporting also would likely need to be adjusted to encompass the preparation of financial information in accordance with IFRS.

At a more detailed level, the Commission seeks input on U.S. issuers' potential first-time adoption of IFRS. Under such a change, a U.S. issuer's first set of IFRS financial statements would reflect the application of IFRS 1, *First-Time Adoption of IFRS.* IFRS 1 provides the requirements for transition from the prior basis of reporting, in this case U.S. GAAP, to IFRS including the restatement of and reconciliation from prior years' financial statements and the related disclosures.

Questions

30. Who do commenters think should make the decision as to whether a U.S. issuer should switch to reporting in IFRS: a company's management, its board of directors or its shareholders? What, if any, disclosure would be warranted to inform investors of the reasons for and the timing to implement such a decision? If management were to make the decision to switch to IFRS, do investors and market participants have any concerns with respect to management's reasons for that decision?

31. When would investors be ready to operate in a U.S. public capital market environment that allows the use of either IFRS or U.S. GAAP by U.S. issuers? When would auditors be ready? How about those with other supporting roles in the U.S. public capital market (e.g., underwriters, actuaries, valuation specialists, and so forth)? Is this conclusion affected by the amount of exposure to IFRS as it is being applied in practice by non-U.S. issuers?

32. Should the Commission establish the timing for when particular U.S. issuers could have the option to switch from preparing U.S. GAAP to IFRS financial statements? Should market forces dictate when a U.S. issuer would make the choice to switch from U.S. GAAP to IFRS financial statement reporting? If the former, what would be the best basis for the Commission's determination about timing?

33. Should the opportunity, if any, to switch to IFRS reporting be available to U.S. issuers only for a particular period of time? If so, why and for what period? At the end of that period of time, could commenters foresee a scenario under which it would be appropriate for the Commission to call for all remaining U.S. issuers to move their financial reporting to IFRS?

34. What difficulties, if any, do U.S. issuers anticipate in applying IFRS 1's requirements on first-time adoption of IFRS, including the requirements for restatement of and reconciliation from previous years' U.S. GAAP financial statements?

35. Would it be appropriate for U.S. issuers that move to IFRS to be allowed to switch back to U.S. GAAP? If so, under what conditions?

V. General Request for Comments

In addition to the areas for comment identified above, we are interested in any other issues that commenters may wish to address and the benefits and costs relating to investors, issuers and other market participants of the possibility of accepting financial statements from U.S. issuers prepared in accordance with IFRS. Please be as specific as possible in your discussion and analysis of any additional issues. Where possible, please provide empirical data or observations to support or illustrate your comments.

Dated: August 7, 2007.

By the Commission.

Nancy M. Morris,

Secretary.

[FR Doc. E7–15865 Filed 8–13–07; 8:45 am]

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CFR PARTS AFFECTED DURING AUGUST

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT AUGUST 14, 2007

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Alaska; fisheries of Exclusive Economic Zone—

Spiny dogfish; published 8-15-07

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Organization, functions, and authority delegations:

Conforming amendments; published 8-14-07

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:

Household and dependent care services necessary for gainful employment; expenses; published 8-14-07

Qualified small business stock; deferral of sale gains by partnerships and their partners; published 8-14-07

COMMENTS DUE NEXT WEEK

AGRICULTURE DEPARTMENT

Agricultural Marketing Service

Beef, lamb, pork, perishable agricultural commodities, and peanuts; mandatory country of origin labeling; comments due by 8-20-07; published 6-20-07 [FR 07-03029]

Fish and shellfish; mandatory country of origin labeling; comments due by 8-20-07; published 6-20-07 [FR 07-03028]

Oranges, grapefruit, tangerines, and tangelos grown in Florida; comments due by 8-20-07; published 6-20-07 [FR E7-11929]

Raisins produced from grapes grown in California; comments due by 8-22-07; published 8-7-07 [FR 07-03856]

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service

Plant-related quarantine, domestic:

Pine shoot beetle; comments due by 8-20-07; published 6-21-07 [FR E7-12025]

AGRICULTURE DEPARTMENT

Grain Inspection, Packers and Stockyards Administration

Grade standards:

Soybeans; comments due by 8-20-07; published 5-1-07 [FR E7-08291]

COMMERCE DEPARTMENT

National Oceanic and Atmospheric Administration

Fishery conservation and management:

Caribbean, Gulf, and South Atlantic fisheries—

Commercial gulf reef fish vessels; vessel monitoring system requirements; comments due by 8-21-07; published 8-6-07 [FR E7-15231]

Magnuson-Stevens Act provisions—

Bering Sea and Aleutian Islands Catcher Processor Capacity Reduction Program; comments due by 8-20-07; published 7-20-07 [FR E7-14118]

COMMODITY FUTURES TRADING COMMISSION

Organization, functions, and authority delegations:

Confidential information and commission records information; comments due by 8-20-07; published 7-20-07 [FR E7-14103]

ENERGY DEPARTMENT

Energy Efficiency and Renewable Energy Office

Energy conservation:

Energy efficient products; Federal procurement requirements; comments due by 8-20-07; published 6-19-07 [FR E7-11772]

ENERGY DEPARTMENT

Federal Energy Regulatory Commission

Natural gas companies (Natural Gas Act and Energy Policy Act):

Transparency provisions; comments due by 8-23-07; published 8-8-07 [FR E7-15392]

ENVIRONMENTAL PROTECTION AGENCY

Air quality implementation plans:

Preparation, adoption, and submittal—

Interstate ozone transport and nitrogen oxides reduction; petition for reconsideration findings for Georgia; comments due by 8-24-07; published 7-13-07 [FR E7-13622]

Air quality implementation plans; approval and promulgation; various States:

Louisiana; comments due by 8-20-07; published 7-20-07 [FR E7-14067]

Minnesota; comments due by 8-20-07; published 7-19-07 [FR E7-13785]

Air quality implementation plans; approval and promulgation; various States;

New York; comments due by 8-20-07; published 7-20-07 [FR E7-14061]

Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:

Pennsylvania; comments due by 8-24-07; published 7-25-07 [FR E7-14360]

Air quality implementation plans; approval and promulgation; various States:

Tennessee; comments due by 8-22-07; published 7-23-07 [FR E7-14171]

FEDERAL COMMUNICATIONS COMMISSION

Television broadcasting:

Multichannel video and cable television service—

Bidirectional navigation devices (two-way-plug-and play); commercial availability; comments due by 8-24-07; published 7-25-07 [FR 07-03651]

FEDERAL ELECTION COMMISSION

Bipartisan Campaign Reform Act; implementation:

Campaign funds use for donations to non-Federal candidates and any other lawful purpose other than personal use; comments due by 8-20-07; published 7-19-07 [FR E7-13956]

HEALTH AND HUMAN SERVICES DEPARTMENT

Centers for Medicare & Medicaid Services

Medicaid:

Medicaid Integrity Program; limitation on contractor liability; comments due by 8-20-07; published 7-20-07 [FR E7-14115]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Animal drugs, feeds, and related products:

Selenium yeast in feed and drinking water; comments due by 8-20-07; published 7-19-07 [FR E7-13954]

HEALTH AND HUMAN SERVICES DEPARTMENT

National Institutes of Health

Grants for research projects:

Principal investigator definition and multiple or concurrent awards conditions; comments due by 8-24-07; published 6-25-07 [FR E7-12223]

HOMELAND SECURITY DEPARTMENT

Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006; implementation; comments due by 8-21-07; published 6-22-07 [FR 07-03101]

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Public and assisted housing programs; income and rent determinations; comments due by 8-20-07; published 6-19-07 [FR E7-11531]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and threatened species:

Critical habitat designations—

San Bernardino kangaroo rat; comments due by 8-20-07; published 6-19-07 [FR 07-02823]

JUSTICE DEPARTMENT

Production or disclosure of material or information:

State or local law enforcement or prosecutive officials testimony while serving on Justice Department task forces; comments due by 8-20-07; published 6-21-07 [FR E7-12038]

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''PLUS'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 2863/P.L. 110–75

To authorize the Coquille Indian Tribe of the State of Oregon to convey land and interests in land owned by the Tribe. (Aug. 13, 2007; 121 Stat. 724)

H.R. 2952/P.L. 110–76

To authorize the Saginaw Chippewa Tribe of Indians of the State of Michigan to convey land and interests in lands owned by the Tribe. (Aug. 13, 2007; 121 Stat. 725)

H.R. 3006/P.L. 110–77

To improve the use of a grant of a parcel of land to the State of Idaho for use as an agricultural college, and for other purposes. (Aug. 13, 2007; 121 Stat. 726)

S. 375/P.L. 110–78

To waive application of the Indian Self-Determination and Education Assistance Act to a specific parcel of real property transferred by the United States to 2 Indian tribes in the State of Oregon, and for other purposes. (Aug. 13, 2007; 121 Stat. 727)

S. 975/P.L. 110–79

Granting the consent and approval of the Congress to an interstate forest fire protection compact. (Aug. 13, 2007; 121 Stat. 730)

S. 1716/P.L. 110–80

To amend the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, to strike a requirement relating to forage producers. (Aug. 13, 2007; 121 Stat. 734)

Last List August 13, 2007

CORRECTION

In the last **List of Public Laws** printed in the *Federal Register* on August 13, 2007, H.R. 2025, Public Law 110-65, and H.R. 2078, Public Law 110-67, were printed incorrectly. They should read as follows:

H.R. 2025/P.L. 110–65

To designate the facility of the United States Postal Service located at 11033 South State Street in Chicago, Illinois, as the ''Willye B. White Post Office Building''. (Aug. 9, 2007; 121 Stat. 568)

H.R. 2078/P.L. 110–67

To designate the facility of the United States Postal Service located at 14536 State Route 136 in Cherry Fork, Ohio, as the ''Staff Sergeant Omer T. 'O.T.' Hawkins Post Office''. (Aug. 9, 2007; 121 Stat. 570)

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